

DOJ Focuses On ADA Compliance In The Digital Age

Law360, New York (March 03, 2014, 5:32 PM ET) -- When companies think about their obligations under the Americans with Disabilities Act, most think about low-tech solutions like wheelchair ramps, elevators and handicapped parking spaces. New developments involving higher-tech devices, however, may soon require companies to rethink their online and in-store experiences for customers.

For example, a slew of recent class actions allege that card readers used by many retailers to process debit card transactions violate the ADA. Other lawsuits allege that various consumer-facing websites violate the ADA. In light of these cases, companies trying to determine whether they comply with the ADA must look beyond mere physical accommodations for the full picture.

ADA Overview

The ADA generally prohibits discrimination on the basis of disability in an effort to ensure equal opportunity for persons with disabilities. Title III of the ADA makes it unlawful to discriminate against the disabled “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation ...”

Discrimination includes both denying the disabled the opportunity to participate in programs or services and providing the disabled with separate, but unequal, goods and services. To ensure the disabled have full and equal enjoyment of the goods and services of places of public accommodation, the ADA also requires companies to make certain “reasonable modifications,” including providing auxiliary aids, to ensure effective communication.

Recent Lawsuits Target Point-Of-Sale Devices

In the past few months, three plaintiffs have filed more than 30 lawsuits against various retailers — including Bath & Body Works LLC, Giant Food Stores LLC, Build-A-Bear Workshop Inc., Express Inc., Office Depot Inc., DSW Inc. and American Eagle Outfitters Inc. — alleging that their point of sale card-swipe devices do not comply with the ADA. Specifically, the plaintiffs allege that the devices have flat touch screen surfaces — rather than textured keys — which are not discernible to, or independently usable by, the blind. In order to use a debit card with these devices, blind customers must reveal their PIN numbers to cashiers, leaving them potentially susceptible to bank fraud. Plaintiffs allege that this discriminates against blind and visually impaired consumers.

In each case, the plaintiffs have requested a declaratory judgment that the card-swipe devices violate Title III of the ADA, as well as a permanent injunction requiring the retailers to update or replace all the devices that violate the ADA. Since the ADA does not allow for monetary damages for claims brought

under Title III, plaintiffs request only reimbursement of attorneys' fees and costs of litigation.

Similar lawsuits filed against American Eagle Outfitters and J.C. Penney Co. Inc. were voluntarily dismissed after the parties entered into settlements. Although the settlements are confidential, it is likely that the retailers agreed to update or replace their point-of-sale devices. Notably, in 2012, the primary plaintiff filing the current point-of-sale device cases filed 35 similar lawsuits against various banks and financial institutions alleging that their ATMs were not accessible to persons with disabilities because their voice-guidance features were not operational. To settle these cases, each of the banks and financial institutions agreed to ensure their ATMs comply with the ADA.

Although it is too early to predict how the pending cases will turn out, retailers should be aware of the renewed interest when it comes to ADA compliance in-store, as well as the new focus on higher-tech devices.

Other Lawsuits Target Websites

Traditionally, the ADA was thought to apply only to brick-and-mortar stores, and courts were historically not receptive to the idea that the Internet constitutes a place of public accommodation subject to the requirements of Title III. In more recent years, however, a handful of courts have applied the ADA to websites, when finding that a "nexus" exists between the e-commerce website and the physical space of public accommodation.

People with disabilities use "assistive technology" to enable them to use computers and access the Internet. For example, the blind can navigate the web with the help of "screen readers" — devices that speak the text found on a webpage. Screen readers can also identify links and graphics to help users navigate using a keyboard, instead of a mouse. In order for a screen reader to work on a given website, though, the site must use code that is comprehensible to screen readers.

The National Federation for the Blind ("NFB") has pushed various companies — including Amazon.com Inc. , Apple Inc., and Target Corp. — to ensure their sites are compatible with screen readers. Sometimes, that push has come in the form of lawsuits. In those cases, the NFB has argued that screen readers represent a "reasonable modification" under the ADA. Because each of the lawsuits has settled, we do not have clear guidance from courts as to how the ADA applies online. Nevertheless, a federal court's decision denying Target's motion to dismiss may provide some clues.

In that suit, the NFB argued that Target violated the ADA and a California law because its website did not provide equal access to blind customers. For example, blind customers could not access the website to purchase products, redeem gift cards, find Target stores or perform other functions available to sighted customers. Moreover, the NFB argued that the reasonable modifications required to make the website accessible were technologically simple and not economically prohibitive.

Target filed a motion to dismiss, arguing that the ADA did not apply to its website, in part, because its website was not a place of "public accommodation" within the meaning of the ADA. A California federal court disagreed, finding that the ADA could apply where there was a "nexus" between the use of a website and enjoyment of the goods and services offered in a retailer's physical store.

The parties eventually settled the suit. As part of the settlement, Target agreed to make changes to its website to ensure "that blind guests using screen-reader software may acquire the same information and engage in the same transactions as are available to sighted guests with substantially equivalent ease

of use.” In addition, the company agreed to pay over \$6 million to the class and \$20,000 to a nonprofit corporation dedicated to helping the blind.

Not all courts or regulators seem to think that a nexus is necessary though. For example, in 2012, a Massachusetts court held that web-streaming services offered by Netflix Inc. are subject to Title III of the ADA, even without a nexus to a physical place of accommodation. In addition, purely e-commerce websites, such as Priceline.com Inc., Apple’s iTunes store, and Monster Worldwide Inc. have all agreed to make their websites ADA-accessible in settlements with state attorneys general.

Although the language of the ADA does not explicitly mention the Internet, the U.S. Department of Justice — the primary enforcer of the ADA — has taken the position that Title III covers access to websites of public accommodations. The DOJ’s regulations implementing Title III, however, do not address website accessibility.

In light of the inconsistent court decisions, differing standards for determining website accessibility, and repeated calls for DOJ action, the department issued an advanced notice of proposed rulemaking in 2010, seeking comment on whether Title III should apply to websites of entities that provide goods or services that fall within the 12 categories of “public accommodations.” The DOJ also sought comment on whether such websites should be required to meet the now voluntary standards set by the World Wide Web Consortium (“W3C”), or be required to meet the same accessibility standards as is currently set for federal agencies.

The DOJ intends to issue a proposed rule in April 2014, which would “make clear to entities covered by the ADA their obligations to make their [w]ebsites accessible.” Implementing a new rule covering website accessibility may be complicated even further, however, given the most recent action brought by the NFB.

In 2013, the NFB brought an action against two tax preparation websites for failing to be ADA-compliant. The DOJ sought to intervene in the case, stating that the United States has “a significant interest in the pending litigation because it will help define the application of the ADA to public accommodations’ websites ... Federal litigation interpreting and applying the provisions of the ADA, and its regulations, is an important enforcement tool for the United States.” The court granted the motion to intervene in December 2013.

The outcome of the pending cases and the DOJ’s rulemaking could shed some more light on exactly how, and to what extent, the ADA applies to websites, whether those sites are purely “e-commerce” or are maintained for traditional “brick-and-mortar” stores.

What You Should Do

Although it’s hard to predict exactly what will happen with the pending lawsuits and DOJ rulemaking, it is safe to say that we are likely to see more lawsuits and the DOJ will continue to push for a broader interpretation of the ADA. If your company has not assessed whether its website, card readers and other consumer-facing devices comply with the ADA, now may be the time to do that. And if you aren’t complying, now may be the time to balance the costs of making the necessary changes against the costs of potential litigation.

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