

COVID Quarantine + Surge in eCommerce = ... ADA Discrimination Claims?!

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While much about COVID-19 and its long-term impact on businesses and the economy is unknown, its effect of a worldwide increase in a reliance on digital means to engage in business transactions is undeniable and unlikely to decrease as we move forward.

This means all organizations – commercial businesses, nonprofits, educational institutions, healthcare entities, and professional organizations – need to consider whether this new reliance on digital means of consumer interactions creates previously unconsidered risks and liabilities to their operations.

What?! – Website Discrimination Regulations?

The Americans with Disabilities Act (ADA), which was enacted to prevent discrimination against people with disabilities in locations generally open to the public, applies to websites and other digital communication means, such as mobile sites and mobile applications.

Organizations, institutions, businesses, and other establishments with websites, mobile sites, and mobile applications that are subject to the ADA must provide accommodations to people with disabilities so that they can have the same level of access to the online digital content and services as everyone else.

Which Businesses are Subject to ADA?

Organizations, institutions, businesses, and other establishments that have either (i) 15 or more employees (Title I Employers) **or** (ii) offer public accommodations (regardless of the number of employees) to consumers (Title III Public Accommodations) must maintain ADA compliant websites (traditional and mobile) and mobile applications.

Many businesses with more than 15 employees are aware of the requirement to be ADA compliant in its spaces of brick and mortar public accommodations, but are unaware of the requirement and risk of not having an ADA compliant digital presence. If an organization has more than 15 employees (public accommodations offered or not), it must have an ADA compliant website.

It is Title III – Public Accommodations – that often ensnares smaller businesses such as healthcare providers, law offices, and small or start-up businesses that have fewer than 15 employees and do not offer the traditional public accommodations (such as retail space) yet have other public accommodations such as offices or conference meeting areas. If an organization maintains a public accommodation for its patrons (regardless of the number of employees), it must have an ADA compliant website.

What Does Compliance Require?

There is no legislation that directly sets out the technical requirements of website accessibility. There are, however, the WCAG private industry standards, developed by technology and accessibility experts, which have been widely adopted, including by federal agencies. The current guidelines are the WCAG 2.1 Guidelines, and it contains three levels of accessibility –A, AA, and AAA accessibility. Federal websites are required to meet level AA accessibility.

There are four Principles to WCAG accessibility for those with disabilities (e.g., hearing impairment, seeing impairment, cognitive impairment, mobility issues, etc.):

1. **Perceivable:** Information and user interface components must be presented in a way that allows a user to perceive the content (e.g., recognize photos).
2. **Operable:** User interface components and navigation must be operable (e.g., dropdowns identifiable).
3. **Understandable:** Information and the operation of the user interface must be understandable (e.g., form completion).
4. **Robust:** Content must be robust enough that it can be interpreted by a variety of user agents (e.g., assistive technologies)

It is worth noting that it is not the use or inclusion of specific technologies, such as those that amplify words or offer audible versions of content, which is required for compliance. The requirement for compliance is that businesses offer websites and other digital platforms that are robust enough to provide equally perceivable, operable, and understandable access to all consumers through the consumer's use of these technologies (i.e., digital platforms that will interact with these specific technologies as provided and used by the consumer).

Is Compliance Enforced?

ADA website compliance litigation is a regular occurrence and is expected to rise as all consumers become more and more reliant on websites and mobile applications to conduct business. These cases of enforcement span a number of industries – Real Estate (Zillow), Retail (Banana Republic), Entertainers (Beyoncé), and Restaurants (Domino's Pizza) to name a few recognizable, well-defended defendants – and many resulted in federal fines and compulsory ADA compliance.

Most recently, a case against Domino's Pizza made clear:

- ADA applies to websites and mobile applications as public accommodations.
- Businesses have been "on notice" since 1996 that their websites must be in ADA compliance and effectively communicate with people with disabilities.
- The lack of specific requirements does not absolve a business from its obligations.

What are the Best Ways to Mitigate Risk?

When building a website, or assessing an existing one for compliance, use the WCAG 2.1 Guidelines and its four principles. Many marketing professionals and website hosting platforms can provide templates that will

assist with ADA compliance. There are also companies that specialize in accessibility compliance that can review and test the website, mobile site, and application. Businesses should regularly assess their website for compliance as it is updated, and content and features are added.

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