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Virtual Version of ADA Noncompliance Is Fertile Ground for Lawsuits; WCAG Is Standard

By Nina Youngstrom

In a new take on the Americans with Disabilities Act (ADA) and other anti-discrimination laws, people with disabilities and their advocates are filing far more lawsuits against hospitals and other organizations over websites, apps and electronic health records (EHRs) that allegedly aren't accessible. Overwhelmingly it's visually impaired patients who are unable to use websites, apps or EHRs because they're not designed and configured to work with assistive technology, such as screen readers. In the lawsuits, people with disabilities are asking federal courts to compel the organizations to comply with the ADA, make changes to their technology so that it can be accessed by people with disabilities and sometimes pay damages.

"This is significant in that bursts of litigation usually follow a new law or regulation, but there's no new law or regulation," says attorney Steven Helland, with Fredrikson & Byron in Minneapolis. "Plaintiffs' lawyers are starting to apply the same laws to digital and virtual places and not just physical places, like wheelchair ramps. This is new terrain for courts, and the litigation explosion has been gigantic." The Department of Justice (DOJ) has taken the position that the ADA applies to websites and apps "and multiple courts have agreed," he says. But the definition of "accessible" is somewhat murky. Because many cases end in settlement, courts haven't shed much light, and neither has DOJ. After promising for years to publish guidance on the ADA, DOJ changed its mind. In late 2017, "the Trump Administration said it has no intention of issuing regulations," Helland explains. "It's funky because normally businesses don't like regulations, but this is a case where a lot of businesses welcome regulations because it would give them clarity."

To reduce the risk of virtual ADA violations and improve compliance with state and federal anti-discrimination laws, organizations should follow Web Content Accessibility Guidelines (WCAG) version 2.1 AA, as recommended by DOJ and a number of courts, and require vendors to sign an accessibility warranty, Helland says (see box, p. 3). He notes that one in five Americans has a disability.

The major federal anti-discrimination laws in this area are the 1990 ADA and 1973 Rehabilitation Act. Helland says most of the litigation is under Title III of the ADA, which states, "No individual shall be discriminated against 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 by any person who owns, leases (or leases to), or operates a place of public accommodation" (42 U.S. Code Sec. 12182).

The term "public accommodation" includes hospitals, pharmacies, physician offices, lawyer's offices and government offices. The definition of "discrimination" includes "failure to take steps necessary to ensure that no individual with a disability is excluded, denied service, or otherwise treated differently because of the absence of auxiliary aids and services, unless such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage or accommodation being offered or would result in an undue burden" (42 U.S. Code §12182).

As of April 2019, Helland hasn't seen any case where the defense successfully argued an accommodation was

unduly burdensome. For example, in a 2017 case, Winn-Dixie, a major supermarket chain, was sued when a person with a disability alleged its upgraded website was inaccessible. Winn-Dixie said it would be too expensive to change the website, but the U.S. District Court for the Southern District of Florida said the cost—$37,000—was not an undue burden for a multi-billion dollar company, Helland says.

Sec. 504 of the Rehabilitation Act bars discrimination against "otherwise qualified individuals" with a disability by organizations receiving federal funds. There are also state laws barring discrimination against people with disabilities.

Blind Woman Sued HCA Over Its Website

Some court rulings on virtual accessibility have been mixed and others are still pending. For example, Netflix has gotten contradictory rulings from different judges. In a 2015 decision, the U.S. Court of Appeals for the Ninth Circuit ruled in *Cullen v. Netflix* that Title III of the ADA doesn't apply because Netflix doesn't have a "place of public accommodation." In other words, Netflix's online services are not connected to an actual place (e.g., a store or a theater). But in 2012, the National Association for the Deaf sued Netflix over its lack of captions in U.S. District Court in Massachusetts, which ruled that Title III applies to Netflix even though it lacks a physical place. "This is an area where different courts said different things, so it's a fuzzy issue," Helland explains.

In the health care space, HCA, a hospital chain, was the target of a major ADA title III lawsuit. In 2017, Lisa Frazier, who is blind, filed a complaint in the U.S. District Court for the Western District of Pennsylvania alleging that more than 100 HCA hospitals aren't accessible to blind and visually impaired consumers. "Consumers with visual disabilities must use screen reading software or other assistive technologies in order to access website content. Defendant's Websites contain digital barriers which limit the ability of blind and visually impaired consumers to access the site," the lawsuit alleged. "Plaintiff has patronized Defendant's Websites in the past, and intend[s] to patronize Defendant's Websites in the future. However, unless Defendant is required to eliminate the access barriers at issue and required to change its policies so that access barriers do not reoccur on Defendant's Websites, Plaintiff will continue to be denied full access to the Websites as described, and will be deterred from fully using Defendant's Websites in the future."

Frazier asked the court for an injunction to require HCA to hire a consultant to help it comply with WCAG, conduct periodic audits to ensure WCAG compliance, develop a website policy and post a phone number to report accessibility problems. Helland says the case "appears to have been settled on private and confidential terms."

There also has been an uptick in lawsuits under Title I of the ADA, which applies to the employer-employee relationship, he says. For example, in a health care case, the National Federation of the Blind sued Epic, the EHR vendor, alleging that blind health care workers can't use its software, Helland says. The lawsuit stemmed from a visually impaired employee at Brigham and Women's Hospital in Boston, whose job performance suffered when an Epic software upgrade allegedly interfered with the text-to-speech software, which is an assistive technology. The employee, Manuel Morse, who was able to use the software in place prior to Epic, was placed on paid administrative leave, Helland says. Although Morse appears to have privately settled his claims, the lawsuit directly between the National Federation of the Blind and Epic is pending, Helland says.

In a Florida ADA settlement, the Miami-Dade County public schools paid $250,000 to a blind employee in February 2019 and agreed to make its websites and software more accessible and provide her with administrative support until then, Helland says.

There's No Substitute for Manual Testing

In the absence of definitive guidance on virtual accessibility from DOJ or the courts, "there is a strong probability

that the ADA applies to most businesses, and requires deliberate action to improve accessibility," Helland says. Compliance officers and legal counsel should work with their IT departments to reduce risk. For one thing, there are scanning tools, such as the web accessibility evaluation tool (WAVE), to evaluate accessibility. But there's no substitute for manual, live-user testing. "Whether a site is accessible is a human experience," he says. "Could a hearing or visually impaired person go to your website or app and use the functions that anyone else is using? If the answer is no, then it may not be accessible."

Websites and apps should adhere to WCAG guidelines version 2.1 AA to avoid alleged discrimination. The guidelines require text alternatives behind images, captions for videos, keyboard navigation vs. a mouse and color contrast, among other things (http://bit.ly/2UB8yha). Helland also recommends ongoing monitoring of accessibility compliance (website, apps, HR and job portals) and baking accessibility into EHRs. Like a wheelchair ramp in a physical building, it's much cheaper and easier to get it right from the start. And "work on an accessibility statement," he advises. It should be hassle free for people with a disability to reach out to the hospital if they have trouble accessing content on the website, app or portal.

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Pro-Customer Warranty for Contracts with Tech Vendors

Attorney Steven Helland recommends that organizations include warranties in their vendor contracts that ensure website, app and other virtual accessibility and shift the financial responsibility to vendors if their noncompliance results in a lawsuit. "Next time you are getting a website update or buying new technology, you want to put in the contract the vendor will comply with the Americans with Disabilities Act and will indemnify you," says Helland, with Fredrikson & Byron in Minneapolis. Below is his suggested language. Contact him at shelland@fredlaw.com.

Accessibility Warranty. Vendor represents and warrants to Client that all deliverables and all services (specifically including software-as-a-service, hosting, subscription, or similar services and offerings): (a) shall be accessible to and usable by disabled individuals using assistive technology (such as a screen reader or captions); (b) will comply with the applicable requirements of the Americans with Disabilities Act, Rehabilitation Act, and equivalent state or local anti-discrimination law, including any related regulations; (c) shall meet or exceed the standards set forth in the Web Content Accessibility Guidelines (WCAG) version 2.1 AA, or higher, as well as any subsequent standard endorsed by the U.S. Department of Justice; and (d) for any mobile application or "app," meet or exceed the Apple and Google developer guidelines for apps. In addition to any other remedies, Vendor shall defend, indemnify, and hold harmless Client from any claim, demand, allegation, suit, or charge arising from or related to any breach or alleged breach of the foregoing representation and warranty as well as correct such deficiency at no additional charge or fee to Client.