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2018 Online Accessibility Legal News Recap

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Commentary

2018 Online Accessibility Legal News Recap

By
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Record-Setting Website Litigation, Changes To Digital Accessibility Standards And Disability Laws, Transportation Lawsuits, And Service Animals Round Out 2018's Accessibility Legal News

Final numbers are still coming in, but by anyone's measure, 2018 was a record-setting year for website accessibility activity. Why?

The Americans with Disabilities Act has specific require-ments for public accommodations that enable people with visual, hearing, mobility, cognitive, and other dis-abilities to obtain access to services. Traditionally, those requirements have applied to brick-and-mortar facilities. With today's range of internet-delivered offerings affect-ing nearly every aspect of daily living, equal access to online services is a major issue.¹

Financial services, restaurants and grocers, casinos, pizza chains, wineries, sports teams, universities, and others

all found themselves on the receiving end of complaint letters and litigation regarding their digital environments. Even tech giant Apple, a champion of accessible and assistive technologies, had its online presence found wanting.

But the legal churn didn't stop with litigation activity. The United States and Canada each offered up legislation affecting people with disabilities, with various results. Furthermore, the U.S. Access Board's 2017 updates to federal accessibility regulations went into effect this year. And, internationally recognized guidelines for online accessibility were updated to account for increased touchscreen and mobile use.

The United States Department of Education Office for Civil Rights found itself overwhelmed with web accessibility complaints made against schools across the country. In response, the Office changed its complaint processing manual, dismissed hundreds of complaints, and then subsequently became the subject of a lawsuit itself.

However, no one lives exclusively online. While covering accessibility and related news topics over the past year, we noticed that other areas related to disability laws received a significant amount of coverage. While not directly related to online or digital accessibility, they show the growing prominence of legal activity within the area of disability rights. We've highlighted a few of those in this 2018 accessibility legal news recap.

Accessibility Lawsuits Pummel Credit Unions, DOJ Weighs In

Toward the end of 2017, credit unions across the U.S. began seeing a rise in the number of website accessibility lawsuits. However, credit union trade associations were

strident in questioning the applicability of the Americans with Disabilities Act (ADA) to online environments, as well as whether or not their sites could be held to a technical standard that had not been formally mandated for the private sector.² This rise in legal activity further fueled the already heated debate on whether companies should be protected from “drive-by lawsuits” in which one law firm and one plaintiff file against multiple organizations at once, hoping to get some to settle, and often without actually conducting business with the organization in question. However, for credit unions specifically, another factor that affected whether cases moved forward was the eligibility of litigants for membership at the credit union in question.

The National Association of Federal Credit Unions (NAFCU) and the Credit Union National Association (CUNA) aggressively defended many of its members against website accessibility legal actions, calling for the federal government to clarify requirements. With both organizations seeking help from lawmakers and the Department of Justice (DOJ), the 2018 result was a DOJ statement affecting businesses of all types.

In a September letter to Representative Ted Budd of North Carolina, Assistant Attorney General Stephen Boyd stated that the DOJ was “evaluating whether promulgating specific web accessibility standards through regulations is necessary and appropriate to ensure compliance with the ADA.”³ In the letter, Boyd also stated, “Absent 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.” Further, “noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA.” In essence, yes, the DOJ viewed websites as needing to be accessible to meet the requirements of the ADA, but noncompliance with the WCAG 2.0, the “voluntary technical standard” used in many settlements wasn’t necessarily indicative of being found in violation of the ADA.

Many found this to leave a lot still unclear, and it’s also unclear if or how this DOJ statement will affect the pace of web accessibility lawsuits in the future. However, according to *CU Times*, by the end of the year, credit union website accessibility lawsuits were down, from more than 100 to just over a dozen, with most

having settled and several dismissed because of lack of plaintiff eligibility to join the credit union.⁴

That lack of eligibility was a key component affecting a landmark case before the Court of Appeals for the Fourth Circuit. In January 2019, the court ruled in favor of the Department of Labor Federal Credit Union in *Griffin v. DOL FCU*, stating that the plaintiff was not allowed to sue the credit union under the ADA since the plaintiff was “barred by law from making use of defendant’s services.”⁵ This particular case was the first to reach a U.S. Court of Appeals, establishing precedent at the federal appellate level.⁶

Website Accessibility Litigation Continues To Rise: New York And Florida Most Affected, And Lawsuits Hit Apple, Walmart, NBC, Several Universities

The number of website accessibility lawsuits has risen dramatically over the past three years. By mid-2018, cases had already surpassed 2017’s total. Projections at that time forecast that 2018 could end with up to 2,000 federally filed website accessibility cases.⁷ New York and Florida were by far the busiest states in terms of website accessibility lawsuits in 2018. The other states such as Texas, Massachusetts, California, Georgia, and Pennsylvania made up the rest.⁸

This year, Apple—a company known for its industry-leading efforts in building and offering accessibility features across its product line—was among those suits. The suit complained of multiple access barriers on Apple’s website, stating that it denied “full and equal access to the facilities, goods, and services offered to the public,” violating the ADA. The plaintiff, a legally blind woman using a screen reader to perceive online content, claimed that the lack of accessibility prohibited her from browsing products or making service appointments at Apple stores. Because of Apple’s prominent position in the accessible technology space, this case crystalized the question of whether any organization was safe from scrutiny when it came to online accessibility.

Since screen readers are among the few forms of technology that allow for blind users to access websites, barriers created by lack of compatibility can render a website impassible to legally blind customers. NBC’s website presented barriers to screen readers, and was hit with a class action lawsuit. In this case, the plaintiff alleged that NBC’s website lacked image descriptions,

or alternative text needed for screen-readers to relay the content or meaning of website images to blind visitors. In addition, one blind man in New York filed suit against 50 universities whose websites failed to meet accessibility requirements associated with screen readers.

But digital accessibility doesn't just affect websites. Near the end of October, Walmart was sued under the claim that their self-checkout service was not accessible to blind people under the ADA. This suit was brought on by three residents from Maryland and the National Federation of the Blind, with one of the plaintiffs claiming that a Walmart employee had selected cash back on her debit card and had taken \$40 without the plaintiff knowing. The plaintiffs ask that the retailer make all self-service kiosks fully accessible to their patrons.⁹

Department Of Transportation Says Airline's Separate-But-Accessible Website Won't Cut It

Referring to the Air Carrier Access Act (ACAA) rather than the ADA, the United States Department of Transportation issued a consent order against the Scandinavian Airlines System (SAS) in late December, resulting in a settlement to avoid litigation. While the ADA has no specific requirements for websites, the ACAA specifies that the primary website for each domestic and foreign airline must be accessible to consumers and adhere to Web Content Accessibility Guidelines 2.0. In the SAS situation, the airline had created a separate website that was accessible to visitors with disabilities, linking to it from their primary website.¹⁰

Department Of Education Office For Civil Rights Dismisses Hundreds Of Complaints, Then Reopens Cases Following Lawsuit

In March, the United States Department of Education's (DOE) Office for Civil Rights (OCR) announced that they were implementing a new case processing manual that would allow the Office to dismiss complaints not adhering to the new rules. The DOE stated it was a strain on their resources to review complaints filed against multiple recipients by a single filer, filed by multiple people against the same organization, or filed without addressing all necessary information. This led to the dismissal of hundreds of complaints.¹¹ Disability and civil rights advocates did not take these actions lightly. The National Association for the Advancement of Colored People, the National Federation of the Blind, and the Council of Parent Attorneys and Advocates filed a lawsuit against the DOE in May.

In November, the Department of Education reversed their position, going back to reviewing all complaints, and announcing they would be reopening complaints that had been dismissed.¹²

Trump Signs Integrated Digital Experience Act (IDEA) Into Law

Back in May, Democrat Ro Khanna of California and Republican John Ratcliffe of Texas introduced the 21st Century IDEA Act in the House of Representatives (H.R.5759).¹³ The goal of the legislation was to improve customer experience and accessibility of online government services and websites. The act will also help the government modernize and digitize standard government forms and allow for digital signatures, thereby streamlining government processes and saving taxpayers money, and deliver services on par with customer expectations driven by experience with private sector technology.¹⁴ The legislation is of particular interest from an accessibility standpoint as it will require all existing government websites to abide by standards set in Section 508 of the Rehabilitation Act of 1973 (www.section508.gov) within one year of the passing of the bill, and new websites, web forms, and apps will have 180 days to ensure digital accessibility for all citizens. The Act passed easily through the House and Senate and was signed into law by President Trump on December 20, only seven months after first introduction.

Updated Web Content Accessibility Guidelines Includes Criteria For Touchscreen, Mobile

In June 2018, the World Wide Web Consortium (W3C) introduced a new version of their Web Content Accessibility Guidelines. The most widely cited guidelines in website accessibility cases, WCAG 2.0 had been initially released in 2008.¹⁵ The update, WCAG 2.1, provides developers with new industry standards on web accessibility. Since the previous version was released, technology has advanced significantly, most notably regarding smart phones and other mobile devices. With mobile web browsing now being a part of our everyday lives, the W3C made sure to include details on mobile apps, touchscreens, and mobile browsers. While WCAG is not mandated for the private sector by the ADA, there are other jurisdictions that specify their use, particularly at the state level in the U.S., and in other countries. Section 508 of the U.S. Rehabilitation Act of 1973 was updated in 2017, adopting WCAG 2.0 success criteria by reference.¹⁶ However, it is unlikely to be impacted by the update soon as that would require

the U.S. Access Board to implement rulemaking, a process that could take a few years.

Government Procurement Templates Influence Private-Sector's Approach To Accessible Technology

One area affected by the update to WCAG 2.1 is government-influenced sale and purchases of information and communications technology (ICT). Whether because they are selling to federally funded organizations or government agencies requiring accessible ICT, or whether they are under other requirements to provide accessibility in their offerings, companies are seeing an increased need to vouch for the accessibility of their technology products and services. Typically, this means attesting to their products' levels of accessibility through a Voluntary Product Accessibility Template (VPAT[®]).¹⁷ Originally created for accessible government technology procurements, this template was revised significantly in 2018 to make it more thorough and encourage more accurate completion. As template creators received input, the templates underwent a series of minor revisions, with version 2.3 incorporating WCAG 2.1 guidelines in all but the Section 508 VPAT.

The ADA Education And Reform Act Aims To Curtail Architectural Barrier "Drive-By" Lawsuits, But Stalls In The Senate

H.R. 620, also known as the "ADA Education and Reform Act of 2017" made big news early in 2018 when it passed through the U.S. House of Representatives. Introduced by Texas Representative Ted Poe, the bill aimed to change several important details of the Americans with Disabilities Act in an attempt to protect owners and operators from excessive litigation. If the bill passed, people with disabilities would be required to file an official complaint stating a building is not accessible before they could take any legal action against the building's owner. This would slow down the process of removing accessibility barriers as the bill only requires that "substantial progress" be made toward improving accessibility. The bill would also eliminate incentive for businesses to proactively comply with the ADA. Disability rights advocates claimed the bill was a step backward and would delay progress in facilitating access that is often sorely needed. However, the bill stalled in the Senate in April after Senator Tammy Duckworth of Illinois gathered 43 senate votes to filibuster any attempt to vote on the bill.¹⁸

Accessible Canada Act Proposal Gets Cheers And Jeers

In June 2018, the Canadian federal government announced they would be introducing a new bill to help create a barrier-free Canada. Bill C-81, the "Accessible Canada Act," would be the first national legislation on accessibility. However, provincial legislation already exists such as the Accessibility for Ontarians with Disabilities Act (AODA), which was created in 2005, and set a deadline of 2025 to make all "goods, services, facilities, accommodation, employment, buildings, structures, premises or such other things," accessible in Ontario across public and private sectors. Similarly, the national bill aims to create standards and regulations regarding accessibility for people with disabilities across the public and private sector, including digital accessibility standards. This would allow the government to seek out areas that need improved accessibility and adjust regulations based on the needs of the time. This iterative adjustment approach would be especially beneficial to the ever-changing digital landscape. However, many disability rights activists have raised concerns that the act lacks the teeth needed to make a difference. Claiming that the language in the act is vague, the bill repeatedly uses words like "may" and "shall," offering no solidity in the requirements. Also, in contrast to provincial accessibility legislation like the AODA, there are no official deadlines as to when these changes need to take place, and without deadlines there is no real clarity on when the policies would be implemented. Despite the concerns, the general attitude remains that the bill is a step in the right direction for people with disabilities.

Uber And MTA Lawsuits Spotlight Lack Of Accessibility In Transportation

Two lawsuits have had a big impact on transportation accessibility this year, both occurring within quick succession back in March. First, the non-profit Disability Rights Advocates (DRA) sued Uber, stating the company does not provide sufficient service for customers using wheelchairs. This lawsuit was later followed by another suit by DRA directed at Uber's competitor, Lyft, addressing the same grievance. Uber has a program in place for people in wheelchairs called Uber-WAV (Wheelchair Accessible Vans). However, this type of vehicle only makes up a small fraction of Uber's fleet, and the drivers are also able to pick up customers without wheelchairs which decreases availability and

increases waiting times. Uber has also claimed that under the ADA they are only required to provide access to their services, and that they are not required to make that service identical for people with disabilities. A similar campaign was led against taxi services in New York City called Taxis for All which has set the stage for the suits against Uber and Lyft. In 2011, a class action lawsuit was brought against the Taxi and Limousine Commission of New York, which mandated that 50 percent of taxis be wheelchair accessible by 2020. This was a big win for disability rights given that the percentage of accessible taxis at the time of the suit was less than 2 percent.

Another big lawsuit in the transit world was directed at New York City's Metropolitan Transportation Authority (MTA). This suit, which was brought on by federal prosecutors, claimed that the MTA is refusing to adhere to the ADA when renovating subway stations. The suit focuses on one station in particular. That station received a \$27 million renovation in 2014 but is still inaccessible to travelers in wheelchairs. The MTA has since created a position of accessibility chief to oversee the new "Fast Forward" plan. The plan aims to add 180 elevators to the transit system over the next ten years.

Airlines, Others, Encounter Conflict And Confusion Over Emotional Support Animals

Under the ADA, restaurants, taxi services, airlines, and other private institutions are required to allow service animals on their premises. However, an increase in emotional support animals, therapy animals, and other comfort animals that are not sanctioned by ADA Title II and III—as well as animal misbehavior—have organizations grappling with how to best approach having animals within their places of business. An "emotional support" peacock was denied a seat on a United Airlines flight in January 2018, setting off a firestorm of activity regarding how businesses should address non-human companions while respecting the requirements of the ADA and related laws (such as federal airline guidelines for emotional support animals).¹⁹ The ADA requires that a service animal must be able to perform any task that assists with including a "physical, sensory, psychiatric, intellectual, or other mental disability" recognizes trained dogs and miniature horses as service animals.²⁰ The ADA does not require business owners to allow non-service animals

within their establishment. However, any person can claim their pet is a service animal, and often do, some going so far as to purchase service vests online for their pets. Business owners are limited in what they can ask about an animal's purpose or a person's disability, and there is no requirement to show proof that the service animal is indeed trained as an assistive animal. As of now, there are no repercussions on a federal level; however, more than 20 states have passed laws to address misrepresenting a pet for a service animal and bringing untrained animals into places of business.²¹

Conclusion

Technology is playing an increasing role in the lives of people with disabilities, both in the opportunities now being presented to live independently and in the increased visibility of disability-related issues. Society's thinking and treatment of these issues, and the laws and cases that both govern them and reflect them, is sure to continue to evolve in the year ahead.

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