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ADA Title III Considerations for Businesses During the COVID-19 Pandemic

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While many potential targets for Americans with Disabilities Act (ADA) Title III litigation are currently shuttered due to the COVID-19 pandemic, a significant number of cases remain pending on court dockets throughout the nation, and businesses will continue to be sued, particularly with the public's increased reliance upon websites and mobile applications.

The total number of ADA Title III lawsuits filed in federal courts has increased every year for the past several years, with more than 11,000 cases filed in 2019. Yet, this does not paint the entire picture, as this figure excludes the significant number of accessibility lawsuits filed in state courts under analogous state and local laws and the thousands of demand letters sent by the plaintiffs' bar that often are resolved short of litigation.

Accordingly, businesses are encouraged to reevaluate their strategies regarding pending matters in light of the pandemic and to mitigate their risk of future claims. Below are responses to three pressing questions that businesses may have at this time.

What are the most common types of ADA Title III claims filed against businesses?

Traditionally, ADA Title III claims have alleged barriers to access physical places of public accommodation, such as steps at the entrance to a retail store, a missing grab bar in a restaurant's restroom or an improperly sloped

shopping center parking lot. These "brick-and-mortar" claims tend to be brought by plaintiffs who have physical disabilities that affect their mobility. Plaintiffs often file these claims against both the operator of the establishment at issue and the property owner.

In recent years, as we [reported in 2017](#), plaintiffs also have been filing claims regarding the accessibility of websites and mobile applications. For example, blind or visually impaired plaintiffs typically claim that they cannot access content or complete transactions because websites and mobile applications are not compatible with screen readers. Similarly, deaf or hard of hearing plaintiffs generally claim that websites are not accessible if videos do not contain proper captioning. These claims are being filed against businesses both with and without a physical presence, as courts in certain jurisdictions have ruled that a nexus between the website or mobile application and a physical location is not necessarily required.

My business has closed due to the COVID-19 pandemic. Does the closure affect my pending ADA Title III lawsuit?

The answer to this question likely depends on whether the closure is permanent or temporary. For example, if COVID-19 has forced a business to close *permanently* and the business has no future intention of reopening, the business may be able to secure the dismissal of any pending or newly filed ADA

Title III claim. The reason is that Title III of the ADA only allows for injunctive relief and a plaintiff must demonstrate a real and immediate threat of a future injury. If a business is permanently closed, then there is no likelihood of a future injury because the “place of public accommodation” at issue no longer exists. Under these circumstances, the plaintiff’s ADA Title III claim would be moot and the court would lack subject-matter jurisdiction to adjudicate it.

To the extent that a plaintiff also has filed accessibility claims under state or local law—such as the New York State and City Human Rights Laws or California’s Unruh Civil Rights Act—the court *may* dismiss those claims or decline to exercise jurisdiction over them. However, the plaintiff’s state and local law claims *may* continue to be viable under certain circumstances. Accordingly, businesses should consult with counsel to discuss their specific situation when evaluating this potential strategy.

On the other hand, if COVID-19 has forced a business to close *temporarily*, then a court may be less inclined to dismiss the claims because the threat of a future injury has not been eliminated. However, a business that has temporarily closed may be able to obtain a stay of the litigation until the business reopens or otherwise extend litigation deadlines during the temporary closure. During this time, the business may consider remediating the alleged issues (if possible) in an effort to moot the claims or exploring settlement possibilities with the plaintiff, particularly if the cost of continued litigation after the business reopens could jeopardize the viability of the business.

What can I do to protect my business from an ADA Title III claim during the COVID-19 pandemic?

As noted above, the most common ADA Title III claims are brick-and-mortar claims regarding architectural barriers at physical places and digital accessibility claims regarding websites and mobile applications. While businesses continue to be targeted for litigation despite the COVID-19 pandemic, there are proactive measures that businesses can take at this time to ensure compliance with Title III of the ADA and mitigate the risk of future claims.

Physical Accessibility Claims

If a business has a physical location that is open to the public, the business should conduct a comprehensive review of the accessibility of the premises and remediate as many issues as possible (especially before reopening if the location is temporarily closed). Businesses are particularly at risk for these “drive by” claims if there are steps at their entrances and no permanent ramp or platform lift. A plaintiff could have a viable claim—or at least one that likely would survive dismissal—without having ever entered the establishment (although most plaintiffs raise issues concerning the establishment’s interior as well).

Significantly, businesses’ obligations under Title III of the ADA may vary depending on the construction/alteration history of the facility and other factors, such as structural issues or existing conditions that make it “technically infeasible” to comply with a particular ADA standard. For example, one business may be required under the law to construct a permanent ramp at its entrance, while another business may satisfy its obligations by merely deploying a portable ramp.

Compliance is fact-specific and complicated, particularly given the complexity of the ADA Title III regulations and the detailed scoping and

technical requirements contained in the 1991 and 2010 ADA Standards for Accessible Design. Accordingly, we strongly recommend that businesses review these issues with the assistance of counsel and a credentialed ADA consultant who has an architectural or engineering background. Counsel should retain the expert on behalf of the business and properly document the engagement.

Digital Accessibility Claims

Similarly, if a business has a website or mobile application, the business should consult with counsel regarding its obligations under Title III of the ADA. Given government shutdown and stay-at-home orders and the resulting closures of businesses, people increasingly rely upon websites and mobile applications to obtain information, conduct transactions and participate in society. Never has digital accessibility been more critical than it is today, as, for example, people with disabilities may require online ordering for their everyday essentials. Thus, it would not be surprising if there were an increase in these “surf by” claims regarding websites and mobile applications in response to the COVID-19 pandemic.

Businesses are encouraged to review the accessibility of their websites and mobile applications and ensure that they are accessible. The generally recognized measure of compliance is conformance with the privately developed Web Content Accessibility Guidelines (WCAG) 2.0 or 2.1, Level AA standard. Like the ADA’s Standards for Accessible Design applicable to physical facilities, these guidelines are highly technical and complex, and evaluating the accessibility of a website or mobile application generally requires extensive manual and automated testing conducted by an expert.

We encourage businesses to retain credentialed experts through counsel to review their digital platforms, provide constructive feedback and

assist in the remediation of any issues that may exist. Businesses also should consider uploading an accessibility statement to their websites or mobile applications, training staff members that are responsible for updating the website or mobile application, and conducting accessibility reviews on a regular basis. Critically, any changes made to a website or mobile application could throw the platform out of compliance and make it a target for litigation. For example, simply uploading a new image to a webpage may create issues if alt text is not provided for that image. Additionally, businesses should review their agreements with any third-party vendors operating within their digital platforms, as businesses may be held responsible for any third-party services that are inaccessible.

Insurance Coverage

Finally, insurance coverage may be available to businesses to help mitigate their financial exposure to ADA Title III claims. For example, these claims may be treated as third-party discrimination claims under employment practices liability insurance policies. While these policies often do not cover the costly remediation that typically is required to address ADA Title III issues—whether physical or digital—they may cover the costs of defending against such claims and any monetary payment that may be owed to the plaintiff as a result of a judgment or settlement.

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