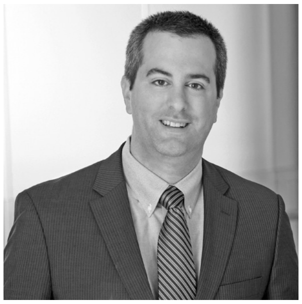
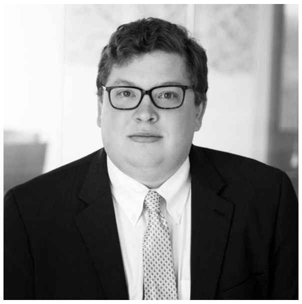
Willcox Savage
Employment Law Outlook
Winter 2018

Is Your Website Compliant with the ADA?





David A. Kushner **James B. Wood**

Since its enactment in 1990, the Americans with Disabilities Act (ADA) has required places of public accommodation (such as stores, restaurants, and other businesses who sell to the general public) to meet certain standards of accessibility for people with disabilities. Businesses have long understood that Title III of the ADA often requires physical modifications (such as ramps) and policy modifications (such as allowing service animals onto the premises). However, the question of what the ADA requires for online businesses has not been clear, and has been the subject of hundreds of threatened or filed lawsuits over the past few years. Many of these lawsuits are being filed by the same serial plaintiffs and plaintiffs' law firms who have turned these lawsuits into a cottage industry.

When the ADA was first codified in 1990, the Internet was not yet publicly available (that came a year later). As such, the ADA did not include any specific standards for Internet-based businesses. In recent years, the Department of Justice (DOJ) has repeatedly promised to release regulations specifically requiring most businesses' webpages to be accessible. Although the DOJ has never followed through with these regulations, it has formally adopted the position that a webpage designed to offer services to the public must be accessible to those with disabilities, including vision-impaired patrons.

Despite the lack of formal regulations describing how far this website accessibility obligation may go, there have been numerous recent lawsuits in which businesses have been sued based on the alleged lack of accessibility of their websites. These lawsuits have targeted major Internet-based businesses like Netflix, traditional brick-and-mortar businesses like restaurants and retail chains, and even professional services firms like real estate agencies, accountants, and law firms.

The federal courts have been divided on which businesses must ensure website accessibility. Some courts have held that websites are only subject to the ADA when they have a nexus to goods or services available at a physical store or location. Other courts have interpreted the ADA more broadly to include even websites related to online-only businesses. With the lack of uniformity in the law, most of these cases end in settlement or government imposed consent decrees, as the cost of defending sometimes exceeds the cost of compliance.

Based on the explosion of litigation, a desire to comply with the law, and a desire to provide equal access to all members of the public, many companies are seeking to proactively update their websites. While there is no formal DOJ guidance on what will qualify as an appropriately "accessible" website, most experts believe that the Web Content Accessibility Guidelines (WCAG) 2.0 published by the Web Accessibility Initiative (WAI) are not only the best practice guidelines for web accessibility, but also the most likely rules to be eventually adopted by the DOJ. In fact, the WCAG standard is the access standard that has been used in virtually all DOJ settlement agreements and consent decrees related to ADA challenges of websites.

The WCAG is a well-respected technical standard with 12 guidelines for website accessibility under four core principles. Specifically, the four core principles indicate that websites should be:

- Perceivable – Under this principle, websites should make it easier for users to see and hear content. This can be providing texts, captions, or using assistive technology that allows the website to be accessible without losing its meaning.

- Operable – This principle relates to making the website functional from interface components. Moreover, it relates to helping users to navigate and find content, as well as avowing content that may induce seizures.

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Employment Trends to Watch for in 2018

Phillip H. Hucles

In 2017, President Trump was sworn into office, ending eight years of an Obama administration active in employment regulation. The Trump administration has already scaled back regulations in many areas. Below are some of the most important trends we have seen over the past year, and what we believe will be hot issues in 2018.

DOL Will Not Move Forward with its Proposed Amendments to the FLSA's White-Collar Exemption

At the end of 2016 and into 2017, a federal court in Texas issued an injunction preventing the Department of Labor (DOL) from enforcing its highly anticipated amendments to the FLSA's white collar exemptions regulations. These sweeping changes (which we have previously covered) would affect millions of employers and employees. Although the Court issued the injunction during the Obama administration, the Trump administration's DOL has not sought to enforce the previous administration's regulation, nor proposed changes to the white collar exemptions.

The DOL does have an interest in clarifying that it has the power to make the proposed changes. The white collar exemptions are significantly dated and the salary basis threshold is easily met by most employees. The DOL may decide to take another stab at proposing regulations, with more gradual changes taking force rather than making a sweeping increase to the salary thresholds. With the DOL unlikely to take any major action at reviving the prior proposed regulations, it may decide to issue new regulations.

Proposed Legislation to Modify the NLRA's and FLSA's Definitions of "Employer"

Congress has proposed legislation to soften the liability impact for some employers by amending the term "employer" as it relates to joint employers. The Save Local Business Act, H.R. 3441, will amend the National Labor Relations Act (NLRA) and Fair Labor Standards Act (FLSA) if it passes through the Senate (the Bill passed the House on November 7, 2017).

The Save Local Business Act provides that a person may be considered a joint employer under the FLSA and NLRA if it directly exercises significant control over the essential terms and conditions of employment such as hiring employees, discharging employees, determining individual employee's rates of pay and benefits, assigning individual work schedules, positions, and tasks, or administering employee discipline.

Various federal agencies over the past few years have made the joint employment relationship a priority in issuing penalties and seeking remuneration for alleged violations. The bill seeks to delineate between those situations when a clear joint employment relationship exists and other times when the line is blurred.

Any litigation to determine whether an employer is a "joint employer" for purposes of the NLRA or FLSA will likely include a balancing test by the courts.

Proposed Legislation: Workflex in the 21st Century Act

On November 2, 2017, two Republican House representatives introduced the Workflex in the 21st Century Act. The bill is a sweeping combination of guaranteed paid leave and increased workplace flexibility options. Under the legislation, employers may voluntarily offer full-time and part-time employees at least a guaranteed minimum level of paid leave. The amount depends on the employee’s tenure and the employer’s size. Participating employers could offer employees at least one type of workflex option. The options include: compressed work schedule, biweekly work program, telecommuting program, job-sharing program, flexible scheduling or a predictable schedule.

The proposed legislation amends the Employee Retirement Income Security Act (ERISA) and would likely preempt conflicting state and local law. Paid leave would be extended to all full-time and part-time employees. Employees may accrue leave over the course of a plan year or employers may offer employees a leave lump sum amount at the start of the plan year. New employees would be subject to restrictions on the use of leave during the first 90 days of employment.

Paid leave requirements would be scaled to the size of the employer’s workforce and the tenure of the employee, allowing employers to design a leave plan that meets the needs of the organization and its employees. Part-time workers would be entitled to a proportional amount of paid leave based on the number of hours they work. Many employers may already satisfy the requirements of the proposed legislation if they offer a Paid Time Off (PTO) bank, which employees may use for any purpose.

The bill also has other eligibility requirements, similar to

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IRS Affordable Care Act Penalty Letters

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On November 2, 2017, the Internal Revenue Service (IRS) published guidance regarding enforcement of penalties under the Affordable Care Act (ACA) for applicable large employers whose full-time employees enrolled in an Exchange and received a premium tax credit. The guidance, in the form of Questions & Answers (Q&As), fleshed out how the IRS proposes to assess and collect employers' shared responsibility payments owed for 2015. According to the Q&As, the assessment process will consist of up to four steps, described below.

Step 1 – The IRS will issue Letter 226J (Initial Notice of Potential ESRP Liability) that will provide the applicable large employers with the following information: (1) brief explanation of the Internal Revenue Code (Code) section 4980H dealing with penalties imposed for ACA non-compliance; (2) a table summarizing the proposed payment by month and indicating for each month if the liability is imposed under Code section 4980H(a) or 4980H(b); (3) an explanation of the table; (4) an employer response form called Form 14764 (ESRP Response); (4) a description of the actions the employer should take if it agrees or disagrees with the proposed penalty; and (5) a description of the actions the IRS will take if the employer does not provide a timely response.

An employer that receives the Letter 226J must respond within 30 days of the date of the letter, using Form 14764.

An employer that receives the Letter 226J must respond within 30 days of the date of the letter, using Form 14764. If the employer agrees with the proposed penalty, it must return Form 14764 and include the penalty amount, with an election to pay electronically. If the employer does not agree it still has to return Form 14764 with a signed statement explaining why it doesn't agree and include supporting documentation.

Step 2 – After receiving Form 14764, the IRS will issue Letter 227 generally acknowledging the employer's response and describing further actions the employer may need to take. Upon receipt of Letter 227, the employer may request a pre-assessment conference with the IRS. If the employer does nothing or agrees with the IRS, the IRS will proceed to Step 4 below.

Step 3 – An employer must request a pre-assessment conference with the IRS Office of Appeals within 30 days of receiving Letter 227. The conference may be conducted by correspondence, phone or in-person.

Step 4 – If the IRS concludes that the employer is liable for the assessed penalty (following any of the preceding steps), it will issue a notice and demand for payment, Notice CP 220J.

The IRS started sending out Letter 226J at the end of 2017. Given, that employers have only 30 days to respond, employers should have the information that was filed on Forms 1094-C and 1095-C for 2015 readily available and most importantly do not ignore any correspondence from the IRS related to Letter 226J.■

Is Your Website Compliant with the ADA?

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- Understandable – This ensures that text and information is readable and understandable, including ensuring that content or operations are not beyond the user's understanding.
- Robust – This principle provides that website content should maximize compatibility with current and future tools, especially as assistive technologies advance.

If your business has a website and sells to the general public, you should consider whether your website is currently WCAG compliant. If you have any questions about the ADA web accessibility, or if you receive a threat of litigation, we encourage you to contact one of the authors of this article. If your website needs to be updated, we partner with a number of vendors who are experienced with WCAG 2.0.■

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Employment Trends to Watch for in 2018

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the Family Medical Leave Act (FMLA). To be eligible for a workflex arrangement, an employee would have to be employed for at least 12 months by the employer and would have to have worked at least 1,000 hours during the previous 12 months.

State Laws and Regulations are a Trap for the Unwary Employer

One trend that will likely continue in 2018 is the enactment of individual state and municipal laws regulating employers. Employers who operate in multiple states must ensure that their employee handbooks and other employment policies comply with *both* state and federal laws. Among the many areas regulated at a local level include: paid sick leave, use of criminal convictions in the hiring process, inquiries about prior salary history in the application process, minimum wage, and parental/military leave. We saw increased legislation in 2017, and believe that the trend will continue.■

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