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WEBINAR QUESTIONS AND ANSWERS

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Could My Company's Website Violate the Americans with Disabilities Act?

On Tuesday, June 14th, Chuck Marion and Jeff Goldman of Pepper Hamilton LLP and Alana Sharenow of Dunkin' Brands, Inc., presented a webinar entitled "Could My Company's Website Violate the Americans with Disabilities Act?"

During the webinar, several attendees posed questions to the panel, and unfortunately we did not have time to answer all of them during the 60-minute program. All of the questions posed during the webinar, along with the answers from our speakers, are set forth below. If you have any other questions, please let us know.

Q: Are the best practices the same for a business-to-business website that does not target consumers or allow consumers on the application?

A: This question raises some interesting issues. Starting with the latter part of it, if the general public is not "allowed" to access the website in question — that is, if visitors to the site must enter a user name and password to access it or pay a fee simply to access it, or if access is otherwise similarly restricted — there would be a good argument that the website is not a place of "public" accommodation (compare it to a movie theater, restaurant, library, etc., where visitors do **not** have to provide a password or other special identification to enter the site).

If, however, the business-to-business website in question does **not** restrict access in any way, and anyone visiting the site can access the information contained there, purchase goods or services through it, etc., it would more likely be viewed as a place of public accommodation, for which best practices would be the same as we discussed in our program for other websites that allow consumers to access information, purchase or order goods, etc. If an individual were to visit the site and not have to enter a password or other information to access it, but then could not view or access all of the information on it due to a disability, the owner and operator of the site would have some exposure under the ADA. While we have not seen any cases addressing this question, that may not be the case if it is a business entity, rather than an individual proprietor or business owner, that is attempting to access and navigate through the site. But, in general, if a visitor to the site is able to enter the site without entering a password or paying a fee, best practices dictate that the site be made ADA-compliant.

We are happy to discuss with you the specific website and situation further. If we were given more facts about the site, we could likely offer more definitive guidance.

Q: In this context, what does it mean to be "properly coded"?

A: As you can likely imagine, every website is different, and determining what changes need to be made to make a site more accessible and compliant with the ADA depends on the specific items contained on that site (for example, does it contain videos, a color-coded map, links to other sites,

etc.?). While we discussed some issues and changes that are relatively common — such as adding closed captioning to videos and changing the contrast to make certain colors show up better — there are many other possible issues with websites that may need to be addressed through coding or other changes. For example, does the website offer the option of increasing the size of its text without losing any content? Is audio content accompanied by a text alternative? Can the user use a keyboard rather than a mouse to navigate through the website in the event that the user is unable to use a mouse due to a disability, such as Parkinson's disease?

We are happy to discuss with you any specific situations or issues, and, of course, there are various outside consultants that can be retained to advise on and recommend coding and other changes that should be made to a particular website.

Q: If the information is not confidential, can you comment on the size of the settlements?

A: In the matters we have handled and settled for our clients, the settlements are confidential, and, therefore, we are unable to share the specific amounts paid, if any, or anything else about the "size" of the settlements.

In certain class actions, the amount paid is available. For example, in a class action against Target, which we mentioned during our program, among the various terms of the settlement were Target's agreement to pay class damages of $6 million. We also know that there could be exposure to penalties imposed by the U.S. Department of Justice. But, in general, in the cases that have been settled, the settlements are confidential, and we cannot offer any additional information on their size. We are, however, happy to discuss any specific situations or claims and provide our assessment, based on our experience in handling some litigation and claims in this area, as to the potential exposure to the website owner/operator.

Q: Is it possible to provide the consultant Alana mentioned?

A: The consultant that Alana Sharenow mentioned was The Carl and Ruth Shapiro Family National Center for Accessible Media. There are other entities that can assist you with adjusting your website to comply with WCAG 2.0 AA, and we're happy to provide some names if you'd like.

Q: Please expand on the "sufficient nexus" ruling and how that would apply to consumer-packaged-goods (CPG) companies that have no brick-and-mortar locations but whose products are sold at retailers.

A: This "sufficient nexus" question raises a couple of issues. First, as we discussed in the webinar, the courts in the Ninth Circuit that are addressing the "nexus" issue have not really provided a definitive answer. California federal courts have declined to apply the ADA to websites with zero nexus to a brick-and-mortar location, whereas other federal courts (e.g., in Vermont) have so applied the ADA. At least one other California federal court has declined to apply the ADA to a website that provides purely digital services, even if access to those services is bundled with access to a brick-and-mortar location.

On the other hand, courts in the Ninth Circuit have applied the ADA to websites that are used to acquire goods/services in a brick-and-mortar location, as was the case in the lawsuit against Target.com. The general takeaway is that, in the Ninth Circuit, there is a "sliding scale" and whether any website is subject to the ADA would require a case-by-case, and common sense, analysis.

This leads to the next issue regarding whether CPG companies with no brick-and-mortar location (but whose products are sold at retailers) need to have their websites in compliance with the ADA. We've dealt with this issue before in California in the context of a client that made products sold at retail locations, but did not actually own any of those locations. At the end of the day, the matter did not move forward to litigation, in part because the manufacturer did not actually own any "places of public accommodation." All that said, it's still possible that a CPG company with no physical location may be found to be subject to the ADA in those jurisdictions that don't require a nexus to a physical location (such as Vermont). The CPG company may also still have to comply with WCAG 2.0 AA under California law, given that state's Unruh Civil Rights Act, its Disabled Persons Act, and similar laws.

Q: What language could you put in a settlement agreement to attempt to stop future suits?

A: We're bound by confidentiality obligations from disclosing the specific language we have negotiated in good faith in prior settlements. But, suffice it to say, there are provisions that can be negotiated with opposing counsel — within the limits of ethical boundaries — that should give a defendant additional comfort that it will not immediately face further lawsuits once settlement is achieved. These provisions reflect both legal and business realities of these sorts of claims.

Q: I didn't see any lawsuits in New Jersey. Any reason?

A: We are not aware of any specific reason and believe it is only a matter of time until we do see these types of lawsuits being filed in New Jersey. It may be that the attorneys who have filed the lawsuits to date believe that the New York and Pennsylvania courts are better equipped, or have certain mechanisms and procedures in place, to move these cases along more quickly and direct or encourage the parties to engage in settlement conferences or other forms of alternative dispute resolution at an earlier point in the process.

Sincerely yours,

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