

# LEGAL IMPLICATIONS OF WEB ACCESSIBILITY

Mary Rice & Heather Kaiser  
Fafinski Mark & Johnson



# AMERICANS WITH DISABILITIES ACT

- Enacted in 1990
- “To provide a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities.”
- Internet in its infancy, not a consideration. Used by research institutions...
- ADA has not been amended to specifically address internet application.
- Regulations have not been issued to clarify.
- Courts provide the only guidance, and they are divided.

# AMERICANS WITH DISABILITIES ACT

- If your organization receives federal financial assistance such as grants or loans, it is also subject to section 504. Its provisions are very similar to those of the ADA.
- Generally, section 504 applies to your organization if it:
  - Receives a federal grant or loan
  - Receives funds from another agency such as a city agency that receives federal financial assistance

# ADA TITLE I: EMPLOYMENT

- **Title I** requires employers with 15 or more employees to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment-related opportunities available to people without disabilities. Religious entities with 15 or more employees are also covered by title I.

# ADA TITLE II: STATE AND LOCAL GOVERNMENT ACTIVITIES

- **Title II** covers all activities of state and local governments regardless of the government entity's size or receipt of federal funding. It requires that state and local governments give people with disabilities an equal opportunity to benefit from all of their programs, services and activities (e.g., public education, employment, recreation, health care, social services, courts, voting and town meetings).

# ADA TITLE III: PUBLIC ACCOMMODATIONS

- **Title III** covers businesses and nonprofit service providers that are public accommodations, private entities offering certain types of courses and examinations, privately operated transportation, and commercial facilities.
- 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.C. 12182(a)

# ADA TITLE III: PUBLIC ACCOMMODATIONS

- **Title III:** Must make reasonable modifications in policies, practices, or procedures, including offering auxiliary aids and services, to make a good, service or item available, unless the modification would fundamentally alter the nature of the goods, services, privileges or accommodations or would result in an undue burden.
- Undue burden: “Significant difficulty or expense.”
- Original application: building ramps, grab bars, lowering telephones, providing auxiliary aids, etc.

# ADA TITLE III: PUBLIC ACCOMMODATIONS

- Title III: Are websites a public accommodation? What is required under the ADA?
- Statutory examples of public accommodation: theaters, places of public gathering, shopping centers, recreational and educational places, social service establishments.

# ADA TITLE III: PUBLIC ACCOMMODATIONS

- **Issue:** Must a website have a nexus with a “physical place of public accommodation” to fall within the scope of the ADA, or is the website itself a “place of public accommodation”?
- **7th Circuit:** A nexus is NOT required, and websites without connections to physical commercial entities are nevertheless “places of public accommodation” for purposes of the ADA. “An insurance company can no more refuse to sell a policy to a disabled person over the internet than a furniture store can refuse to sell furniture to a disabled person who enters the store.”

# ADA TITLE III: PUBLIC ACCOMMODATIONS

- **3rd, 6th, 9th and 11th Circuits:** In order to be a “place of public accommodation,” there must be a *nexus* between the website and service of a physical “place of public accommodation” like a brick and mortar store. But a website inaccessible to visually impaired individuals may still violate the ADA if it provides unequal access to the “services” that may be available at a physical location. A website allowing a customer to order delivery from a local restaurant could be in violation of the ADA if it is inaccessible to the blind or vision impaired. The *nexus* between the challenged service and the physical place of public accommodation would make the website subject to the ADA.

# TITLE III CLAIM

- Plaintiff shows:
  - Plaintiff is an individual with a disability (or associated with an individual with a disability);
  - Defendant owned, leased or operated a place of public accommodation;
  - Defendant discriminated against plaintiff on the basis of his/her disability (no “intent” requirement”)
- In the case of making reasonable modifications, the discrimination must be based on the plaintiff’s disability by failing to make a requested reasonable modification that was necessary to accommodate the plaintiff’s disability.

# UNDUE BURDEN DEFENSE

## Considerations:

- The nature and cost of the action
- The organization or site's overall financial resources;
- The administrative/fiscal relationship of the site in question to any parent corp.;
- Overall financial resources and size of parent corp.;
- Type of operation of the parent.

# STATE LAW – UNDUE BURDEN CONSIDERS

- **State Law – M.S. 363A.11** – Undue burden defense considers these factors:
  - Frequency and predictability with which members of the public will be served by the accommodation;
  - Size of the business at that location, physical size, annual gross revenue, number of employees;
  - Extent to which disabled persons will be further served by the accommodation;
  - Type of operation;
  - Nature and amount of direct and legitimate indirect costs of making the accommodation and reasonableness of financing the accommodation; and
  - Extent to which persons may be adversely affected by the accommodation.

# REMEDIES FOR PREVAILING PLAINTIFF

- Injunctive relief;
- State law (public accommodation discrimination under M.S. 363A.11)
  - Damages (3x actual, punitive up to \$25,000), penalty to state;
- Attorneys' fees and costs (consider lodestar, enhancements)

# ADA TITLE I: EMPLOYMENT

- Title I of ADA protects certain qualified individuals with disabilities from employment discrimination
- For more information, see <https://www.eeoc.gov/facts/ada17.html>

# DISABILITY DEFINITION OF THE ADA

- For the purposes of the ADA, a **person has a disability if he has a physical or mental impairment that substantially limits a major life activity.**
- To be protected under the ADA, **an individual must have, have a record of, or be regarded as having a substantial (as opposed to a minor) impairment.**

# PROTECTION UNDER THE ADA

- For further protection, an individual **must be qualified to perform essential functions of the job with or without reasonable accommodation.**
- Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation.

# ADA AND THE EEOC

- According to the EEOC, the Equal Employment Opportunity Commission, the ADA does not interfere with an employer's right to hire the best qualified applicant.
- Nor does the ADA impose any affirmative action obligations.
- The ADA **does prohibit employers from discriminating** against a qualified applicant or employee because of his/her disability.

# DUTY ON EMPLOYERS

- The ADA imposes a duty on employers to **provide a reasonable accommodation to a disabled applicant or employee.**
- A **reasonable accommodation** is a change or adjustment to a job or work environment in order to enable a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.
- The Job Accommodation network is a good resource: <https://askjan.org>

# UNDUE HARDSHIP

- It is a violation of the ADA to fail to provide a reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, unless to do so would impose an **undue hardship** on the operation of your business.
- An **undue hardship** means that the accommodation would **require significant difficulty or expense**.
- Some examples (on a case-by-case basis): cost, collective bargaining agreements, impact on other employees, administrative burden, etc.

# REQUESTING ACCOMMODATION

- The ADA also requires an interactive process when an applicant or employee requests an adjustment or change due to disability. This includes:
  - Having the employee complete an accommodation form with a medical certificate
  - Determining if the employee is disabled under the ADA
  - Meeting with the employee to determine his/her essential functions, review the job description, and determine if the employee can perform those functions with or without a need for an accommodation
  - Considering type of reasonable accommodations and consult other resources
  - Meeting with the employee to provide feedback and explore options
  - Implementing an effective reasonable accommodation, or determining undue hardship

# EXAMPLE CASE LAW

*US Equal Employment Opportunity Commission (EEOC) v. FedEx Ground (2014)*

In 2014, the EEOC sued FedEx for ADA violations because they failed to provide accommodations for deaf or hard-of-hearing employees or job applicants, such as providing American Sign Language (ASL) interpretation and closed-captioned training videos during the mandatory initial tour of the facilities and new-hire orientation.

In July, 2015, the NAD joined the plaintiff in the litigation.

In January, 2016, the court denied FedEx's motions to dismiss the case.

Status: Case is currently being litigated.

# WEBSITE ACCESSIBILITY UNDER ADA

- For companies that require applicants to apply for employment through a website, an ADA Title I issue may arise in regard to ADA accessibility and accommodations – there are mixed opinion on whether remedying the issue requires WCAG 2.0 AA Compliance.
- It is best to provide an accommodation to a vision-impaired applicant, such as providing an alternative way for an individual to submit his or her application.
- If your company uses its webpage with employees, it must be up to date on Web access for disabled employees and applicants. Employers should review internet-based services consistent with accessibility issues,

# TIPS

- For employers who are providing materials to job seekers and employees, be sure that the online human resource (HR) system being used is accessible. It is imperative that recruiting tools, applications, calendars, benefits forms, timesheets, and leave requests are accessible. Unusable online systems create barriers for applicants and employees with disabilities.
- For an online application system that has forms or other unavoidable custom designs, give alternative options such as e-mail, fax, telephone, or mail, to provide the requested information.
- Display the company's equal employment opportunity (EEO) policy statement in a place where a user can access it easily. With this, explain to people with disabilities how they can get help using the online application system and where to get reasonable accommodation if they cannot apply online.

**QUESTIONS?**

**FMIJ**  
Fafinski Mark & Johnson

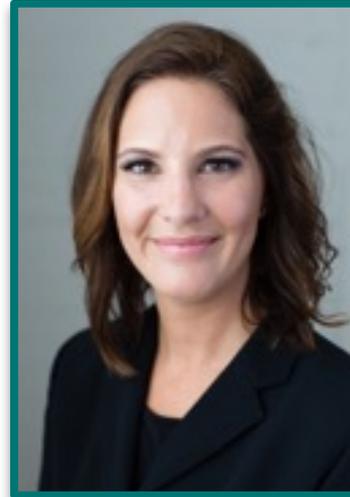
# SPEAKERS



**Mary Rice**  
Shareholder

Represents employers, both private and governmental, and employees in a wide variety of employment law disputes. Has handled employment disputed in federal and state courts, and before the EOCC, the Minnesota Department of Human Rights, and the Minnesota Department of Economic and Employment Development.

[mary.rice@fmjlaw.com](mailto:mary.rice@fmjlaw.com)



**Heather Kaiser**  
Associate

Handles a variety of employment and business-related matters, including employment advising and risk management, as well as commercial litigation. Advises on employment matters ranging from proper hiring and firing procedures, human right issues, risk management, compliance, employment manuals, and policies and handbooks.

[heather.kaiser@fmjlaw.com](mailto:heather.kaiser@fmjlaw.com)

# FMJ NONPROFIT GROUP

**FMJ's Nonprofit & Philanthropic group has provided trusted legal counsel to nonprofit and philanthropic organizations in various areas, including general corporate and business matters, mergers & acquisitions, planned giving programs, and employment matters.**

FMJ has first-hand knowledge of the intricacies of the nonprofit sector as many of our attorneys are currently serving on boards of various local and national organizations. This knowledge is coupled with our extensive experience of assisting organizations with formation, public charity rules and regulations, private foundation rules and regulations, employment issues unique to nonprofits, merger, acquisition, and affiliation, contract drafting and review, creation of subsidiaries and affiliates, formation and administration of scholarship and grant programs, regulatory compliance, internal investigations, governance policies and procedures, IRS, Department of Labor, and other governmental audits, and dissolution.

In addition, our attorneys are attuned to the unique needs of each local, national, and international organization we represent. FMJ attorneys are passionate about assisting philanthropies and nonprofit organizations in carrying out their meaningful missions, paired with their extensive experience in an array of areas, makes the firm an ideal fit to help nonprofit and philanthropic organizations face the many nuances of nonprofit law.

# FMJ HR & EMPLOYMENT GROUP

**FMJ's HR & Employment Group guides clients through the complexities of employment procedures and policies, employee benefits, hiring and termination practices and compliance with ever-changing laws. How can we help you?**

- Offer training and advice for the development of effective employment policies and agreements.
- Commonly advise on restrictive covenants including non-compete restrictions, non-solicitation restrictions, non-recruit or no-hire restrictions, and confidentiality restrictions.
- Design and draft numerous deferred compensation and executive compensation plans. Implement stock appreciation rights plans, phantom stock plans, equity participation plans, and stock option plans.
- Prepared to aggressively protect your interests in any type of employment claim brought against you. We have successfully defended employers in cases involving discrimination, harassment, whistleblower retaliation, breach of contract, compensation, and violations of federal and state employment regulations.
- Extensive experience prosecuting and defending employers in actions against competitors involving corporate raiding, violations of non-compete restrictions, tortious interference claims, misappropriation of trade secrets, and breach of fiduciary duty.

# FMJ CORPORATE GROUP

**FMJ's Corporate Group works with organizations of all sizes, from start-ups to Fortune 500 companies, across all industries, helping them devise strategies and solve problems.**

We work with organizations of all sizes, from start-ups to Fortune 500 companies, across all industries, helping them devise strategies and solve problems. Much of the work we do in our General Corporate & Business group is contractual – structuring, negotiating and reviewing contracts.

For more specialized work, we partner with attorneys in our other areas. For example, if a client wants to buy or sell a business, we work with attorneys in our Mergers & Acquisitions group; or if a client is looking to buy or sell a commercial building, we'll connect with our Real Estate group.

Our General Corporate & Business attorneys are strategic problem-solvers who are dedicated to helping businesses get to where they want to be.

© Copyright 2017 Fafinski Mark & Johnson, P.A. These materials may be considered advertising for legal services under the laws and rules of professional conduct of the jurisdictions for which we practice. The material contained in this presentation has been prepared by Fafinski Mark & Johnson, P.A. for informational purposes only and is not intended to be legal advice nor does it establish an attorney-client relationship. Legal advice of any nature should be sought from legal counsel. Unsolicited emails and information sent to Fafinski Mark & Johnson, P.A. will not be considered confidential and do not create an attorney-client relationship with Fafinski Mark & Johnson, P.A. or any of our attorneys. Furthermore, any unsolicited communications and materials may not receive a response. For more information about Fafinski Mark & Johnson, P.A. and our practices, please visit [fmjlaw.com](http://fmjlaw.com).

