

A More Accommodating Stay: ADA Title III and the Hotel Industry

By Jennifer Rusie & Joseph J. DiPalma

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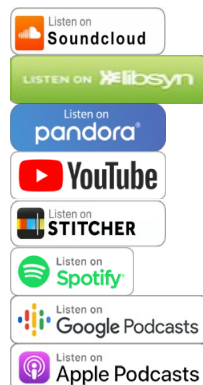
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Details

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All hotels aspire to provide their guests with top-quality service no matter the location or type of establishment. As guests resume—and ramp up—their business and personal travel post-COVID-19, all establishments must be prepared to accommodate individuals with disabilities. Ensuring grounds, sleeping rooms, bathrooms, and websites are accessible goes beyond simply maintaining legal compliance.

Jackson Lewis P.C. · A More Accommodating Stay: ADA Title III and the Hotel Industry



Transcript

Alitia Faccione:

Welcome to Jackson Lewis's podcast, We Get Work. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace, and its continuing evolution and helps answer the question on every employer's mind, "How will my business be impacted?"

All hotels aspire to providing their guests with top quality service, no matter the location or type of establishment. As guests resume and ramp up their business and personal travel post COVID-19, all establishments must be prepared to accommodate individuals with disabilities. Ensuring grounds, sleeping rooms, bathrooms, and websites are accessible, goes beyond simply maintaining legal compliance.

On this episode of We Get Work, we discuss ways hotels and other types of establishments can address common accessibility issues for restaurant menus, service animals, shuttle services, and websites. Our host today are Jen Rusie,

principal and office litigation manager in the Nashville office of Jackson Lewis, and Jo DiPalma, principal in the White Plains office.

Jen and Jo are members of the firm's disability access, litigation and compliance resource group. Both have handled hundreds of disability access matters involving architectural barriers, website and mobile app accessibility, disclosure of accessible features at hotels and braille gift cards.

Jen and Joe, the question on everyone's mind today is what are common types of disability based claims and inquiries that affect hotels and how does that impact my business?

Joe DiPalma:

Hey, Jen. So when I think of ADA Title III, Americans with Disabilities Act, Title III, and how it affects our hotel clients, I really think of four or five main issues that I see from a litigation perspective. The first is the one that everyone probably knows of, the brick and mortar, typically, a plaintiff in a wheelchair comes into the hotel and says that it's inaccessible to them.

The second and third pertain to the website. The second would be the website itself isn't accessible to a person with a visual impairment or hearing impairment. And then the third one is the hotel fails to comply with the regulation that specifically says they need to list certain accessible or inaccessible information on the website so a person with disability who's using that website can make an independent determination as to whether the hotel's going to meet his or her accessibility needs.

Jenn Rusie:

And Joe, I was going to cut in and tell you that it's a thing that trips up people sometimes on that, is that even if you aren't running the website, you have to make sure that that information is given to the third party aggregators so that that information is available on your Travelocitys, your Expedias, because it is the person who owns or operates the place of lodging who is liable for that.

Joe DiPalma:

Right, and on that point, Expedia or Travelocity and those types of companies, they're not always going to ask the hotel for that information. So it is incumbent upon the hotel to think about this proactively that there's a chance that not everyone's going to go to their website to book the hotel. They go to Expedia or another third party site, and that's something that they're going to need to provide.

The other two issues that I've been seeing, one pertains to service animals coming into the hotels and comparing that to emotional support animals and knowing the difference. And then the fifth one I know is something a little bit more in your wheelhouse, but it pertains to transportation offered by hotels, whether it be trolleys, vans, buses, etcetera, and the requirements on those being accessible.

So in that framework, what do you think of those issues is really the hot button topic right now that hotels are struggling with.

Jenn Rusie:

Yeah, absolutely. I think, like you said, the shuttle buses is a little more mobile health. I had a class action on this topic. It is something that I think a lot of hotel owners don't think about. A lot of people offer shuttles from the airport or maybe to downtown, things like that. And typically these vehicles are not accessible. A lot of times they're just a van. And so you have to be able to offer comparable accessible transportation to individuals who need that.

And the way you do that is you contact Uber, a Lyft, a cab, some sort of shuttle service that has an accessible vehicle, and you need to make sure that if your shuttle is free, that the accessible alternative is also free. It's going to be paid for by the hotel. And also you want to make sure that the process to obtain that accessible transportation is seamless and is similar to the process for the regular shuttle that you have.

You also want to make sure that the front of house employees are aware of these options. That was the main issue in the case that I had. Apparently this woman was calling different hotels and asking the front desk employees, "Do you have an accessible shuttle?" And she alleged that they all said, "No." And she said, "Oh, well, could you get me one?" And they all said, "Yeah, but you're going to have to pay for it," which is not true.

And so we wound up having this class action. It was one of the only actual depositions I've taken in a Title III case was in this case about shuttles. It was an actually fully litigated case. There's not a lot of case law on it because it's a rarer situation, but it is something that could trip people up.

But I do think the biggest issue that has the most confusion is the service animal. What do you think, Joe?

Joe DiPalma:

Yeah, I've seen a handful of service animal cases over the years. I think initially what people get tripped up on is what is a service animal? It's important to keep in mind that ADA Title III, which is the law we're talking about that affects places of public accommodation, only provides for service animals as it compares to emotional support animals.

What are service animals? The law says that they are either dogs or miniature horses. So at the outset, if a person comes into a hotel with a cat, you know that can't be a service animal.

Jenn Rusie:

Or a large horse. I mean, it has to be a small-

Joe DiPalma:

A miniature. And a lot of people ask that question, why a miniature horse? And apparently the reason is that they're more hypoallergenic. So people with allergy issues who may be allergic to dogs can use a miniature horse, and a miniature horse can serve a lot of the same needs as a dog would in that situation.

Jenn Rusie:

And speaking of those, actually I'm going to cut in. I think there is an account either a TikTok or a YouTube or something for Tony, the Wonder Pony, and he is a service horse. You can check that out and see all the great things that a service horse can do.

Joe DiPalma:

On the only miniature horse I really know is Little Sebastian from Parks and Rec.

Jenn Rusie:

Right. Yes. RIP. Yeah, and he died. Spoiler alert.

Joe DiPalma:

The big question then is a person comes in with an animal that isn't a dog or a miniature horse, and what are the hotels obligations for an emotional support animal? And the short answer under Title III of the ADA is nothing. You don't have to allow emotional support animals, but you do have to allow service animals.

And then Jen, I guess when you see hotels with pet policies, how does that play in to dealing with service animals when service animals come?

Jenn Rusie:

So that's the thing is if they have a no pet policy, it doesn't apply to a service animal because a service animal is not a pet. It is an animal that provides a service. So a hotel would have to let the service animal stay. And if you have a charge, a pet policy where there is a fee for a pet, you cannot charge that fee to somebody who has a service animal.

And a lot of times that's where I've seen the issue. People have called me and they're getting frustrated because they think that guests are trying to pass off pets as a service animal and avoid paying the pet fee, or to try to bring in a pet where there's usually pets not allowed and they feel a little hamstrung because there's only two questions that you can ask to a guest to see whether or not it is a service animal.

And those questions are, is this animal a service animal or do you have this animal because of a disability? And the second question is, what service or task does the animal perform? And that's it. You can't say, can I see its papers? Because guess what? There's no papers that are involved. If somebody says it's a certified service animal. That's not true because there's no such thing as a certified service animal. But you can't ask for any sort of documentation. Service animals don't have to wear a certain kind of collar or jacket, anything that designates them as a service animal. The hallmark of a service animal is that it performs a specific task or job for the person whose service animal it is.

Joe DiPalma:

Right. And that's kind of interesting because it can raise the question, at least that second question when it's answered, what service are they trained to provide for the person? What if the person at the hotel who's asking that question doesn't necessarily believe the response from the guest? And that could be pretty

challenging, especially when it sounds like the answer to be pretty hard to believe.

And a lot of the times when I go to hotels, when I speak to people from hotels, the people that are asking these questions at the front desk maybe aren't necessarily well versed in ADA Title III and what specifically they can ask. And I think one of the biggest things you want to do to avoid this as a hotel is really train your people who are asking these questions not to pass any sort of judgements or make any independent decisions when faced with an answer to those questions.

So for example, if a person with a dog comes in and says, "This mini chihuahua is trained to make me smile when I'm feeling sad," that sounds like an emotional support animal. But what do you do when you're standing there behind the desk and it seems like this is just the person's pet or emotional support animal and not really a service animal. Any guidance that you have to our hotel clients as to how they can address those types of issues?

Jenn Rusie:

And that's the tough problem, that's what they're running into is you have a lot of times people who, they don't even go that far. They just say, "Hey, it's an emotional support animal." And if they say that, then you can say, "Hey, that's not covered." Because a lot of times people who are trying to pass off the service animals or emotional support animals or pets as service animals don't understand the distinction between an emotional support animal and a service animal. So that is one thing. If somebody just says, "Hey, this dog is my emotional support animal," they should feel comfortable saying, "We only accommodate service animals." And there is a difference there. I mean, it could be risky because someone could... You always run the risk of having a lawsuit but there should be a defense there because as we noted, a service animal is trained to perform a specific task, such as a guide dog for somebody who is blind, or they are trained to sense somebody who is about to have a diabetic seizure or some other sort of a seizure or an allergic reaction.

And so then you run into the stickier situation, like you said, if somebody says, "Oh, it's trained to make me feel better, treats my depression, anxiety, whatever." I'd say you're probably the most conservative course of action would be just to let it stay. Because if you do push back, then obviously you are going to potentially run the risk of getting a charge or a lawsuit, upsetting the guest, negative Yelp reviews and things like that.

And it's sort of a not great area of the law in terms of what's out there in terms of precedent. So that's just kind of a gray area, and it's a judgment call. And again, I don't know how much of the front desk employees you want to be making these judgment calls. So I think your best bet is probably if someone is saying, "This dog is trained to do anything," that you let them have it.

Joe DiPalma:

That makes sense to me. And at least my experience here in New York is I don't really see service animal cases coming in by serial plaintiffs and serial plaintiff attorneys. It's not the cottage industry that a lot of people tend to think of when they think of ADA Title III cases. So I think one point on that for hotel operators

and owners is that you probably are dealing with a legitimate guest, right? A legitimate guest who wants to stay at the hotel and actually does need a service animal. And they're not looking to file a lawsuit. They're just looking to stay at the hotel. And in a minute when we talk about some of these other ADA issues, you'll understand the difference between well, who these guests are, potential guests are, as opposed to a lot of who these plaintiffs are and the lawsuits we see.

So yeah, moving from service animals, one of the other areas that I've spent a lot of time, really twofold, is the brick and mortar cases where persons with disabilities are coming to the hotel and they maybe have a bad experience, or maybe they just came to the hotel in the first instance to see is the hotel accessible and then they file a lawsuit on that basis. So the stereotypical fact pattern is the plaintiff is in a wheelchair and he or she alleges that starting from the front, the front entrance is inaccessible, the lobby is inaccessible, it doesn't have accessible service counters, there wasn't an accessible bathroom in the lobby. The restaurant on the first floor wasn't accessible, no accessible tables or bar seating. The elevator wasn't accessible, the guest room wasn't accessible, the gym wasn't accessible, the conference room wasn't accessible. So think about all of the different areas that...

Jenn Rusie:

Pool lift.

Joe DiPalma:

The pool, there was no pool lift. So you think about all the different areas that a hotel has that's open to the public, and all of this is essentially low hanging fruit for whether it be a legitimate plaintiff who actually stayed there and experienced these issues, or one of the serial filers we see who file cases against 60 different hotels in New York City in one year, which is impressive that they have the ability to travel that much.

So that's just when you think about those types of cases and you think about how they interplay with one another as far as service animals go, the physical brick of mortar cases, there's a lot to think about. So if a client were to call Jen and say, "Hey, I just want to make sure, I want to do a wellness check or a gut check as to making sure we're paying attention to Title III of the ADA and doing what we need to do," what do you say to that client? Where do you focus? How do you guide them on that?

Jenn Rusie:

Well, I would first conduct an audit of your physical premises. Get somebody who is some sort of an ADA inspector, somebody who is well versed in Title III of the ADA to come in, look at the physical spaces, and you could see, just do an audit and check to see that everything meets the standards. And it's different than code. A lot of times I hear clients say, "Oh, well it's built to code. The contractor said everything is up to code." And those are going to be local building codes. That has nothing to do with Title III of the ADA.

And another thing, a lot of times people say, "Well, my contractor said that it's built to in accordance with the law." And that's one thing you would obviously want to

check and see what your lease or contract says about things, how they're built and do they comply with the law. But a lot of times you can fully intend to be building something and have everything comply. But when the construction is actually done, things are missed. I mean, think about how many things are in a punch list. Whenever you do any kind of a renovation or construction, things are missed. There's always something that you could go back and check. And then there's also service things that you need to check and train your employees to make sure that they are doing, if they're offering certain things to people who might have a disability.

So that would be the first thing would be to audit your physical premises. You also want to make sure that when you're doing your reservations, that your reservation staff understands about the last room available. You want to reserve the accessible rooms until, and not sell out your accessible rooms unless someone is in need of an accessible room until, you can sell all of the accessible rooms, but only if that is the last room available of that type. Someone needs a king bed with a balcony, and so you need to make sure that you've sold all of the king beds until you dip into that stash of the accessible ones.

Joe DiPalma:

Yeah, I mean, there's a lot of moving parts there. And to keep in mind, and just piggybacking on the reservation system, one of the other topics that we mentioned earlier, the wave of lawsuits that are pertaining to the reservation systems and whether that are available online and hotels having to advertise what are the accessible features of the hotel? This way a person with a disability, whatever that disability is, can make an independent determination as to whether that's specific hotel will meet their accessibility needs. And there's, right now, there's cases going on where there's a split between the circuit as to whether testers should have standing. And when we say the word testers, obviously we're meeting someone who doesn't want to stay at the hotel necessarily, but they're looking to see if the hotel's complying with the law. So it's a hot button issue now because testers have been filing these cases.

But the question I always get from clients is, I understand that there's a regulation that specifically says, we need to put this information on our website, but I know that our hotel doesn't have an accessible front entrance or doesn't have an accessible service counter. What do I do? Do I put that information on the website, that we don't have an accessible front entrance, or do I just leave it blank? And the reason they ask that is because if I put on my website, we don't have an accessible front entrance, aren't I just opening the floodgate for persons to come and sue me because I don't have an accessible front entrance.

And I think that's a great question, and I'll ask you for your opinion in a second, but one of the ways I always thought about this is maybe it does make sense to put that on the website, A, because you're complying with that law, and B, you're potentially avoiding a situation where a person doesn't necessarily want to sue the hotel, but they are going onto the hotel website to see, Hey, I have this specific disability, I need this specific feature, you don't have it, so I'm going to stay somewhere else.

And maybe that is legitimately what they're doing, and you're preventing a scenario

where they show up to the hotel, now they have an issue because the hotel doesn't meet their accessibility needs and they end up having, A, bad stay, B, leaving a bad review and potentially, C, filing a lawsuit they didn't really intend on filing when they first went to the website. I mean, that's a tough issue I think hotels is dealing with. And I'm not sure if that's something you've seen or have any thoughts on.

Jenn Rusie:

Well, my thought is that should I think begs the question of why don't you have an accessible entrance or service counter this, that or the other? I think that is what we should be drilling down to is what is the reason for that? And there are some reasons. If you were in, perhaps it's a historic landmark type situation, and that's why there is this issue. So that is something you would maybe want to note on the website. Due to the historic nature of this property, some entrances are not accessible. I think you might want to preface it with that. But if it's not for one of those reasons, then maybe you should actually be looking into remediating the property to ensure that it's actually complying with Title III of the ADA.

But another thing you just mentioned I wanted to call out was about, we talked about the website and information that's on the website, but we need to make sure that that website itself is accessible to individuals with disabilities. And we want to make sure that it interacts with screen reader software for people typically who have visual impairments, sometimes also hearing impairments. But what we see mostly are people with who have visual impairments and they cannot access the website if it's not coded in a certain way.

And this is a thing that trips up a lot of people because unlike with the physical property standards or even the somewhat vague standards for reservations, there are no official standards for what makes a website accessible. We've got these industry standards. The 2.1 AA standards that are typically... You're typically considered to be compliant with the ADA if your website meets these guidelines. But there's nothing in any sort of regulatory code that actually calls out everything about accessibility. So we've seen people have trouble with that.

And one thing that I would say that I see the most with hotel websites, there's a guy named Jay Brodsky in New York who likes to file charges with state agencies saying that the hotel restaurant's menu is not accessible. And a lot of times it's because a lot of the hotel restaurant will upload a PDF and the PDF is not readable. So that is something that hotel owners should all check their restaurant menu so they don't get hit with that.

Anything else you see with that Joe?

Joe DiPalma:

Right. I mean, the website accessibility space has been blowing up. In the southern district of New York, there's been thousands of lawsuits filed every year for the past few years, and a lot of them are hotels that get hit with it. And it is really the toughest to defend because that, when I talked about cottage industry before, this is really the definition of cottage industry where you have a plaintiff who files hundreds of these with the same attorney, and it really is just apparent from very

early on that they don't necessarily care about the accessibility of the website at all times, and they don't have a good answer as to what needs to be done to make it accessible. The focus of it tends to be about money, and I think that's different than a few of the other areas we were talking about today, right?

With the physical accessibility of the hotel, you can easily see someone with a wheelchair or another ambulatory impairment who really wants to stay at that hotel, maybe because they have friends or family that are staying there and they want it to be accessible and they want it to work. And these are things that hotels could control to some extent. The accessible information on the website, you want to be informed. When you're going to stay somewhere, is this going to be a good fit for me? That's important, and this could not only comply with the law, but give a better experience for those customers that will be coming to stay at the hotel.

To your point about the service animals, right? If I have a service animal, I'm going to want to know, is this a hotel that is going to accept or are they going to give me a hard time? What are the rights there? Making sure your staff knows how to deal with those issues specifically.

So at the end of the day, hotels have a lot of different moving parts and a lot to pay attention to, but we are here to help at Jackson Lewis, so reach out to me, Jen, or any other Jackson Lewis attorney you regularly work with and we'd be happy to walk you through this in more detail as you need.

Jen, it's been great chatting with you. Anything you want to say before we wrap up?

Jenn Rusie:

The only thing I'll say is these issues aren't going away anytime soon. As Joe, as you said, it's cottage industry and it absolutely is, from the attorneys who are filing these cases. And then you've got the whole website auditors, ADA inspectors, there are people everywhere. There's people who are certifying service animals. So I say there's a lot of business that is hinging on these ADA issues and we just keep seeing them getting filed. So we are here to help and are happy to do so.

Joe DiPalma:

Agree. Thank you again. Until next time.

Alitia Faccione:

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