

CLIENT ALERT

The Next Wave of ADA Litigation - Must Retailers Offer Gift Cards in Braille?

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In the last three weeks more than 90 retailers and restaurants have been sued in federal courts in New York because they do not offer Braille-embossed gift cards. Many of these complaints are substantively identical, alleging violations of Title III of the Americans with Disabilities Act (ADA). The complaints allege that the defendant's failure to emboss the issuer of the gift card as well as the denomination of the card in Braille violates ADA Title III, and corresponding New York law, and seek class action status.

The ADA requires places of public accommodation (which includes brick and mortar retailers) to provide disabled individuals the "full and equal enjoyment of the goods and services" offered by the business. The complaints allege defendants violate the statute by failing to make available "appropriate auxiliary aids and services where necessary" to ensure effective communication with individuals with a disability.

These cases present novel legal issues. The threshold question is whether the ADA and state laws even apply. Existing regulatory authority suggests that the ADA does not extend to cover this particular business practice. The ADA's auxiliary aid requirement, which requires places of public accommodation to offer "Brailled materials and displays" in certain circumstances, has been interpreted by the Department of Justice to be a flexible standard, allowing retailers discretion to "choose among various alternatives as long as the result is *effective communication*." (28 C.F.R. § Pt. 36, App. C.). A common example of this requirement is Brailled signage on elevators in commercial buildings. There are no reported decisions addressing the question of whether Brailled gift cards are required.

These complaints are the latest example of how enterprising plaintiffs' lawyers are attempting to extend the previously settled understanding of the scope of the ADA. When it was initially enacted in 1990, lawsuits alleging ADA violations focused on physical access barriers, such as the absence of a wheelchair ramp or an elevator. The concept of access barriers has been extended in recent years; many retailers are by now familiar with the flood of recent ADA lawsuits brought complaining that internet websites are not compliant for the blind and hearing impaired. The unavailability of Braille gift cards may be an easy target for the plaintiffs' bar, as most businesses do not offer Braille gift cards.

There may be both procedural and merits-based defenses to these lawsuits, including the question of whether the claims are barred by an ADA exemption for situations in which "compliance would 'fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden,'" 42 U.S.C. § 12182(b)(2)(A)(iii)). One of the issues that may affect the applicability of this exemption is the existence of at least one retailer with a gift card on the market that contains Braille, a fact pointed out in many of these complaints. Because these cases have just been filed, answers to some of the novel legal questions will take some time.

This new wave of Title III ADA litigation presents risks for restaurants, hotels, merchants, traditional retailers, or any business that offers gift cards for sale in conjunction with their goods or services. As new complaints continue to be filed, businesses should take the time to understand their compliance obligations under the ADA.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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