

## Fox Rothschild Podcast

### Legally EmpowHERed Podcast

#### Episode 10

#### *Featuring Sahara Pynes with Bryn Goodman*

**Pynes:** Welcome back to “Legally Empowered.” I'm your host, Sahara Pynes, and I'm so excited to bring this podcast to you. As an attorney and former business owner myself, I'm passionate about drawing on my own experience and insight to set my female clients up for success.

I know my guest today feels the same. Bryn Goodman focuses her practice on guiding employers on all aspects of employment law. She represents employers in state and federal lawsuits and administrative proceedings involving discrimination, sexual harassment and wage and hour claims. She also advises clients on compliance with local, state and federal laws regarding hiring and termination, discipline, discrimination, retaliation and wage and hour issues. Bryn works closely with clients to draft and revise their handbooks and policies, as well as employment, separation, confidentiality and non-competition agreements. She also conducts anti-discrimination, harassment and diversity training.

Welcome, Bryn. I'm so happy to have you here today.

**Goodman:** Thanks so much for having me.

**Pynes:** I'm really excited that we decided on the topic of websites and the legal issues that are surrounding one of an entrepreneur's most important marketing tools. What laws should we be thinking about at the outset of this conversation?

**Goodman:** When disability laws were written, they didn't consider that websites would be in existence. So, what these disability laws were intended to protect were the public's access to accommodations: goods or services that a business is providing. The laws now — the case law and the courts — are trying to shoehorn these disability laws to protect people and the public to be able to access websites. People with disabilities should be able to access a physical store and this law protects them and enables them to have a ramp or an elevator so that they can get into a physical store and receive goods or services. Cases are being filed to say, “Hey, the same type of consideration should be made for accessing a website.”

So, someone who is visually impaired should be able to use a screen reader software to interact and access a website's content. That's something that is in many jurisdictions: If you don't have accessibility features on your website, you could be violating a disability accommodation law. Meaning that, a person who is visually impaired could say, “You're denying me access to goods and services and violating Title III of the Americans with Disabilities Act, or state and local law, because I can't use my screen reader software to access your goods or services.”

**Pynes:** Has the law actually been changed, or are the cases developing the law in this area?

**Goodman:** Yeah, the law has never been rewritten on this point and regulations have been floated and proposed, but never actually issued. There's never been comments on any regulations, there's just been talk of it. But, there has been third-party guidance on this issue. Basically, to be in compliance, there's something called the WCAG 2.0 AA guidelines.

**Pynes:** That sounds very ominous.

**Goodman:** Website Content Accessibility Guidelines is basically what that stands for. But they are ominous because there's a lot of technical information. You as a solo entrepreneur or even just a small business owner, it's going to be really difficult to digest that information. You probably hired someone to setup your site or write the code for your site. You're going to need to hire someone to make sure that your website is compliant with these guidelines.

**Pynes:** Wait, the person who sets up my website doesn't know about these laws?

**Goodman:** Maybe not. When you're looking at the contract that you're signing to have someone prepare your website, or create your website and the content, you're going to want to ask them, "Is this going to be WCAG 2.0 compliant?" And if they look at you cross-eyed, you're going to want to try and find a different vendor because this is something where, if you can find someone who's knowledgeable at the outset, you're going to save yourself a lot of time and money.

**Pynes:** Some of the big website hosting companies where you can go online and create a website and, maybe not a very good one, but a website in an hour ... have you seen any of their vendor contracts? Do you know, generally, some of those bigger players? WordPress, GoDaddy, those types of companies? Do you know whether they're offering those services?

**Goodman:** What we've seen is those contracts typically have strong indemnification provisions in favor of the provider. You as an entrepreneur or a business owner or a small business owner, you're probably going to have signed a contract that will not permit you to go after the website provider or the person who created the website, like WordPress. Instead actually, if they're sued, you may have to indemnify them. The only thing that's going to change that is if enough people look at the contract and refuse to use the businesses that do not provide assurances as to accessibility. Then, demand will change the practice. But right now, it hasn't risen to that level. But I think it might, Sahara, because the numbers of cases being filed on this issue is skyrocketing.

**Pynes:** Tell me what you're seeing.

**Goodman:** In 2021, 688 website accessibility lawsuits were filed in New York federal court just in Q4, and that was an uptick from 272 in Q3. Mainly, these attorneys are forum shopping. We're seeing a lot of cases filed in the Southern District of New York and California state and federal courts. That doesn't mean the website needs to be headquartered in New York.

**Pynes:** Obviously a website is everywhere, right? They're just trying to find the best court that's going to be most favorable.

**Goodman:** Correct. That's right. You can't turn a blind eye. If you if you happen to be located in Arizona, you still might get a lawsuit filed in one of these venues that is favorable to plaintiffs.

**Pynes:** And what of the plaintiffs' counsels? All they're doing is sitting at a desk, probably in their cozy slippers, and searching for websites that might be inaccessible. And then they have to find a client, or do you think they have clients already?

**Goodman:** Yeah, we're seeing the same plaintiffs file these suits over and over again. For anyone who is familiar with the lawsuits that were filed for accessibility to pools, for instance — or ramps at stores or elevators — there were always willing plaintiffs who would file multiple suits against multiple venues, claiming, "I tried to access your venue and I couldn't because it's inaccessible and not in compliance with the disability law, so I'm suing you to make the change."

**Pynes:** And it's a pretty easy lawsuit to get going.

**Goodman:** They're all the same. They're all pretty much verbatim of the one that was filed before. That's why one firm can file 500 of these suits in a two-month period, just like that.

It's not a matter of whether you will be sued if you're not aware and in compliance with this law, it's a matter of when. Because the number of attorneys taking on these kinds of cases is increasing. It's just easy for an attorney to file the lawsuit. It requires very little work on their part. Most of the time, there aren't a whole lot of defenses, but we can talk about those, if you want, Sahara.

**Pynes:** What's in it for the plaintiffs? What are they getting out of this?

**Goodman:** In terms of damages and penalties, Title III doesn't allow for plaintiffs to receive any kind of damages, but they are entitled to attorneys' fees and injunctive relief. What's going to be expensive for the person hosting the website is you're going to have to pay for your attorney and if you lose, you're going to have to pay the plaintiffs' attorneys' fees. And remediation is not cheap. These websites can cost \$10,000 to review and remediate, depending on how many pages there are within the website. If you don't get it right on the first go around, your website is going to be exponentially more expensive to remediate than it was to set up.

**Pynes:** But why, as a plaintiff, would I want to file claims against 500 different companies if I'm not getting anything out of it?

**Goodman:** Well, your attorney is getting their attorney's fees and there are plenty of plaintiffs who are willing to take up a cause and are likely going to be receiving some type of compensation from the attorney, that's not technically damages, but they're probably receiving something for their time.

**Pynes:** So, when you get a demand letter, the demand is basically that the company fixes the website. It's not that their client receives \$10,000 for pain and suffering or for the inability to access the website at the time that they wanted to?

**Goodman:** That's right, the demand would be to remediate, but there would also be included a demand for attorney's fees, which will likely be higher than what it actually cost the attorney to prepare the lawsuit. The argument being that, you would not have remediated your website had I not filed this, so if you don't settle now, I'm going to incur \$10,000 or more dollars in attorney's fees. Pay that now and I'll go away. It would ultimately end up costing — if you went to trial on something like this — far more than \$10,000.

**Pynes:** Sure.

**Goodman:** But that's the argument that you'll hear from the plaintiffs' lawyers who are trying, essentially, to make a quick buck.

**Pynes:** Exhibit A: Why so many people get bad names in the legal industry.

**Goodman:** Exactly.

**Pynes:** I'd love to hear the details of some of the cases that you're working on or the cases that you're seeing. I really find this area so interesting, and I know so much is evolving.

My only experience in this area — honestly, so don't call me with questions — was 20 years ago. I was representing a bank and a group of blind individuals from an advocacy group came forward and said that the ATMs were not accessible. I had to go and do some research on site and close my eyes and wear a blindfold, and it was pretty difficult. Granted, I didn't have the same training as someone who has a visual disability, but it resulted in a bank-wide change in all of their ATMs. And of course, that's the standard that we see today when we go to an ATM. So, it has evolved quite a bit.

**Goodman:** Sahara, that's an interesting story about the ATMs. That's what we saw all the time: You maybe get a case at a restaurant if you didn't have a braille menu. You certainly have access to a store; the brand would need to have a certain gradient so that you could roll up the ramp on your own if you were in a wheelchair. There would have to be bars in restrooms so that if you were in a wheelchair, you could access the restroom while at a restaurant or at a hotel, or anywhere that would be considered a public accommodation.

But now, what it is, is can my screen reader software read out loud how to purchase whatever it might be, whatever goods and services that the website might provide. The case law is evolving in this area. As I said, the law itself doesn't actually include a website as a place of public accommodation. The way that courts have been determining that these laws apply to websites is because they view a website as akin to a sales establishment. There are actually 12 specified categories of places of accommodation. And so, the courts will see a website as a place selling goods or services, and that's how the disability laws would apply.

Now, there are differing opinions in different jurisdictions. Even in New York, we have conflicting findings. The Eastern District of New York recently had two cases that found that if the website is not connected to a physical store, then it's not a place of public accommodation.

**Pynes:** Oh.

**Goodman:** Yeah. So, the ADA does not apply to online-only business, according to several cases in the Eastern District of New York.

**Pynes:** Okay, but that's not necessarily true across the entire country. A solely online business still needs to pay attention to this stuff, right?

**Goodman:** Correct. For instance, the Southern District of New York found exactly the opposite: Regardless of whether or not you have a physical brick and mortar location, you still need to comply with accessibility standards to comply with the ADA. So, for instance, the cases that we've seen in the Eastern District are, a newspaper with no public facing physical retail location and a website that sold all online services to improve a user's online presence but didn't do anything other than sell online services. Both of those had no public facing physical retail operations. The cases were dismissed. The court found that the ADA did not apply because these were not places of public accommodations.

On the flip side, the Southern District has several cases say even if it's only an online presence, you're subject to these disability discrimination laws. To your point, Sahara, not only do you need to pay attention because you might not be lucky enough to get sued in the Eastern District of New York, but also because state and local laws don't follow the same narrow definition as the ADA. A lot of these state and local laws have been amended more recently to explicitly include web sites. So, you want to be aware of accessibility issues because you don't want to run afoul of your state and local law, even setting aside the potential liability under the federal law.

**Pynes:** You mentioned the screen readers. What other types of features does a website need in order to be ADA compliant or otherwise accessible?

**Goodman:** Another thing to consider is if you have videos on your website, you want to have a sign language option or closed captioning. You want to ensure that if you have images on your website that they can also be described and it's not just an image that that someone can't access it if they can't see. There's also an issue with people who may not be entirely blind but are visually impaired. The contrast levels on your websites need to be considered, so if you have dark text on a dark background, that's going to be problematic.

**Pynes:** Okay, that's really helpful. What other practical advice do you have for entrepreneurs who are either just building their websites or maybe who are looking at a website revamp?

**Goodman:** If you're just building your website, or if you've just built it and just spent a couple of thousand dollars, there are free online tools that you can use. There's something called the Website Accessibility Evaluation Tool (WAVE). You can go on [wave.webaim.org](http://wave.webaim.org) and put your website name in

there. It'll come up and tell you preliminary violations or incompatibility. If, like I said, you just had your website created, it might be good to run your website through that tool and then go back to the creator of the website and say, "Hey, I need you to fix this for me."

**Pynes:** Well, we'll get that up on the show notes so you can check that out after the show. I think that'll be a really helpful tool for our listeners.

**Goodman:** Great. And obviously, an ounce of prevention is worth a pound of cure. The best thing to do is to make sure that the contracts you're signing with your website content creators have provisions that consider accessibility and whether the site is accessible to the users.

**Pynes:** Just to back up a little bit, who does this apply to? You mentioned the Eastern District/Southern District issue of whether or not you're exclusively an online business. What if I have a personal website or my daughter starts a charity and gets a website off one of these providers and designs it herself or has somebody help her? Does she need to worry about that type of compliance at a personalized level rather than a business level?

**Goodman:** To trigger the obligations or to come within the purview of the law, the questions you're going to ask yourself is, "Is my website engaging in commercial activity for the benefit of the general public?" That's the first question. Then, if you are engaged in commercial activity, are you going to be considered one of the 12 specified categories? The broadest category that maybe your website would fall under would be offering sales or services and you could purchase either goods or services through the site. I think if you're if you're a Girl Scout and you're setting up your cookie purchase site, I don't think you need to worry. Maybe, the Girl Scouts of America need to worry about it, not you.

I think in general, if you have a blog and you're not offering anything, you don't need to worry about it. But a lot of small businesses that maybe don't have this on their radar do need to worry.

I want to back up to the question about prevention. Another thing that you can do is, if you're at the point where you're looking at insurance for your business, employment practices liability insurance oftentimes also includes a third-party discrimination claim. If someone's claiming that they can't access your goods or services, you might have insurance coverage for that. But you'd want to raise it with your broker when you're buying the insurance: Is there insurance coverage if someone claims my website is inaccessible or my physical store is inaccessible? The answer is maybe, so you should definitely raise that issue with your insurance broker and have them educate you on whether that's something you want to consider.

**Pynes:** Great tip, great advice. What else have I not asked you that our listeners need to know about website accessibility and compliance?

**Goodman:** The last thing I think that I would mention is that if you realize you're out of compliance and you're freaking out right now, don't freak out entirely. There is a way to bridge the gap while you're evaluating how to bring your website into compliance. If you put a phone number on the site, some courts have said that having a toll-free phone number where you can provide access to the goods and

services on the website in an alternative — and the courts use this language, alternative — and equivalent manner such as 24/7 toll-free access, or you put a phone number and an email address, that could help bridge the gap for the time period while you are making your website accessible.

It's always a good idea to reach out to counsel and talk to them about whether maybe you want to put a statement on the site saying, "We're getting this into compliance." That again depends on the level of noncompliance and the level of traffic on the site, et cetera, if that makes sense. But that's just one other thing to consider. And it's not a panacea. Not all courts have found that that's sufficient, but it does provide you with some defense, so you aren't just left totally unprotected for the time period that you're evaluating the problem.

**Pynes:** Thank you so much for being here, Bryn. I love chatting with you always, and thanks for giving me some updated info about a super interesting topic that I didn't know much about. I really appreciate you being here.

**Goodman:** Thanks, Sahara.