

Web Content Accessibility Under the Americans with Disabilities Act

September 20, 2017 | [Justin B. Hosie](#) and [Erica A.N. Kramer](#)

Like most readers, you probably know that the Americans with Disabilities Act prohibits discrimination based on disability. But you may not know about the surge of cases and enforcement actions that extend the ADA's requirements to websites and mobile applications ("web content").

According to the Department of Justice, "[m]illions of individuals in the United States have disabilities that affect their use of the Web." Many disabled individuals use assistive technology to navigate websites, including speech recognition software, screen readers, or any number of other assistive devices. In addition, disabled individuals may need the ability to resize text, to use keyboard alternatives for mouse commands, or to receive additional time to provide a timed response. Accordingly, courts and regulatory agencies have found that the ADA requires businesses to ensure that disabled individuals can fully and equally enjoy the "goods, services, privileges, advantages or accommodations" offered through websites using assistive technologies.

Courts currently disagree as to whether, and when, the ADA applies to a business's website. Some courts conclude that the ADA only applies to websites that involve a connection to a physical location. In other words, some courts have held that "places of public accommodation" subject to the ADA are physical locations. Therefore, in order for relevant portions of the ADA to apply, a connection must exist between the physical location and the goods, services, or privileges provided by the web content. By contrast, other courts have held that the ADA guarantees more than "mere physical access," and, therefore, the ADA's requirements apply even without a physical location.

Due to the uncertainty these contrasting cases created, the DOJ made efforts at rulemaking to clarify the ADA's scope. In 2010, the DOJ issued a notice of proposed rulemaking requiring businesses to ensure web content accessibility by following specific technical requirements. The DOJ then issued supplemental rulemaking notices in 2016, proposing instead to initially regulate only the websites of state and local governments. In issuing its proposed rulemakings, the DOJ indicated that, though "[v]oluntary standards can be sufficient in certain contexts, ... [r]eliance on voluntary compliance with Web site accessibility guidelines, however, has not resulted in equal access for persons with disabilities." Thus, the DOJ determined that adopting specific web accessibility standards would provide clarity to covered entities regarding how to make websites accessible to disabled individuals.

Though many anticipated that the DOJ would issue a final rulemaking governing state and local governmental entities in 2017 and a rulemaking regarding businesses shortly thereafter, political winds have shifted, and that appears no longer to be the case. On July 20, 2017, the White House's Office of Information and Regulatory Affairs published the Trump administration's regulatory agenda. It included

a list of actions now labeled as "inactive." Among those "inactive actions" was the website accessibility rulemakings for businesses, as well as for state and local governments.

Due in part to the ongoing lack of clear standards, plaintiffs continue to bring claims, asserting that they were unable to access features provided on websites due to their disabilities. In addition, businesses frequently receive letters from plaintiffs' attorneys challenging the accessibility of their web content, in the hopes that such entities will engage in settlement discussions and modify their practices. Moreover, the DOJ has taken regulatory actions against various entities for failing to ensure website accessibility. Accordingly, despite the proposed rules' current inactive statuses, dealers and sales finance companies would be wise to consider the ADA when developing and modifying their web content.

When evaluating web content accessibility, the DOJ and private plaintiffs generally rely upon standards set forth in the Web Content Accessibility Guidelines 2.0 (WCAG 2.0). The WCAG 2.0 was produced by the Web Accessibility Initiative, a working group of the World Wide Web Consortium. These standards are intended to make web content more accessible to a wider range of people with disabilities. The WCAG 2.0 is broken down into twelve guidelines, organized under four overarching design principles: perceivable, operable, understandable, and robust. For each guideline, the WCAG 2.0 provides users with testable criteria to determine which of three levels of conformance has been obtained: Level A (lowest), Level AA, Level AAA (highest). In its enforcement actions, the DOJ has generally mandated compliance with Level AA, suggesting that dealers and sales finance companies ought to strive to meet that level of conformance.

Note that the Web Accessibility Initiative is in the process of developing its Web Content Accessibility Guidelines 2.1 (WCAG 2.1). The group reports that it will publish a draft this month, publish a final draft in November, and then begin implementation testing. What remains to be seen is whether the DOJ will impose the requirements of WCAG 2.1 in its future enforcement actions - and the DOJ's overall appetite for such actions generally under the current administration. The WCAG 2.1 uses the same levels of conformance as found in WCAG 2.0. Thus, public accommodations may anticipate that conformance with Level AA of WCAG 2.1 will be suggested when the final guidelines are published.

The Internet has become an indispensable source of information, goods, and services for most individuals. As a New York court recently pointed out, "... [I]nternet technology enables individuals to participate actively in their community and engage in commerce from the comfort and convenience of their home." Thus, ensuring web content accessibility for disabled individuals should become (or continue to be) a priority, particularly given the continued plaintiff activity in the area. Consider hiring a third party to audit your web content for accessibility, and then develop a plan to implement any recommended updates or improvements needed to comply with Level AA of the WCAG 2.0. In addition, develop web content accessibility policies and procedures that provide for regular audits and corrective measures to ensure ongoing accessibility as technology changes and new content is added or deleted. In addition, consider developing a "Help Desk" mechanism to help disabled individuals access any inaccessible features in your web content. Taking such measures will help minimize the risk of claims made under the ADA.

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7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

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