

ADA-ACCESSIBLE WEBSITES: THE NEXT WAVE OF LEGAL – AND TECHNICAL – CHALLENGES FOR COMPANIES

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Does your website need to be accessible to people who are disabled? As a result of thousands of demand letters and countless lawsuits that have been filed over the past several years, companies around the country are asking themselves this question, and soon the United States Supreme Court itself may offer its opinion on the subject. While everyone waits for a conclusive answer, companies can – and should – take steps to protect themselves from potential liability.

I. BACKGROUND: WHY IS WEBSITE ACCESSIBILITY EVEN AN ISSUE?

The Americans with Disabilities Act (“ADA”) prohibits disability discrimination, and it requires companies that operate “places of public accommodation” to make reasonable efforts to provide equal access to their facilities for people with disabilities. As a result, the ADA has required stores, restaurants, offices, hotels, and other buildings to tailor their physical locations to include wheelchair ramps and accessible parking spaces, allow service dogs, and the like.

Today, many goods and services that were once available only in brick-and-mortar locations are available online; however, because websites pose similar, if not greater, challenges to people with disabilities, a growing number of plaintiffs argue that the protections of the ADA should be read broadly to include websites as places of public accommodation.

II. WHEN MUST A WEBSITE COMPLY WITH THE ADA?

In 2008, Congress amended the ADA, but it did not expressly include websites within the scope of covered entities. As a result, courts have disagreed as to whether and under what circumstances websites should be considered “places of public accommodation” and thus subject to the ADA.

Some courts have ruled that the similarities between online-only services and services available in physical stores render websites places of public accommodation.ⁱ For example, relying on the ADA’s legislative history, the United States District Court for the District of Massachusetts decided that Netflix, which offers online-only video streaming services, must comply with the ADA because Congress intended the ADA to adapt to changes in technology and, similar to video rental stores, Netflix fits within one of the already-existing categories of public entities.

In contrast, other courts require a significant connection between the website and a company’s physical location. For example, the Ninth Circuit recently ruled that the ADA ensures “full and equal enjoyment” of goods or services of a place of public accommodation, such as a Domino’s restaurant, and not merely *in* a place of public accommodation.ⁱⁱ Because the Domino’s mobile app created a nexus to the goods and services available in the company’s brick-and-mortar locations, the Ninth Circuit said that the app was a place of public accommodation subject to the ADA. Domino’s has appealed the Ninth Circuit’s decision, petitioning the United States Supreme Court to settle the issue once and for all.

Significantly, since the Ninth Circuit’s determination depended on the connection between the website and the company’s physical location, some other courts have ruled that websites are not places of public accommodation if they do not have a physical counterpart. For this reason, under the Ninth Circuit’s view, websites like those operated by eBay, Facebook, and Southwest Airlines are *not* subject to the ADA.ⁱⁱⁱ

III. HOW DOES A COMPANY BRING ITS WEBSITE INTO COMPLIANCE WITH THE ADA?

Because Congress and the courts have left website accessibility open to different opinions, ADA-based challenges to websites are becoming more common, particularly in jurisdictions where plaintiffs’ lawyers know that courts have issued favorable interpretations of the law. Although courts do not agree on whether and when websites are subject to the ADA, companies should still be proactive when designing and updating their websites to avoid even an allegation that their websites violate the ADA. Making your website ADA-compliant may have the added business benefit of expanding your customer base to include more individuals with disabilities.

So, in the face of all of this uncertainty, how does a company increase the chances that its website complies with the ADA?

First and foremost, companies should begin by implementing a “website accessibility” policy, and then posting the policy on the company’s website (preferably on or linked from the main homepage). Such a policy will affirm the company’s commitment to accommodating people with disabilities, and it will allow individuals with disabilities to bring any concerns directly to the company’s attention (i.e., without the need for any lawsuits). A website accessibility policy also demonstrates a good-faith effort to comply with the law, regardless of how courts may interpret the law. Last but not least, a website accessibility policy may also serve as a defense to any legal claim that the website fails to comply with the ADA, since the company can attest that all the claimant needed to do was contact the company – instead of hiring a lawyer and filing a lawsuit – to have any concerns addressed and remediated.

Turning to technical aspects of making a website accessible, before the current administration halted regulations interpreting Title III of the ADA, the Department of Justice intended to impose the Web Content Accessibility Guidelines (“WCAG”) 2.0 Level AA as the standard for website accessibility.^{iv}

WCAG 2.0 AA provides many requirements to make websites accessible, such as ensuring that codes are clear and offering closed captioning of videos. Although some of these requirements may sound daunting, a well-designed strategy can avoid making website accessibility more complex than necessary.^v To prioritize where on your website to begin making accessibility changes, start with your website’s most frequently visited pages.

Simply put, the accessibility standards of the WCAG require “intuitive alternatives,” which generally fall into two categories of changes. First, the user must be able to perceive the content on your website, regardless of his or her disability. For example, for people with poor vision, this means that a screen reader can easily convert the website’s content to text. Screen and Braille readers require a line of HTML code to translate an image, and the code must be meaningful and accurately describe the image to convey the same information as one would take in from looking at the photo itself. Likewise, screen readers cannot translate PDFs, so an HTML or RTF version should accompany a PDF document. Still other vision-impaired users may need to be able to adjust the size and color of websites. Therefore, companies should design their websites so that users can manipulate contrast settings and font size to allow such users access to the content.

Second, the website must be navigable by disabled consumers. For example, disabled visitors to your company’s website must be able to navigate the website without a mouse using only the tab or arrow keys. Similarly, blind consumers must be able to navigate the website using non-visual links or tags. Pages of the website should also be predictable and follow a logical flow, with the help of headers and labels. The website should also include a “skip to content” option that allows users to jump to the heart of the information.

Your company’s IT department or outside IT support team should be trained to implement the WCAG guidelines.^{vi} To this end, companies that rely on external web developers should include representations and warranties in their contracts to require the developers to conform to certain accessibility standards.

IV. CONCLUSION: SOONER OR LATER, WEBSITE ACCESSIBILITY WILL BE THE NEW NORMAL

In the modern economy, technology is an ever-increasing part of how companies do business. While courts that have analyzed the ADA may have compared websites to brick-and-mortar stores, companies are using a wide range of technological developments, such as apps, cybersecurity measures, connected devices, artificial intelligence, and more. As technology moves forward, companies should make sure that any technology they implement for the use of their customers – beginning with their websites – is accessible by disabled customers. Companies that do so will be better suited to address new challenges, more attractive to a broader base of customers, and they will avoid potential legal liability under the ADA.

ADDITIONAL INFORMATION

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ⁱ *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F.Supp.2d 196 (D. Mass. 2012) (concluding that Netflix's on-demand service website is a place of public accommodation even though its services are accessed exclusively in the home). *See also Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F.Supp.3d 565, 576 (D. Vt. 2015) (holding that Scribd's website, which allows consumers to access a digital library for a monthly fee, is a place of public accommodation even though it is not associated with any physical location).

ⁱⁱ *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019). *See also Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3rd Cir. 1998) (finding that the term "public accommodation" does not refer to nonphysical access); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997) (stating that a public accommodation is a physical place); *Gomez v. Bang & Olufsen Am., Inc.*, 2017 WL 1957182 (S.D. Fla. 2017) (holding that a website that is wholly unconnected to a physical location is generally not a place of public accommodation under the ADA).

ⁱⁱⁱ *Earll v. eBay, Inc.*, 599 Fed. Appx. 695 (9th Cir. 2015); *Young v. Facebook, Inc.*, 790 F.Supp.2d 1110 (N.D. Cal. 2011); *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F.Supp.2d 1312 (S.D. Fla. 2002).

^{iv} *Supplemental Advance Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations ("SANPRM")*, 81 Fed. Reg. 49908 (May 9, 2016). The WCAG is a technical standard published by the World Wide Web Consortium, the main international standards organization for the World Wide Web.

^v Many third-party website hosting companies and shopping cart service providers already meet the WCAG standard.

^{vi} WCAG 2.0 AA is the latest version of this standard; however, as technology moves forward, this standard will be further updated to meet these changes.