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Legal Sidebar

The Americans with Disabilities Act in Cyberspace: Website Accessibility Standards

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Written in 1990, the Americans with Disabilities Act (ADA) gives uncertain guidance about businesses' and nonprofits' responsibility to make their online offerings accessible to the disabled. As explained in a separate Sidebar, courts are divided on whether the parts of the ADA that govern businesses and nonprofits cover websites, and which websites they cover. (There is little debate that government websites are required to be accessible, either under the ADA or the Rehabilitation Act.) That said, assuming the ADA *does* apply to private websites, the question becomes, How does a covered entity make its website accessible in a way that comports with the statute? The Department of Justice (DOJ), charged with enforcing the relevant provisions of the ADA, recently attempted to clarify the agency's view, issuing guidance on cyberspace accessibility. This Sidebar describes potential features that make a private website accessible in those cases where the ADA may apply. It considers judicial decisions on accessibility, agency guidance for private websites, analogous requirements for federal and federally funded websites, and private accessibility standards—some of which have gained widespread acceptance and agency endorsement.

The ADA: Text and History

In general, the ADA requires "modifications to existing facilities and practices" to allow people with disabilities to participate in public life. The statute covers three major areas of public life: employment (Title I), public services (state and local government) (Title II), and public accommodations (businesses and nonprofits open to the public) (Title III).

For public accommodations, the statute requires "reasonable modifications in policies, practices, or procedures" when needed. Such enterprises must not deny people with disabilities "the opportunity . . . to participate in or benefit from th[eir] goods, services, facilities, privileges, advantages, or accommodations." In other words, to comport with the ADA, public accommodations must be accessible to persons with covered disabilities. They may not provide an accommodation "that is not equal to that afforded to other individuals" or that is "different from or separate from that provided to other individuals" unless a separate benefit is "necessary" to provide an equal opportunity. Reasonable modification includes offering "auxiliary aids and services" for communication.

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A business or nonprofit need not make modifications that are too difficult, that is, modifications that "would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations" or would cause an "undue burden." Nor must establishments modify pre-ADA architecture, except for those changes, such as rearranging shelving, that are "readily achievable." When renovating buildings, public accommodations must make them accessible "to the maximum extent feasible." Under the ADA, anyone subject to discrimination may sue for injunctive relief—that is, changes to stop the discrimination and make accommodations accessible. The Attorney General may also sue for damages and civil penalties.

The ADA has specific instructions for how to make architectural barriers, vehicles, licensing examinations, elevators, and a few other areas of concern accessible but, unsurprisingly for the 1990 law, provides no such instructions for websites. As noted earlier, there is some doubt about whether and when ADA's Title III even reaches websites. This Sidebar next addresses agency action and guidance, court precedent, and other sources that (provided Title III's applicability is resolved) bear on a public accommodation's substantive obligations to maintain an accessible website.

Standards for Web Accessibility

Currently, there are no binding rules of general applicability on what qualifies as an accessible website under the ADA. Basic accessibility features might include text contrast, captions for images, and compatibility with accessible software such as screen readers and hardware such as braille pads. However, many basic web-builder tools do not create accessible sites. As websites have become more graphically sophisticated, they have generally become less accessible. Tables, input boxes for forms, and visual CAPTCHAs (Completely Automated Public Turing Test to Tell Computers and Humans Apart), some observers maintain, are routinely inaccessible.

A handful of web accessibility standards have emerged, both public and private, and they have moved toward consensus over the years. The federal government has also developed rules and standards for the airline industry (under the Air Carrier Access Act and its regulations), as well as for federal government websites under Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d. DOJ has long provided technical assistance to federal agencies on website accessibility.

In its recent guidance regarding public accommodations, DOJ endorses both the federal government website standards and the long-standing, private Web Content Accessibility Guidelines (WCAG), although the guidance does not mandate either standard for nonfederal providers.

The Web Content Accessibility Guidelines

The World Wide Web Consortium (W3C), an international community of stakeholders committed to the long-term development of the internet, has set forth various technical standards and guidelines addressing privacy, uniform coding, internationalization of technology, and other areas across the internet. For accessibility, starting in 1999, the W3C created Web Content Accessibility Guidelines (WCAG). The guidelines grade accessible products with level A, Level AA, or Level AAA compliance.

In general, WCAG requires websites to be "perceivable, operable, understandable, and robust." Specific guidelines elaborate on these principles. To be "perceivable," website elements must work with multiple senses. For example, images should have audible captions and audio files should have closed captions. "Operable" interface components are ones that people with disabilities can activate—with a keyboard rather than a mouse, for example. Information is "understandable" if it is organized in a coherent way, even when audible, and includes necessary labels and instructions. A "robust" accessible website works reliably with various assistive technologies.

As discussed below, parties, courts, DOJ, and other agencies have long incorporated WCAG standards into settlements and orders with private and local government website providers. Many industry insiders advise clients to adopt WCAG standards and consider them a safe harbor for accessibility. Both domestic and international developers have adopted the guidelines. So have many national and local governments and universities.

Section 508

Section 508 of the Rehabilitation Act requires that federal websites be accessible, giving users with disabilities access to and use of information and data "comparable to the access to and use of the information and data" by those without disabilities. The U.S. General Services Administration provides technical assistance and oversight. The statute calls on the U.S. Access Board, an independent federal agency, to set up disability access standards in consultation with core federal agencies. The Board released its first information technology accessibility standards in 2000 and has released revisions.

In its most recent standards, the U.S. Access Board sought to harmonize its requirements with WCAG and European criteria. Current regulations endorse the WCAG standards, with some specific exceptions. The changes may diffuse criticism that prior Section 508 rules were outdated and, when compared to WCAG, held the federal government to a lower standard.

Agency Interpretation and Guidance

On March 18, 2022, the Department of Justice (DOJ), the agency mainly charged with enforcing the ADA, issued nonbinding web accessibility guidance for public accommodations (covered under ADA's Title III) and local governments (under ADA's Title II). The guidance addresses, among other things, how public accommodations can make accessible the goods and services they offer online, although it does not provide detailed standards. The guidance offers a one-page summary of how to make a website accessible, emphasizing website providers' "flexibility in how they comply." WCAG and the federal government's Section 508 rules for its own websites are cited as "helpful guidance."

The limited 2022 guidance contrasts with DOJ's efforts in years past. In 2010, DOJ published an Advance Notice of Proposed Rulemaking providing detailed standards for website accessibility. Then, in 2017, it withdrew its regulatory proposals for websites, stating that it was "evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate."

Aside from referring to WCAG and Section 508 guidelines, the 2022 DOJ guidance lists specific accessibility features web providers must consider. These include color contrast in text; text alternatives (descriptions of visual features that a screen reader can announce); captions for visual access to audio content; labels and other formatting for online forms; keyboard navigation; and a way to report accessibility issues. The DOJ guidance emphasizes that its summary "is not a complete list of things to consider." And especially when it comes to private websites, neither the guidance's considerations nor the standards mentioned above are binding.

Although DOJ has not mandated WCAG, it has repeatedly incorporated WCAG standards into settlement agreements. It has also long recommended them as a resource for local government websites, covered by

ADA's Title II. So for local governments, DOJ's recent guidance merely reaffirms DOJ's position. Other agency regulations have adopted WCAG in some cases. For example, the Department of Health and Human Services applies WCAG to health information technology, and the Department of Transportation uses them to enforce the Air Carrier Access Act. The Department of Labor's Workforce Innovations and Opportunity Act regulations require grantees' information technology be accessible "consistent with modern accessibility standards, such as Section 508 Standards (36 CFR part 1194) and W3C's Web Content Accessibility Guidelines (WCAG) 2.0 AA."

Litigation and Judicial Interpretations

As explained in a previous Sidebar, courts have split on whether the ADA's Title III, regulating private businesses and nonprofits, applies to nonphysical spaces like websites. But even when courts have applied the law, there is no uniform way to decide what makes a website ADA compliant given the partial and generally nonbinding standards described above.

This state of affairs has, according to some observers, provoked excessive lawsuits. Advocates for businesses report a "cottage industry of demands and litigation directed toward the owners of websites and mobile applications," even by users who are not genuine customers. Plaintiffs filed at least 2,258 accessibility suits against websites in 2018, by one observer's count. Another reported 2,055 suits in 2021 and stated that 10 law firms filed three-quarters of these lawsuits.

Most of these suits settle and, as a practical matter, courts may dismiss for lack of standing suits by web users who are not genuine customers. But when these cases do go forward, some courts struggle to decide what constitutes an ADA violation. This led one district court to "call[] on Congress, the Attorney General, and the Department of Justice to take action and to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary."

In contrast, other courts have recognized certain advantages in generalized rules: "the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute's requirements," as one court put it. So "while no specific auxiliary aid or service is required in any given situation, whatever auxiliary aid or service the public accommodation chooses to provide must be effective." The Ninth Circuit, in remanding a case about Domino's Pizza restaurants' online ordering, cited the ADA's text in concluding that "courts are perfectly capable" of deciding whether websites provide "auxiliary aids and services" enabling "full and equal enjoyment" of the restaurant's services. As a result, "the application of the ADA to the facts of this case are well within the court's competence."

While courts do not generally rely on WCAG to assess liability, they do frequently turn to it as a potential remedy. A federal district court in Florida found "*highly* persuasive the number of cases adopting WCAG 2.0 Success Level AA as the appropriate standard to measure accessibility." While the Ninth Circuit did not reach the issue in the Domino's case, it stated that "an order requiring compliance with WCAG 2.0 was a possible equitable remedy." Another court noted arguments that WCAG could be "a sufficient condition, but not a necessary condition, for . . . compliance, and therefore . . . a potential remedy."

Many parties adopt these standards in settling cases. A New York federal district court explained, in approving such a settlement, that WCAG is "an appropriate standard to judge . . . compliance with any accessibility requirements of the ADA." In the court's view, WCAG is "nearly universally accepted." That same court noted that it would modify the settlement if DOJ promulgated a final ADA Title III regulation on website accessibility.

Legislative Action and Considerations for Congress

Given the lack of generally applicable standards for website accessibility, Congress may consider whether to clarify matters through legislation. In the 117th Congress, various bills have proposed new accessibility measures. For instance, the Websites and Software Applications Accessibility Act, S. 4998, introduced in September 2022, calls for DOJ and the Equal Employment Opportunity Commission to issue accessibility regulations. It would cover employers, local governments, and public accommodations, as well as website and application providers who supply websites these entities use. The bill uses some of WCAG's language to describe accessibility requirements, without explicitly incorporating WCAG. The Online Accessibility Act, H.R. 1100, introduced in 2021, would prohibit discrimination in "consumer facing" websites and applications. The bill relies on WCAG for its substantive standards, although a provider could also choose "an alternative means of access." Other bills include H.R. 4686 (116th Congress), which would have required certain transportation related websites to meet WCAG standards.

The bills described above, were they to become law, would not be the first statutes to incorporate WCAG. In amendments due to take effect in 2024, 20 U.S.C. § 1090 requires that the Department of Education make its Free Application for Federal Student Aid, a form often used online, "available in formats accessible to individuals with disabilities and compliant with the most recent Web Content Accessibility Guidelines, or successor guidelines."

In considering whether to impose new requirements on cyberspace infrastructure, Congress may evaluate how often rules require rebuilding existing websites or applications. If imposing retroactive requirements, legislators may consider an appropriate implementation period. And Congress may consider exempting certain web content, such as user-generated content, from accessibility requirements, as Congress has done in other internet rules. Congress may also consider technical challenges. Industry insiders worry that there are too many websites for coders to fix manually—some form of automation is needed. In addition, some third-party accessibility providers have been accused of making websites less secure.

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