

Is Your Business Website ADA Compliant?



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The remarkable interconnectedness of our world through the internet has exponentially increased consumer access to information, goods, services and people. This nexus has also created some uncertainty regarding the application of many laws, including the Americans with Disabilities Act (“ADA”). Congress clearly could not have anticipated widespread consumer use of the internet or the dramatic surge in e-commerce in recent years, when it passed the ADA more than twenty-five years ago. If you are a business owner with a web presence, it has become increasingly important for you to ensure that public accessibility to your website is fully compliant with Title III of the ADA.

The ADA

The ADA provides for comprehensive federal protections against discrimination for individuals with disabilities in all areas of public life. Title III of the ADA addresses access for the disabled to public spaces, and it prohibits businesses from discriminating against any individual on the basis of disability “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any *place of public accommodation*.” The ADA defines “public accommodation” primarily in terms of physical spaces related to one of twelve categories, including hotels, restaurants, bars, theaters, concert halls, grocery stores, banks, gas stations and hospitals. The ADA does not define what Congress meant by “place,” or whether Congress intended the statute’s protections to extend to the internet or commercial websites.

The Department of Justice

The Department of Justice (“DOJ”) is responsible for the ADA’s enforcement. To date, however, the DOJ has not provided businesses or the general public with a clear picture of the federal government’s legal expectations for website accessibility for the disabled. In 2010, the DOJ issued an Advance Notice of Proposed Rulemaking that took the position that websites are places of public accommodation, but it has yet to disseminate any specific guidance or requirements for website compliance with the ADA. Further, in July 2017, the DOJ placed rulemaking for web accessibility under the ADA on its inactive list, which means that rules on this matter are likely to be stalled for the foreseeable future. Both the DOJ’s and the ADA’s silence regarding website accessibility has left it to the courts by default to decide the appropriate standards for website accessibility.

While the federal judiciary has tried to fill in some of the gaps and ambiguities in the wording of the ADA, the courts have often been only marginally successful in that regard, and they remain substantially divided in their views in the face of an increasing number of website accessibility law suits against businesses. The lack of unanimity

among the federal courts has provided an opening for opportunistic plaintiffs' law firms to seize the chance to initiate class action litigation against unwary businesses. Unsuspecting business owners have become increasingly subjected to threats of litigation on the basis of unsubstantiated website inaccessibility claims, with plaintiffs' firms demanding damages and website compliance with the highest technical standards. Understanding the current landscape of court decisions is imperative for business planning, especially for those who have already received letters alleging noncompliance.

The Divided Federal Judiciary

Again, the ADA defines "place of public accommodation" primarily in the context of physical structures or places. Yet a growing number of courts have concluded that the ADA's public accommodations protections extend beyond "bricks and mortar" structures to the internet. Whether this is the correct reading of the ADA's public accommodations protections, however, has left the courts divided. Some federal courts have adopted a narrow reading of the ADA's requirements, concluding that websites lack a sufficient connection or "nexus" to goods and services actually offered at the physical location and thus are beyond the ADA's accessibility protections. Conversely, other circuit courts have taken a more expansive approach, holding that the ADA does not require a physical location in order to trigger the need to consider full and equal website access for the disabled.

Gomez v. Bang & Olufsen America, Inc., a 2017 federal court decision out of Florida, clearly reflects a narrow reading of the scope of the ADA's public accessibility requirements. The case was brought by Andres Gomez, who is legally blind and was interested in purchasing merchandise on line from Bang & Olufsen, a retail store seller of high-end audio and video equipment. Bang & Olufsen maintained a website, which allowed consumers to find physical store locations throughout the U.S., browse and search for brand merchandise, research Bang & Olufsen merchandise and custom installation services, and make appointments with sales representatives in the seller's brick-and-mortar stores. Gomez sued Bang & Olufsen, claiming that its website was inaccessible to him and other visually impaired customers because it lacked alt-text graphics, contained inaccessible forms, required transactions to be performed solely with a mouse, and lacked adequate instructions to assist the visually impaired. The court disagreed, rejecting Gomez's argument that Bang & Olufsen's retail stores – and by extension its website – were sales, rental or service establishments requiring full public access under the ADA. The court relied on what it viewed as "Congress' clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation."

A few months later, however, another federal court in Florida came to the opposite conclusion when considering similar facts in a law suit filed by a visually impaired consumer against Winn Dixie, a large chain-store grocer. In *Gil v. Winn Dixie Stores, Inc.*, the court found that Winn Dixie had violated the ADA because its consumer website was incompatibility with popular screen reader applications, thereby creating accessibility barriers for Gil and other visually impaired Winn Dixie customers. More specifically, the court found that it was difficult for visually impaired customers to order prescriptions, price shop, or access Winn Dixie store locators and coupons online. The court issued an injunction requiring Winn Dixie to conform its website to the Web Content Accessibility Guidelines 2.0 (WCAG 2.0), at an estimated cost to the retailer of about \$37,000, and mandating that all third-party vendor applications linked to Winn Dixie's website also had to comply with WCAG 2.0. For Winn Dixie, third-party vendor applications included Google Maps, for its store locator, and PayPal, for its payment system. In addition to the technical upgrades to its website, Winn Dixie was ordered by the court to pay Gil's attorneys' fees and costs of the litigation.

The *Winn Dixie* case is instructive because it was the first case in which a federal court determined after a trial that the WCAG 2.0 technical standards were tantamount to the ADA's statutory requirements for website public accessibility. Because the DOJ has yet to adopt any specific standards or guidance for website compliance under the ADA and likely will not any time soon, the federal courts will continue to struggle to define the boundaries for website compliance under the ADA. As *Winn Dixie* and

Bang & Olufsen show, the results of the judiciary's case-by-case efforts are likely to be patchwork and inconsistent, which is especially unfortunate for business owners, given the predicted increase in ADA Title III litigation in 2018.

What are the Next Steps for You?

While Virginia, Maryland and D.C. federal courts have yet to report any decision regarding ADA website accessibility, you can anticipate that those decisions will be forthcoming soon. Since 2015, federal lawsuits addressing website accessibility have increased by at least 200 cases a year, and that trend is expected to accelerate in 2018. As a business owner, the best way to ensure ADA compliance is to bring your website up to date with the WCAG 2.0 Level AA standards. That can be costly, especially for smaller businesses, and additional compliance measures may soon be required. WCAG 2.1 is planned to be released in 2018, which could necessitate additional website updates.

Not all businesses have the financial resources to implement the WCAG standards, and based on past guidance under the ADA, that may be alright. Depending on the nature of your business, as well as the services and goods offered through your website, full compliance with the WCAG standards may not be necessary. Other alternative forms of communication may provide an effective means of communication that is perfectly acceptable. It will be important to seek out qualified and experienced counsel to guide your business on the appropriate compliance measures for your business' specific needs, in particular until the either the courts or federal government have clearly defined the ADA's requirements for website accessibility.