

RETAILERS SEEK TO IMPROVE WEBSITE ACCESSIBILITY FOLLOWING SURGE OF ADA CLAIMS

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Retailers have faced a wave of demand letters and lawsuits recently alleging that their websites are inaccessible in violation of the Americans With Disabilities Act of 1990 (the “ADA”), despite the fact that the ADA and its implementing regulations do not expressly address websites. This is the second in a three-part series addressing ADA access claims. In a [December 1st](#) post we addressed how to reduce potential liability for premises issues, and this post focuses on website accessibility.

Title III of the ADA prohibits discrimination against individuals “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,” 42 U.S.C. § 12182(a), which includes brick and mortar retail stores.

The Department of Justice (“DOJ”) is the government agency that enforces the ADA and issues regulations concerning its implementation. The DOJ is in the process of developing regulations for website accessibility, but is not expected to finalize these regulations until 2018 at the earliest.

While government regulations are being developed, the demand letters and lawsuits typically demand compliance with the [Web Content Accessibility Guidelines \(WCAG\) 2.0 level AA guidelines](#) created by an industry group, the [World Wide Web Consortium \(W3C\)](#). Despite its stalled regulations, the DOJ has made clear its position that the ADA applies to websites, and that WCAG 2.0 level AA provides an appropriate standard for website accessibility.

A final rule was announced recently under Section 508 of the Rehabilitation Act, which applies to the federal government, requiring the websites and electronic content of federal agencies to conform to WCAG 2.0 level AA within one year. The federal government’s adoption of WCAG 2.0 level AA for its own websites makes it even more likely that the DOJ will adopt the same standards for websites of public accommodations.

Are Retailer Websites Subject to the ADA?

Courts disagree as to whether a website that operates solely in cyberspace constitutes a place of public accommodation under Title III of the ADA. They generally agree, however, that where there is

a nexus between the goods and services provided on the website and an actual physical location, the website must be accessible to those with disabilities.

This is likely to apply to most retailers, and was the holding in *National Federation of the Blind v. Target Corp.*, in which a California district court allowed a class action to proceed based on the allegation that Target's website was inaccessible to blind users in violation of the ADA. Target later settled the case for \$6 million, and paid the plaintiff another \$3.7 million in attorneys' fees.

And this past year, a California state court in *Davis v. Colorado Bag'n & Baggage* granted summary judgment for the first time ever in a website accessibility case to a visually-impaired plaintiff who alleged that he could not access the luggage retailer's website using a screen reader. The plaintiff was awarded the minimum statutory penalty of \$4,000 under California's Unruh Act, which is often asserted in ADA cases, and was also entitled to recovery of his attorneys' fees.

More recently, in a Florida district court case against Winn Dixie, the retailer argued it had no obligation to make its website accessible. The DOJ could not let this position go unchallenged: It filed a statement of interest stating that "websites of places of public accommodation, such as grocery stores, must be accessible to people who are blind, unless the public accommodation can demonstrate that doing so would result in a fundamental alteration or undue burden."

What Does it Mean for a Website to be Accessible?

In light of the uncertain state of the law and the likelihood that the DOJ will eventually issue regulations adopting WCAG 2.0 level AA guidelines, many retailers are taking steps to implement those standards, even though not legally required.

WCAG 2.0 has three levels of compliance: A, AA, and AAA. Most of the demand letters reference the middle level, AA. WCAG 2.0 is based on four principles: Websites should be (1) perceivable, (2) operable, (3) understandable, and (4) robust. What does that mean as a practical matter?

(1) Perceivable: Disabled users should be able to perceive website content using their available senses. In order to ensure websites are accessible using a screen reader, there should be text alternatives for non-text content, such as pictures, icons, graphics and links. Videos and audio content should have close captioning to make them accessible to hearing-impaired users.

There should be sufficient color contrast between background and foreground, and color should not be used as the only way of conveying information. Type size should be resizable up to 200 percent.

Web forms asking users to provide information, for instance to log in or check out, should have a clear label for each field.

(2) Operable: Websites should be operable using a variety of assistive technologies or adaptive strategies. They should be navigable using only a keyboard, without a mouse. Users should be able

to tab through elements and remain clear where they are on the page. They should be able to pause or stop time-based media or scrolling content.

If there is a timed session and it times out, users should be able to log bag in within a short time period without losing data or their place on the page. Websites should not use flashing lights that may cause seizures in some epileptic users.

(3) Understandable: Users should be able to easily understand not only the content, but how to operate the website. Websites should have a site map with headings and be organized in a way that the content makes sense when being navigated with a screen reader.

Websites should operate in predictable ways; elements that appear on multiple pages should appear in the same place on each page, and operate in the same way.

(4) Robust: Websites should be accessible using a variety of assistive technologies, and continue to be compatible as technology improves. Websites should assist users in avoiding and correcting mistakes, for example by providing suggestions for correcting an error. Finally, retailers may want to provide assistance in the form of a contact number or help line for users who encounter difficulty.

Retailers can conduct an initial analysis of their website's accessibility by using the [WAVE](#) web accessibility evaluation tool. This is the same program relied upon by many plaintiff's attorneys in sending their demand letters. Users enter in their website address, and get a summary of "errors" and "alerts" that may make the website difficult for a disabled person to use. An "outline" will demonstrate the heading structure as encountered by a screen reader and using the keyboard to navigate the website.

For more information concerning website accessibility claims, or to schedule a webinar or presentation for your company, contact Merrit Jones at Merrit.Jones@bryancave.com or 415-675-3435.

MEET THE TEAM



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