

Best Practices for ADA Website Compliance (Annotated)

Editor's Note: This checklist provides a roadmap for whether the Americans with Disabilities Act ("ADA") applies to a website, and if so, steps for ensuring a website is accessible to persons with disabilities.

Contributed by Nicholas M. Reiter and Karel Mazanec of Venable LLP.

Website accessibility lawsuits remain a hot trend among the plaintiffs' bar. Vision-impaired, hearing-impaired, and other disabled plaintiffs have recently filed cases against website owners in staggering numbers. All companies and organizations with an internal or publicly facing website—so virtually all companies and organizations—should evaluate whether their websites must comply with the ADA.

Step 1 – Determine What Laws Might Apply to the Website

Internal websites, such as employee intranet and benefits portals, may be subject to Title I of the ADA, which requires employers to provide reasonable accommodations to qualified employees with disabilities. Publicly facing websites may be subject to Title III of the ADA, which requires "places of public accommodation" to provide consumers with disabilities equal access to goods and services. Under the ADA, places of public accommodation include, without limitation:

- Sales establishments (retailers, restaurants, etc.);
- Service establishments (banks, hotels, healthcare providers, etc.);
- Educational institutions (secondary schools, universities, etc.);
- Social service center establishments (food banks, homeless shelters, etc.); and
- Other establishments covered by one of the 12 categories included in the definition of "public accommodation" under Title III of the ADA.

Do not forget about state and local laws, however. Website owners should determine if their websites are subject to any state or local accessibility law or regulation. For example, California's Unruh Act typically covers a broader range of websites than the ADA. *See Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1196 (N.D. Cal. 2007) (applying the Unruh Act to any "business establishment"); Cal Civ. Code § 51(b) (extending the prohibition against disability discrimination to "all business establishments of every kind whatsoever"). In addition, state and local laws may also provide for higher damages, broader injunctive relief, and other remedies that are unavailable under the ADA.

Remember that forum-shopping matters. Different jurisdictions apply the ADA and similar accessibility laws differently. *See Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 388-92 (E.D.N.Y. 2017) (noting split amongst different circuits for applicability of the ADA to websites); *Robles v. Domino's Pizza, LLC*, No. 17-55504, 2019 BL 13200 (9th Cir. Jan. 15, 2019) (affirming ADA's application to company's website and app connecting customers to the goods and services at physical locations). A website that sells goods or services throughout the U.S. may be subject to the laws of all 50 states (in addition to federal law). And a smart plaintiff will not hesitate to file his or her lawsuit in the jurisdiction that provides the highest likelihood of success. Similarly, companies or organizations with international websites may

also be subject to accessibility laws of the nations in which they do business.

Step 2 – Consider Whether There is a Business Reason for Website Accessibility

Website accessibility is not only a litigation risk. It can also be a business risk. If disabled persons are unable to access a website, then they are also likely unable to purchase goods or access information on that website. Even if the ADA does not apply, website owners may want to consider the pros and cons of making their website more accessible.

Step 3 – Assess the Potential Areas of Noncompliance

There are a number of ways a website may be inaccessible. Relevant questions a website owner should ask include:

- Is all website content keyboard accessible (e.g., ability to “tab” through menus, links, etc.)?
- Does the website provide alternative text or the text equivalent for images and links?
- Do videos within the website include closed captions?
- Does the website apply the same accessibility measures to interactive or dynamic content, such as fillable forms and tables offered within the website?
- Is the website content generally compatible with screen reader technology, such as JAWS (Job Access With Speech) or NVDA (NonVisual Desktop Access)?

The most common technical standards used to measure website accessibility are the Web Content Accessibility Guidelines (“WCAG”) 2.0, Levels A and AA. Although no law or regulation has yet required compliance with WCAG 2.0, courts routinely turn to WCAG 2.0 for guidance as to what constitutes an accessible website. *See Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1346 (S.D. Fla. 2017) (recognizing WCAG 2.0 as “the industry standard for accessibility”). The answers to the questions above can help determine whether a website is WCAG 2.0 compliant.

To help answer questions about compliance, website owners should consider retaining a website accessibility consultant who is familiar with the WCAG 2.0 standards. Most consultants will conduct a wall-to-wall website audit in order to identify potential accessibility deficiencies and recommend cost-effective solutions. Depending upon the circumstances of the engagement, the consultant may be engaged by legal counsel either in anticipation of litigation or in connection with providing legal advice to the website owner. In such cases, communications with the consultant may be protected by a legal privilege, which can be critical in the event a lawsuit is filed.

Step 4 – Eliminate Areas of Noncompliance

Using the results of the consultant’s audit, the next step is to implement measures necessary for compliance with the WCAG 2.0 standards. The types of solutions needed will depend upon a website’s content, scope, purpose, and accessibility barriers. Common solutions include, among other things:

- Modifying the website’s source code;

- Adding closed captioning to video content;
- Installing web overlays, such as dialog boxes, modal windows, lightboxes, or other pop-ups that can aid accessibility;
- Preparing an accessibility statement for the website owner;
- Creating a toll-free accessible hotline for disabled persons to use in lieu of inaccessible portions of the website;
- Training key staff, such as customer service representatives who interact with website visitors, to assist persons with disabilities; and
- Adding accessible products or features to the website, such as accessible PDFs.

As an alternative to the above solutions, some website owners may determine it is faster or more cost effective to completely redesign a website.

While some in-house web professionals or IT (information technology) staff may be able to implement minor solutions, a third party web developer or accessibility consultant is recommended for large-scale source code remediation. Further, the scale of a website owner's remediation efforts may provide a defense to allegations of an intentional or reckless violation of accessibility laws.

After the accessibility solutions are implemented, a series of post-remediation audits is recommended. These audits typically serve two purposes. First, they identify any shortcomings in the remediation efforts. And second, they help ensure that new accessibility barriers do not arise as time passes. For extra protection, website owners should consider conducting an end-user audit and/or seeking input on the accessibility of the website from consumers with disabilities and disability rights groups.

Finally, in addition to the steps above, website owners should strongly consider engaging experienced legal counsel in order to minimize litigation risk related to website accessibility. Although statutory damages are typically low for a single plaintiff, the costs to a website owner can quickly add up if a class-action complaint is filed or if substantial website changes are required. Experienced counsel can opine on the applicability of the ADA, defend a website owner against alleged violations, and negotiate a favorable resolution.