THE ADA GOES DIGITAL

Accessibility Risk Analysis for Websites and Apps

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The Americans with Disabilities Act (ADA) was signed into law nearly 35 years ago. However, in the intervening decades and particularly in the aftermath of the 2020 COVID-19 Pandemic, our economy has moved rapidly away from brick and mortar and into online business. According to e-commerce company DigitalCommerce360, in 2022, total online sales in the United States surpassed $1 trillion. The ADA was created before most of the country was online and is, quite simply, outdated. None of the branches of the federal government have yet to offer straightforward guidance for private companies that rely on online sales and services. This article will examine the current Circuit Split, the guidance issued by the Department of Justice ("DOJ") and offer suggestions for businesses looking to minimize risk while maximizing customer use via websites and applications.

The ADA, which applies both to state/local governments (Title II) and private businesses and companies (Title III), prohibits discrimination against people living with disabilities. The pertinent part of the Act states, "no individual shall be discriminated against 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 by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Title III of the ADA defines places of public accommodation for private entities and groups them into 12 different categories, such as hotels and restaurants. 42 U.S.C.A. § 12181. According to the DOJ, businesses that act as public accommodations, i.e., they are open to and serve the public, must prevent discrimination in not only their physical buildings and improvements but also in how they communicate and serve their customers. Historically, the public, the courts, and the DOJ considered actions such as building wheelchair friendly access ramps, providing text-phones, materials written in braille, and audio description devices in movie theatres.

Whether or not the ADA applies to a company's website, however, is the subject of a current Circuit Split. The Third, Sixth, and Ninth Circuits look for a nexus between a physical location and the online service, and if such nexus exists, then the website or app is subject to the ADA's public accommodation requirements. In *Robles v Domino's Pizza, LLC*, for example, the Ninth Circuit found that a nexus existed between the Domino's delivery app and its physical stores when a blind customer could not

order pizza (made in a physical store), the basic service intended and provided to customers through the app or website. (2019). By contrast, in *Erasmus v. Chien*, a District Court in California decided that the plaintiff had not sufficiently plead there existed enough of a physical nexus between a surgery and dental implant center and its website (E.D. Cal 2023). The District Court explained the ADA requires "some connection between the good or service complained of and an actual physical place." The District Court focused its examination on how a website facilitates customers access to the services of the business, which was essential in *Robles*, and found the plaintiff's inability to access information alone, was insufficient enough to establish a nexus between the surgery center's online presence and its brick-and-mortar location.

Meanwhile, the First, Fourth, and Seventh Circuits do not require a nexus, and have held repeatedly that websites, by definition, are "places of public accommodation." Finally, the remaining four Circuits have either not ruled or have not upheld one of their own rulings. District Courts within the Second Circuit ruled contradictory to themselves without Circuit Court guidance, and the Eleventh Circuit decided that a grocery store's online website did qualify as a public accommodation in 2021, but then by the end of the year had vacated the decision after re-hearing the case. *Gil v. Winn-Dixie Stores, Inc.,* (2021). The Eleventh Circuit focused on how a website was not within one of the 12 enumerated categories and so did not constitute a place of public accommodation. In addition, and unlike ordering pizzas, the Winn-Dixie website did not provide for online transactions, so the court found it was of "limited functionality." So far, the Fifth and D.C. Circuits have not yet ruled directly on the issue.

Case law aside, in March 2022, the DOJ issued new guidelines for online accessibility under the ADA for both Title II (government) and Title III (private companies), specifically stating that the "Department has consistently taken the position that the ADA's requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web."

The guidance provided several examples of accessibility barriers on websites:

- Poor color contrast (ex: light gray text on a light-colored background) and its impact on limited vision or color-blind users;
- Use of color alone to give information or to distinguish information, such that screen readers for the visually impaired would not convey the full amount of information;
- Lack of "alt text" on images or captions on videos, meaning that screen readers for the visually impaired would not provide any context for images, charts, graphs, videos, or other illustrations;
- Online forms that lack text to convey certain cues to filling it out, such as error indicators for missing required fields; and
- Mouse-only navigation, preventing those who are limited to keyboard-only use.

In addition, the DOJ detailed agreements reached to ensure website accessibility with companies for vaccine registration portals, online testing preparation, tax preparation, and online grocery delivery services. Furthermore, in August of 2023, the DOJ issued a Notice of Proposed Rulemaking on Accessibility of Web Information and Services of State and Local Government. Although the Proposed Rule only applies to state and local government (under Title II of the ADA, and not through public accommodation under Title III), it may offer guidance on where the DOJ is prepared to go in the future under Title III. The Proposed Rule includes a technical standard of what is required to be accessible, with limited exceptions for archived, pre-existing, and third-party content, as well as password-protected content. As of the date of this publication, the Proposed Rule has not yet been adopted.

This Circuit Split and somewhat conflicting regulatory guidance leaves businesses facing a difficult task when exploring their obligations (and therefore their risk) under the ADA when designing and launching websites or applications for their business. On one side, the Department of Justice, private industry, and digital accessibility advocacy groups within the United States seem to generally agree that Web Content Accessibility Guidelines 2.0 (WCAG) are the gold standard for companies to utilize in making websites more accessible. Published by the Web Accessibility Initiative of the World Wide Web Consortium, the guidelines seek to increase access for people living with color blindness, limited or impaired vision, deafness, hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities, photosensitivity, and more. These standards include everything from providing text alternatives like braille or symbols to designing content in a way that eliminates the risk of seizures and ensuring adaptability with keyboards, screen readers, and other assistive devices.

On the side, there are at least three Circuits that do not require ADA accessibility unless the website or application has a nexus to a physical brick and mortar location, and four Circuits that haven't ruled. Neither the Supreme Court nor Congress have weighed in, and even the DOJ opted only to apply the newest Proposed Rule to state and local governments. Unlike their guidance in 2022, they declined to include Title III's public accommodation in the proposed rule.

For companies and businesses operating in the First, Fourth, and Seventh Circuits, the best practice is likely to aim for that gold standard, regardless of whether your website has any relationship to brick-and-mortar up to and until the Supreme Court or Congress takes a position. For those in the Third, Sixth, and Ninth, an analysis of the nexus test and how it might apply to your business is crucial. For those in the remaining Circuits, arguments as to the applicability of the ADA could realistically go either way. Consideration of the target and anticipated user should also play a role in determining the importance of web accessibility for a company. For example, websites or apps of convenience, such as grocery delivery or "we-come-to-you" alternatives may target disabled users, and therefore web accessibility may be a higher priority not only for sales and promotion but for risk avoidance.

Ultimately, ecommerce in the United States has grown substantially and will only keep growing. While the applicability of the ADA and the standards upon which the ADA might rely are currently uncertain, when companies take the time and effort to design accessible online services and activities, not only are they opening themselves up to more customers, but they are also avoiding risks from private litigation and public enforcement.

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