

# ADA Website Accessibility: What Businesses Need to Know

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*Lawsuits based on Title III of the American with Disabilities Act (ADA) related to business websites and mobile applications have increased markedly. While the internet did not exist as it does today when the ADA was first enacted, websites are now considered “places of public accommodation.” There is considerable uncertainty for businesses because there is limited regulatory guidance for compliance. This paper reviews the Americans with Disabilities Act (ADA) as it applies to website accessibility. An explanation of the generally-accepted website accessibility guidelines (WCAG 2.1) is provided with suggestions to help businesses ensure their websites are less subject to complaints and litigation concerning accessibility.*

*Keywords: website accessibility, Americans with Disabilities Act (ADA), WCAG 2.1*

## INTRODUCTION

Businesses and organizations have faced lawsuits under the Americans with Disabilities Act (ADA) regarding physical accommodation accessibility for years, but more recently, some ADA lawsuits are premised on claims that these websites and mobile applications are inaccessible to persons with disabilities. Federal lawsuits regarding websites and mobile applications have increased markedly from 57 cases in 2015 (Henrick, 2019) to 2,256 in 2019 (Launey & Vu, 2020) (see Figure 1). The first three months of 2020, for example, saw 538 cases filed (Launey & Vu, 2020). While only ten firms filed 82 percent of the cases in 2018 (U.S. Chamber of Commerce, 2019), over 400 *more* lawyers in 2019 have been involved in ADA website accessibility cases compared to 2018 (UsableNet, 2019). More than half of the 2019 cases settled within 60 days (U.S. Chamber of Commerce, 2019). While some complain that plaintiffs’ attorneys are filing multiple suits, usually for a single plaintiff, just to force a quick settlement, it appears that website accessibility cases may continue to be low-hanging fruit for some plaintiffs’ lawyers until clear guidance emerges and companies adopt measures to defeat these claims. Until then, companies can expect to be sued, in many cases multiple times. In fact, 21 percent of defendants in 2019 were sued multiple times (UsableNet, 2019). Moreover, given the increased reliance on business websites in light of the COVID-19 crisis, it is even more imperative to understand this threat.

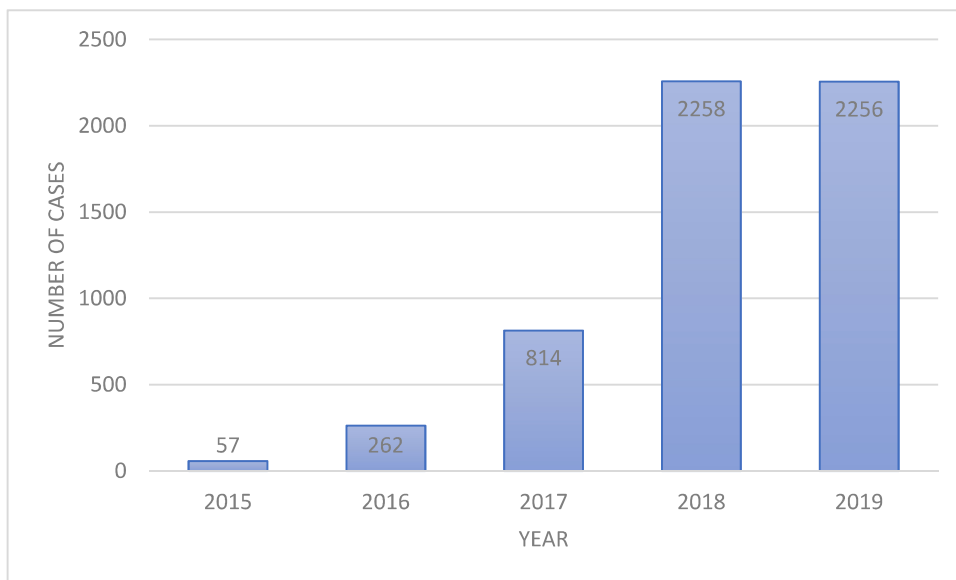
There are almost 1.3 billion sites on the World Wide Web, and while only 10-15 percent are active websites, that still means there are hundreds of thousands of active websites (Mill for Business, 2020). WebAIM, a non-profit organization housed in the Center for Persons with Disabilities at Utah State

University, annually conducts an accessibility analysis of one million home pages and finds that websites are becoming more complex and that accessibility non-conformance and errors are increasing over time (WebAIM, 2020). In addition to analyzing website home pages, the study randomly tests more than one hundred thousand interior pages from the top 1300 websites. The 2020 study found:

- One in every 14 home page elements contained errors;
- 98.1% of home pages and 97.8% of interior pages had failures, the most common being low contrast, missing alternative text, empty links, missing form labels, empty buttons, and missing document language;
- Pages using popular ad systems had more errors, with Google AdSense users exhibiting an average of 37 more errors compared to pages using other systems; and
- One single home page had 24,444 errors.

What is more alarming, though, is that the methodology used in this analysis, the WAVE accessibility engine, is an automated tool and that only 25-35 percent of conformance failures can be detected using these types of tools (WebAIM, 2020). Consequently, the state of website inaccessibility is likely much worse than found in this study.

**FIGURE 1**  
**FEDERAL ADA TITLE III WEBSITE ACCESSIBILITY LAWSUITS (2015-2019)**



Sources: Henrick (2019); Launey & Vu (2020); UsableNet (2019)

While the majority of lawsuits have been brought on behalf of visually-impaired plaintiffs, businesses must be aware that other types of disabilities can lead to website inaccessibility liability. According to the U.S. Census Bureau (2019), based on data from the 2018 American Community Survey, more than 7.45 million Americans are visually impaired (2.4% of the population), 11.5+ million report a hearing disability (3.6%), and over 15 million report a cognitive disability (5.1%). These disabilities hinder a person’s ability to see content on a website or mobile application, to hear content from videos, or to manually navigate a website or application. These statistics, coupled with the growing complexity of websites and mobile applications, will likely exacerbate the legal threat to businesses.

Though many of the defendants in notable cases are large corporations, small and medium-sized enterprises are not beyond the sights of plaintiffs’ lawyers. This is also true regarding physical accommodation lawsuits, but it may be even worse because a disabled person does not have to leave his or her home to be denied access to websites and can visit many in a very short period of time. Business

owners are being warned of “cut and paste” lawsuits affecting local businesses in their communities. For example, the Riverhead Chamber of Commerce in New York issued an “urgent alert” to inform businesses of the threat and to ensure their websites are accessible to people with disabilities (Smith, 2020). According to this article, many small business owners are well-aware of ADA regulations applicable to their physical business, but are “stunned to learn” that their websites are subject to this law as well.

Thus, the purpose of this paper is to review the Americans with Disabilities Act (ADA) and discuss how it has evolved to encompass websites and mobile applications since neither existed at the time the law was enacted. Businesses continue to face significant uncertainty due to the lack of specific regulations defining how a business must conform to meet the needs of disabled persons. Consequently, this article explains the generally-accepted guidelines (i.e., WCAG 2) for businesses to bring their websites and other electronic interfaces into compliance. Finally, in addition to avoiding the expensive legal threat, this paper discusses reasons why safeguarding website accessibility makes good business sense.

## **AMERICANS WITH DISABILITIES ACT (ADA)**

Congress enacted the ADA in 1990 (Americans with Disability Act, 1990) and amended it in 2008 (ADA Amendments Act (ADAAA), 2008) to afford protections against discrimination based on disability. There are four principal sections of the law: Title I (employment), Title II (public entities, including public transportation), Title III (public accommodations), and Title IV (telecommunications). Each title addresses a different topic. For instance, Title I provides that employers covered by the ADA may not discriminate against a “qualified individual with a disability” with respect to job applications, hiring, promoting and discharging employees, job training, and other terms, conditions, and privileges of employment (ADAAA, 2008, 42 U.S.C. §§12111-12117). It also limits employers from asking employees and job applicants certain disability-related questions and limits certain medical examinations, requires medical information to be protected, and requires employers to provide reasonable accommodations, such as job restructuring, for disabled employees in some cases (ADAAA, 2008, 42 U.S.C. §§12112(b)(5)).

Title III of the ADA is important because it applies to public accommodations. Under Title III, 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 operates a place of public accommodation” (ADA, 1990, 42 U.S.C. 12182(a)). Places of “public accommodation” apply to twelve specific categories of facilities, including among other things, hotels, restaurants, bars and nightclubs, movie theaters, concert halls, grocery stores, shopping centers, gas stations, hospitals, airports and terminals, museums, gymnasiums, and other types of listed public commercial enterprises (ADA, 1990, 42 U.S.C. §12181(7)).

Title III of the ADA requires that all new construction of public accommodations, including modification or alterations of existing facilities, fully comply with the Americans with Disabilities Act Accessibility Guidelines (ADAAG), found in the U.S. Code of Federal Regulations at 28 C.F.R., Part 36, Appendix A. It also applies to existing facilities, and requires architectural barriers in existing facilities to be removed if is “readily achievable,” or can be “...easily accomplished without much difficulty or expense” (ADA, 1990, 42 U.S.C. §12182(b)(2)(A)(iv)). The regulations provide general and specific guidance for removal of architectural barriers, for instance, such as installing ramps, removing shelves, widening doors, and reconfiguring bathrooms, among other things.

At the time that the ADA was passed, websites did not yet exist and so there is no express inclusion of websites within the statutory language of the ADA. However, as businesses began to use websites, in 1996, the Department of Justice, which enforces the ADA, opined that covered entities under Title III must make their websites accessible to disabled users (Patrick, 1996). In 2010, the Department of Justice announced plans to prepare ADA regulations regarding website accessibility (Department of Justice, 2010) but has since withdrawn this rulemaking action (Department of Justice, 2017).

The Department of Justice seemed to take an inconsistent position when it filed an amicus brief with the U.S. Supreme Court and agreed with the 5<sup>th</sup> Circuit Court of Appeals decision in *Magee v. Coca-Cola Refreshment USA*, holding that a vending machine was not a public accommodation covered by Title III. In its brief, the DOJ suggested that websites would be treated similarly (833 F.3d 530 (5<sup>th</sup> Cir. 2016), cert. denied, 138 S.Ct. 55; 199 L.Ed.2d 18, 2017).

However, more recently, in 2018, the Department of Justice again reaffirmed its position that the ADA applies to public accommodations' websites, reasoning that ADA Title III requires that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to persons with disabilities (Boyd, 2018). Consequently, no regulations exist to guide businesses, even though the DOJ has opined that commerce websites fall under Title III of the ADA.

## COURT DECISIONS CONCERNING WEBSITE ACCESSIBILITY

With no real clear guidance from the Department of Justice or Congress, website accessibility cases have resulted in inconsistent decisions from the courts, as courts have split on whether a website is a "public accommodation" within the meaning of Title III. Federal courts in the First, Second, and Seventh Circuits have held that the ADA covers websites. The Eleventh Circuit also has held that this particular prohibition on discrimination "is not limited to tangible barriers that disabled persons face but can extend to intangible barriers as well" (*Haynes v. Dunkin' Donuts*, 2018). These courts have reasoned that businesses offer goods and services through websites and therefore have to make them accessible to individuals with disabilities. In *Haynes*, for instance, the court noted that the website offers products sold in physical Dunkin' Donuts stores.

In contrast, courts in the Third, Sixth, and Ninth Circuits have held that "places of public accommodation must be physical spaces, and that goods and services provided by a public accommodation must have a sufficient nexus to a physical space in order to be covered by the ADA" (*Haynes v. Dunkin' Donuts*, 2018). However, courts in the First, Second, and Seventh Circuits have held that a website may be considered a "public accommodation" absent a connection to a physical space (*Haynes v. Dunkin' Donuts*, 2018).

In a recent federal district court decision in Michigan, *Brintley v. Aeroquip Credit Union* (2018), the court allowed the plaintiff's case to survive a motion to dismiss, recognizing there was a sufficient nexus between the defendant's website and its physical branch locations such that a user's inability to access the website because of a disability could give rise to a claim under Title III. The court also stated that the plaintiff's inability to access the website "deterred Plaintiff from using Defendant's physical locations." In addition, more recent decisions applying the same logic as in the *Brintley* case have held that inaccessibility to websites is a violation of the ADA (e.g., *Gomez v. General Nutrition Corp.*, 2018). This is true even if the company operates only online and has no physical storefront (e.g., *Access Now, Inc. v. Blue Apron, LLC*, 2017).

The U.S. Chamber of Commerce and the National Federation of Independent Business have called on the Supreme Court to weigh-in on this issue (Frankel, 2019). These groups filed an amicus brief regarding a ruling from the 9<sup>th</sup> U.S. Circuit Court of Appeals in the case against Domino's Pizza in which a blind man claimed he was discriminated against because he could not customize his pizza order on the Domino's website or mobile application (U.S. Chamber of Commerce, 2019). The 9<sup>th</sup> Circuit decision reversed a rare summary judgment in favor of the defendant, Domino's, which led the pizzamaker to petition the Supreme Court (Arenth, 2019). Unfortunately, the Supreme Court refused to hear the case, leaving in place the ruling by the 9<sup>th</sup> U.S. Circuit Court of Appeals that Domino's and other retailers must make online services accessible with the case expected to go to trial (Tyko, 2019).

## CONGRESSIONAL ACTION

In 2017, Congress recognized that website disability cases were increasing and legislative action might be necessary to curb the tide. As such, the U.S. House of Representatives passed H.R. 620, a bill to

provide certain restriction on website accessibility case filings (ADA Education and Reform Act, 2017). However, the Bill was never passed by the U.S. Senate (Powell, 2018). In the form passed by the House, the Bill would have required that before a lawsuit could be filed, there must be notice to the defendant company and the company must be afforded an opportunity to cure the problem. This was a tacit acknowledgement that companies needed some protection from multiple class action lawsuits, especially if they had no prior notice of any website issues.

Thus, given the current state of the law, until the U.S. Supreme Court decides the issue or Congress clarifies website accessibility under the ADA, it is likely that litigation will continue, especially in jurisdictions that have been more receptive to plaintiffs' cases, such as Florida and New York, and as more services by companies are provided through their websites. For now, in the absence of federal regulations regarding website accessibility, it is recommended that businesses implement the accessibility guidelines (WCAG) that are officially required for public entities such as federal, state, and local governments subject to Title II of the ADA and Section 508 of the Rehabilitation Act of 1973 (Department of Justice, 2003) and have essentially become the *de facto* regulations for businesses through case law (e.g., *Gil v. Winn Dixie*, 2017).

## WCAG GUIDELINES

WCAG stands for Web Content Accessibility Guidelines developed by the World Wide Web Consortium (W3C), an organization whose mission is "to lead the World Wide Web to its full potential by developing protocols and guidelines that ensure the long-term growth of the Web" (W3C, n.d.). It was founded in 1994 by Sir Tim Berners-Lee, the inventor of the World Wide Web, and is an international organization that envisions an inclusive Web built on globally-shared knowledge. It currently boasts more than 400 members worldwide (W3C, 2020) and is administered by four host institutions (Massachusetts Institute of Technology (MIT) in the U.S., the European Research Consortium for Informatics and Mathematics (ERCIM), Keio University in Japan, and Beihang University in China). While the focus of this consortium is broad, a major initiative is to develop internationally-accepted standards regarding website accessibility for all.

The Web Content Accessibility Guidelines (WCAG 2.0) were published in 2008 and updated to WCAG 2.1 in 2018, with all requirements of the former included in the latter (W3C Web Accessibility Initiative, n.d.). Even though most judges have ruled that WCAG 2.0 are acceptable, businesses should probably strive to attain WCAG 2.1 conformance. WCAG have multiple guidelines organized under four broad principles (POUR): perceivable, operable, understandable, and robust.

- **Perceivable.** Website and mobile application users must be able to perceive the content, and oftentimes disabled persons are using technology, such as screen-reading software, to assist them in accessing content. The content must be made so that it is easier for users to see and hear, such as by changing font sizes or volumes. Non-text content, such as pictures, must have text alternatives, and captions and other alternatives provided for multimedia, such as videos.
- **Operable.** All functionality must be available from a keyboard as some users may not be able to operate a computer mouse. It must be easy to navigate and find content within the site. Content that can induce seizures or physical reactions should not be included, and users must be given enough time to read and use content, such as to complete an online form.
- **Understandable.** Content should be readable and understandable, with definitions provided where necessary. The content should also appear in predictable ways, so consistent navigation on subsequent pages should be used throughout. Users should be informed of mistakes and ways to correct them (e.g., not entering a complete address in an online form).
- **Robust.** Website should be compatible with current and future user tools, such as screen-readers.



In addition to these four broad principles, there are varying levels of accessibility denoted as A, AA, and AAA:

- A: Considered below acceptable, but websites should at least be at this level.
- AA: Standard – where most companies should be and seems to be the level cited in court cases.
- AAA: Exceptional – would be great to be at this level, but it does not seem to be required.

So how much does all this cost? For existing websites, it is important to first conduct an audit, which may cost at least \$1,500, but the actual cost likely will depend on factors such as the age of the website, the number of pages, the number of templates or page types, and the framework on which it was built (Bachmeier, 2019). Other sources estimate that audit costs could start at \$3,500 (e.g., Rivenburgh, 2018). Perhaps a good place to start is by using one of the free online checkers, such as AChecker (AChecker, 2011) or WebAIM's WAVE tool (WebAIM, n.d.) to get an idea of how big of a problem you may be facing, remembering, however, that automated audits may not detect up to 75 percent of compliance failures (WebAIM, 2020). Thus, audits are somewhat expensive because the manual aspect of it could require four-to-seven hours to test each unique page/template (Accessibility.Works, 2019). Then, developing an ADA-compliant website may cost approximately \$3,000 - \$5,000 or more, depending on the aforementioned factors. There are continued audit and maintenance costs, which can range from \$500 to \$1,000 per month (Bachmeier, 2019). Other sources estimate that costs could be even higher – between \$27,000 and \$50,000 – for a small or medium-sized e-commerce site to become ADA compliant (Cristancho, 2017). For websites more than four years old, experts recommend a complete redesign, not just to be ADA compliant, but because the site likely needs a design refresh and better mobile and SEO performance (Accessibility.Works, 2019). However, given the litigation costs involved with defending these types of cases, this would appear to be money well-spent.

## **OTHER REASONS TO MAINTAIN WEBSITE ACCESSIBILITY**

### **Increased Sales**

Individuals with disabilities is a market segment that businesses should not ignore. Yin, Shaewitz, Overton, and Smith (2018) estimated that U.S. working-age adults with disabilities possess considerable purchasing power, which is compounded when factoring in their families, friends, and others associated with them who likely look favorably on inclusive businesses. With respect to after-tax disposable income, this market is similar in size to the African-American and Hispanic markets, and greater than these two segments combined with respect to discretionary income (Yin et al., 2018). Disabled consumers have everyday needs similar to all consumers, so excluding this market is a lost opportunity to gain sales and perhaps fiercely loyal customers.

Enhanced website accessibility creates a better user experience not just for disabled users, but for all users, which could translate into higher sales. One key aspect of accessibility is that the website will be cleaner in design, more esthetically-pleasing, and easier to use for all, not just disabled users (*5 ways retailers...*, 2018). Moreover, as current customers age and possibility develop a disability, they will likely continue to be a customer if the website is accessible.

Accessible websites will enhance search engine optimization (SEO) because the added text used for video captioning and descriptions of graphical elements result in better search discovery, possibly bringing new users to the company's website (Dudharejia, 2020). Search engine crawlers cannot see or hear and behave similarly to those with disabilities. Google, the world's leading search engine with almost 90 percent market share (Clement, 2020), places a priority on accessibility and includes an open-source accessibility tool, called Lighthouse, in its web developer tools (McMichael, 2018). Thus, complying with Google's initiative focused on accessibility for all can result in being placed higher in search results.

## Increased Innovation

Developing websites for inclusivity may foster innovation in other areas of a company's business because it brings to light the challenges disabled individuals face every day. Instead of approaching website accessibility as something that must be done merely to avoid legal threats, adopting an inclusive design philosophy in every aspect of business may bring to light unforeseen opportunities that not only benefit disabled consumers, but all consumers.

For example, companies like Google and Microsoft take accessibility very seriously and embrace an inclusive design philosophy when developing services, which benefits all, not just persons with disabilities (Brownlee, 2016). Google's Android accessibility guidelines for contrast not only enable color-blind or low vision persons to see content easier, they also benefit all users because it is easier to read a screen in bright sunlight (Brownlee, 2016). Thus, nondisabled users of the business's website will benefit as well if contrast accessibility guidelines are implemented, perhaps enabling businesses to see other ways in which to develop greater satisfaction among all customers. Other examples many of us take for granted include autocomplete and voice control, features originally developed to help disabled persons use computers more effectively and are now enjoyed by everyone (Brownlee, 2016).

Adopting a philosophy of inclusivity may also lead to developing products or services specifically for this market. For example, in the fashion industry, brand marketers Tommy Hilfiger developed accessible clothing with magnetic closures in place of buttons and adjustable pant leg and sleeve lengths, Zappos developed sensory-friendly clothing for autistic consumers, and Nike developed shoes that are easier to put on (Yin et al., 2018). Shoes and clothing that are easier to use could be beneficial to other, non-disabled consumers, such as children or elderly consumers, so businesses that focus on developing products or services specifically for disabled customers may find opportunities for those products in other market segments.

## Enhanced Business Reputation

According to a study by Nielson, over half of the respondents in a global study indicated they are more willing to do business with a company that is socially responsible (Nielson, 2014). Tully and Winer (2014) conducted a meta-analysis of eighty studies regarding corporate social responsibility and found a majority of consumers are willing to pay a premium of almost 17 percent with companies exhibiting socially-responsible behavior. Moreover, this willingness to pay a premium is greater when the socially responsible behavior benefits humans compared to the environment. On the flip side, another study found that 65 percent of consumers are less forgiving of a company that has treated a customer poorly (Aflac, 2017). So, in sum, it pays to do the right thing.

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