

# **ADA Website Compliance Litigation**

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## Overview

The Americans with Disabilities Act (the “ADA”) has been the source of a significant amount of accessibility litigation since it was passed in 1990. Over the past few years, lawsuits alleging that companies have violated Title III of the ADA because their websites are not accessible to disabled users have proliferated. While ADA accessibility lawsuits previously focused on physical access barriers present in businesses open to the public (“places of public accommodation”), these new lawsuits allege that: (1) private company websites qualify as “places of public accommodation” and (2) websites with accessibility barriers deny disabled users the right of equal access.

Successful individuals or groups who file suit under the ADA (or analogous state statutes) can obtain injunctive relief (meaning a court order requiring that a company take certain steps to ensure its compliance with the ADA) plus attorneys’ fees. Private plaintiffs have latched onto these claims and have been routinely sending demand letters to companies with websites that are not fully ADA accessible, often quickly settling thereafter by obtaining a written agreement from the company to modify its site and pay some amount of attorneys’ fees. Therefore, it is recommended that companies which offer goods or services online should be proactive and take affirmative steps to update their websites before litigation is threatened or initiated. Below is some additional information regarding the mandates of the ADA, current litigation matters involving website compliance with the ADA and recommended best practices.

## What Does the ADA Require?

The ADA mandates that people with disabilities are entitled to access “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations” that a public accommodation offers to its customers. This means that the ADA requires websites that offer goods or services to the general public be designed in such a manner that individuals with disabilities, such as visually- or hearing-impaired individuals, can access and view all vital features of the sites either with or without assistive technology. Such design features include the use of text in a format compatible with screen reading software for visually-impaired individuals, or the use of video subtitles or transcripts for hearing-impaired individuals.

The Department of Justice (DOJ) has signaled its intent to publish specific guidance regarding uniform standards for website accessibility under the ADA. However, the DOJ has never published such guidance and, given the agency’s present priorities, it is unlikely that it will issue such guidance in the near future. Accordingly, courts around the country have been called on to address whether specific websites provide sufficient access to disabled users through their use of “auxiliary aids and services”(meaning items, equipment or services that assist in effective communication between a person who has a hearing, vision, or speech disability and a person who does not). In determining the standards for ADA compliance, several courts have referred to the Web Content Accessibility Guidelines (WCAG) 2.1, Level AA (or its predecessor, WCAG 2.0) (website: <https://www.w3.org/TR/2008/REC-WCAG20-20081211/> ), a series of web

accessibility guidelines published by a non-profit organization called World Wide Web Consortium, formed to develop uniform international standards across the internet. No court has held that the ADA requires, as a matter of law, website publishers to comply with the WCAG Level AA guidelines. However, in cases where courts have found that certain websites are not accessible, several have ordered that companies achieve compliance by conforming to the WCAG Level AA guidelines as a remedial measure. In other words, while organizations have flexibility to determine in what manner they will provide access to disabled individuals online, the WCAG guidelines provide a helpful summary of potential solutions, regardless of whether organizations decide to adhere specifically to the guidelines.

### Who Must Comply With the ADA?

As discussed above, the ADA applies only to “places of public accommodation.” A place of public accommodation is one that offers goods and/or services to the general public. Some courts have held that, in order to be considered a place of public accommodation, a website must provide something more than simply information to the public about an organization’s business. However, in general, a website that sells goods or services online, identifies physical locations where a business’s products can be purchased or accessed, or provides information about sales, offers, and discounts will be considered to be one that offers “goods or services” to the general public.

In some jurisdictions, courts have held that in order for a website to be considered a place of public accommodation, there must also be a “nexus,” or some connection between the website and an actual physical or “brick and mortar” space, such as a store, doctor’s office, bank, etc. Courts in other jurisdictions, however, have held that a website can be a place of public accommodation independent of any connection to a physical space. Accordingly, the very same website may be covered by the ADA’s accessibility requirements in some states and simultaneously be outside of the scope of the ADA in other states. But because websites are generally accessible across the country, regardless of the physical location of the user, companies utilizing websites to advertise or provide information about their services to the general public are advised to comply with the ADA’s accessibility requirements.

### What kinds of companies may be covered?

Where a website is heavily integrated with physical store locations and operates as a gateway to the physical store locations, courts have found that the website is a service of a public accommodation and, therefore, covered by the ADA. See *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953-55 (N.D. Cal. 2006); see also *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1349 (S.D. Fla. 2017) (“The services offered on Winn-Dixie’s website, such as the online pharmacy management system, the ability to access digital coupons that link automatically to a customer’s rewards card, and the ability to find store locations, are undoubtedly services, privileges, advantages, and accommodations offered by Winn-Dixie’s physical store locations.”) (emphasis added).

On the other hand, where a website is wholly unconnected to a physical location, some courts have held the website not to be covered by the ADA. See, e.g., *Gomez v. Bang & Olufsen Am.*,

*Inc., No. 16-23801, 2017 WL 1957182 (S.D. Fla. Feb. 2, 2017), at \*8* (holding that a website that is wholly unconnected to a physical location is generally not a place of public accommodation under the ADA).

It is recommended that companies seek guidance and advice to determine whether they are subject to risk here and what steps may be appropriate to take depending upon that risk level. Since the manner of compliance is not a settled area of the law, the interpretation varies from jurisdiction to jurisdiction.

### What Steps Should Companies Take?

Given the ongoing proliferation of lawsuits alleging website accessibility violations, businesses are encouraged to consider taking the following steps:

- Audit your website for accessibility.
  - Free, easy-to-use audit tools exist online (e.g., <https://wave.webaim.org/>, <https://achecker.ca/checker/>), and they may be a good place to start. However, these tools can be both under- and over-inclusive with respect to their audit results. Only manual testing (which requires an experienced tester to play the role of an individual using assistive technology) can determine whether a website is fully accessible or compliant with specific accessibility standards.
- Ensure that any web designers or third-party vendors responsible for updating or making changes to your website are familiar with commonly-applied accessibility standards, including the WCAG-2.1, Level AA standards, and have the requisite ability to implement them and to review accessibility regularly.
  - Many vendors will represent that they are able to build and maintain ADA-accessible websites, but have little knowledge or understanding of what it means to be fully compliant under the law. It is recommended that a company ask specific questions when interviewing website vendors regarding their ADA compliance experience, and the steps they can and will take to ensure the ADA accessibility of your site.
- Review your vendor agreements with counsel and include in the agreement provisions regarding the vendor's obligations to build and maintain the site in an ADA compliant manner, as well as to perform regular compliance audits and updates.
  - It is recommended that companies include the specific level of compliance (e.g. "meeting the WCAG-2.1, Level AA standards, in all vendor agreements"). Otherwise, contractual language regarding ADA compliance will be difficult to enforce if vendors fall short of expectations, leaving a company exposed.

### Attempts to comply with the WCAG will not prevent lawsuits

Based on my recent experience and that of a number of companies in the United States, merely taking steps to show you have reviewed the WCAG guidelines and/or attempted to comply will

not stave off lawsuits. The ADA is a strict liability statute. Just as brick and mortar stores that do not maintain properly-sized ramps for wheelchair access will be deemed to have violated the ADA without consideration of their attempts at compliance, websites are either accessible to individuals with disabilities or they are not. Unfortunately, while there are specific ADA requirements that apply to brick and mortar stores (i.e., technical specifications for ramp length and height), the guidelines for website accessibility are more nebulous and open to interpretation. That said, the plaintiff's bar will not be dissuaded from initiating litigation –and the potential settlement value will be largely unaffected –based on a company's attempts to comply with the ADA.

In a recent case, the plaintiff's bar demonstrated a clear indifference towards attempts to comply with the ADA. In the case, the defendant—an online-only retailer—spent approximately several hundred thousand dollars developing its online commerce website. The developers specifically took care to ensure the site's compliance with Level AA of the WCAG 2.0. However, as time went on, the company did not have continued compliance procedures and it added additional products to its website that did not meet WCAG accessibility requirements. After viewing these few and minor “violations,” the company received a demand letter from a plaintiff's firm, followed promptly by a lawsuit initiated in California seeking significant monetary damages. While the defendant's counsel was able to point out legal deficiencies in the plaintiff's complaint and, ultimately, settle the case for significantly less than what was originally demanded, the case demonstrates that the plaintiff's bar is indifferent towards even heroic efforts taken by companies to ensure compliance.

### Defending Against and Damages Resulting from Claims Can Be Costly

While these cases are not extremely complex, plaintiff's attorneys quickly rack up \$10,000 or more in fees even before active court litigation. While those fees, coupled with the cost of defense, may not outweigh the cost of engaging a web developer to ensure WCAG compliance, it is advisable to consider the possibility of multiple website violation lawsuits. Claims for website compliance suits under the ADA entitle Plaintiff to be awarded attorney's fees. In addition, the ADA provides for injunctive relief. Thus, in the event a company loses a website accessibility lawsuit –and sometimes as a condition of settlement –the court may order the company to take steps to comply with the WCAG. In other words, it is recommended to take steps on the front end to ensure compliance, especially considering the fact that losing a website accessibility lawsuit will likely lead to a court order requiring compliance with the WCAG anyway.

Another consideration is that various states have enacted statutes that provide for compensatory damages for ADA violations. For instance, in California, the Unruh Act allows plaintiffs to recover \$4,000 for accessibility violations. In the case described above, the plaintiff argued he was entitled to \$4,000 for each time he visited the client's website (which was, apparently, multiple times before engaging counsel). While the law firm was ultimately able to successfully argue against that theory, the case law is unsettled in this area. In other words, businesses could face significant liability in the states that provide for compensatory damages should courts decide that each visit entitles a plaintiff to stack damages.

## Recommended Consulting Firms

Some companies have used American Eagle (no relation to the clothing brand) for assistance with ADA-compliant web design in the past ([www.americaneagle.com](http://www.americaneagle.com)). In one case, American Eagle's fee for assessing a website was approximately \$17,000, which in totality was very cost-effective. Another company is PaperStreet (<http://www.paperstreet.com/>) who offers a full-service solution with audit, design and development capabilities. There are a number of services operating within the space and companies' outside counsel and audit firms may be able to assist with locating additional companies should that be helpful

Also, guide that includes some technical tips for designing an accessible website is available at <https://webaccess.berkeley.edu/resources/tips/web-accessibility> (please note, though, that this guide does not mention the WCAG, so simply adopting these technical suggestions will not ensure compliance with the WCAG standards).

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