

Breaking News! U.S. Department of Justice Releases Long-Awaited ADA Website Accessibility Guidance

The U.S. Department of Justice ("DOJ") has just released long-awaited guidance for businesses to make their websites accessible for people with disabilities (the "Guidance"), in compliance with Title III of the Americans with Disabilities Act ("Title III").^[1] For many years the business community has clamored for DOJ accessibility guidance because there were no other official standards in place. Ironically, as a resource for companies, the Guidance incorporates much of what is already widely used Web Content Accessibility Guidelines (WCAG), favored by both the DOJ and Plaintiffs' Bar.

While businesses subject to Title III and related litigation are likely glad to receive the long-awaited Guidance, on its face, the Guidance appears to suggest measures businesses have already been taken to ensure website accessibility. However, at least now, businesses should be able to adopt the above list of suggested website features, with the piece of mind they are complying with Title III. Whether the Guidance will impact the Circuit Split, and persuade those Circuits requiring brick-and-mortar locations to change their stance, remains to be seen.

The Guidance

Website accessibility jurisprudence focuses on individuals with visual impairments, who utilize screen-reading technology to access websites. Lawsuits by the disabled have grown exponentially. In the long-awaited Guidance, the DOJ reaffirms its 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." While the DOJ stated that "[b]usinesses and state and local governments have flexibility in how they comply with the ADA's general requirements of nondiscrimination and effective communication," it suggests businesses refer to "existing technical standards," which "provide helpful guidance concerning how to ensure accessibility of website features." The Guidance sets forth this list of suggested features to ensure accessibility:

- Color contrast in text;
- Text cues when using color in text, for people who cannot perceive color in text;
- Text alternatives ("alt text") in images;
- Video captions;
- Online forms – using labels, keyboard access, and clear instructions to ensure forms are accessible;
- Text size and zoom capability – allowing users to use a browser's zoom capabilities to increase the size of the font;
- Headings – building visual headings into the website's layout for easy navigation;
- Keyboard and mouse navigation – allowing users to navigate web content using keystrokes, rather than a mouse;
- Pairing a manual check of a website with the use of automated accessibility checkers; and
- Providing a method for the public to report accessibility issues

Controversy: Circuit Court of Appeals Split Regarding Websites as "Public Accommodations"

The Guidance flies directly in the face of approximately one-half of the federal Circuit Courts of Appeal, which are still split over whether a website has to be accessible to people with disabilities. The split arises from those courts that hold a website must be tied

to a “brick-and- mortar” facility in order to fall within the ADA, and those that make no distinction: websites, without more, must be ADA compliant. The DOJ Guidance makes no such distinction, interpreting the ADA to require businesses serving as “places of public accommodation,” such as restaurants, retail stores, theaters, and websites (whether or not tied to a brick-and-mortar location) to remove barriers to access for people with disabilities.

The Ninth and Eleventh Circuits have explicitly held that websites belonging to businesses without brick-and-mortar locations are not covered by Title III of the ADA. While the Third and Sixth Circuits have not explicitly addressed web-only businesses, they have held that public accommodations covered by the ADA are limited to physical locations. In contrast, the First Circuit has held that a public accommodation under the ADA need not be a physical location. The Seventh Circuit has indicated in *dicta* that it would find web-only businesses to be covered under the ADA.

Remediation and Best Practices

The DOJ did not include specific regulations in the Guidance, but did refer to “existing technical standards,” including the Web Content Accessibility Guidelines (“WCAG”) international standard, and the Section 508 Standards, which the federal government uses. The Guidance also provided links to additional resources for businesses to utilize in remediating websites. As noted above, the Guidance also set forth a non-exhaustive list of suggested features to ensure accessibility, and noted that businesses have flexibility in how they comply with the ADA.

The Guidance also referred to sample settlement agreements the DOJ has entered into with certain businesses, which can provide further information for businesses looking to update their websites, accessibility statements, policies, and training programs.

The best practices for businesses looking to comply with the ADA, remains to consult with competent counsel, and web developers or experts about the best means of compliance with the ADA. Counsel and web developers can help businesses to mitigate the risk of costly litigation. In addition, businesses facing filed claims may wish to speak with their insurance broker or insurance company about whether the business may have any insurance coverage for the claim, including under an employment practices liability insurance policy.

KD IS HERE TO HELP

The experienced Labor & Employment attorneys at Kaufman, Dolowich & Voluck are available to assist with any questions you may have. Please contact Philip Voluck at pvoluck@kaufmandolowich.com, Jennifer Sherven at jsherven@kaufmandolowich.com or Jennifer Prior at jprior@kaufmandolowich.com for further information.