

TECHNOLOGY ALERT

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The focus of the ADA turns to websites in the digital age: Is your site compliant?



Title III of the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in places of public accommodation, including restaurants, movie theaters, schools, day care and recreational facilities, and doctors' offices, and requires new or remodeled public places, as well as privately owned commercial facilities, to comply with ADA standards. This law, enacted in 1990, does not specifically address website accessibility for the disabled. But since 2006, when Target settled a class action lawsuit¹ alleging Target.com was inaccessible to the blind in violation of the ADA, the issue of whether the law applies to websites has been a much-discussed topic in the federal courts.

Courts are split on two issues.² The first is the threshold issue as to whether the ADA applies to websites at all. The second issue relates to the degree in which the ADA applies to websites. The Third, Ninth and Eleventh Circuit courts apply the ADA only to websites that have a physical connection to goods and services available at a physical store or location. But the Second and Seventh Circuit courts apply the ADA more broadly to include websites that lack "some connection to physical space."³

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The Department of Justice (DOJ) has made clear that it interprets the ADA as applicable to websites, and issued an Advanced Notice of Proposed Rulemaking that would amend the language of the ADA to explicitly



Despite the split, one thing is for certain; the tide is moving toward ADA compliance for websites.

prohibit discrimination with respect to websites. Additionally, private standards and market signals, such as the [Web Content Accessibility Guidelines](#) (WCAG 2.0) and website design consulting services, indicate an expectation that websites will soon need to be ADA compliant.

New legal landscape is taking shape

The DOJ's [proposed amendments to the ADA](#), expected in April 2016, would "require public entities and public accommodations that provide products or services to the public through websites on the Internet to make their sites accessible to and usable by individuals with disabilities." The DOJ is careful, however, not to suggest products and services currently offered through websites are excused from ADA compliance, despite the fact that amendments to that effect are currently being proposed.

Thompson Information Services published an [ADA Compliance Guide Newsletter](#) in late 2014 that suggests the DOJ will likely adopt the most recent version of WCAG 2.0 — written by the [World Wide Web Consortium](#), an international community that develops open standards for the Web — as the standard for accessibility. The newsletter holds: "Costly or not, and the lack of website regulations notwithstanding, DOJ is pressuring companies to modify websites and mobile apps to meet WCAG 2.0 technical standards."

In support of this prediction, the DOJ reached a [settlement agreement with edX Inc.](#), a provider of online courses, in April 2015. The settlement resolved "allegations that edX's website ... w[as] not fully accessible to

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individuals with disabilities ... in violation of Title III of the ADA." In the settlement, edX Inc. entered a four-year agreement to make its system "fully accessible within 18 months." The agreement also requires edX Inc. to provide training for course creators, appoint Web Accessibility positions, solicit feedback, and "retain a consultant to evaluate conformance of the website, platform, and mobile applications."

What this means for website owners

Though the official announcement is yet to come, website owners and operators need to begin making websites accessible to disabled users through features such as easier navigation and compatibility with assistive technologies. Even if the divided federal courts were able to stay the application of the current ADA to websites, the DOJ already has stated its intent to explicitly require its application to websites. Website owners and operators can look to private standards, past settlement agreements, and consulting services for guidance. Now is the time to proactively plan and prepare forthcoming legal requirements.

To get started, website owners and managers should:

1. Review [WCAG 2.0](#) for details about making websites accessible across a variety of ADA-covered disabilities, including blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities and photosensitivity.
2. Mirror terms set forth in recent settlement agreements such as those in the [edX Inc. agreement](#).
3. Consider hiring a third-party consultant to conduct a thorough website audit to establish what features might be lacking and develop a roadmap for implementing necessary updates.

Users with disabilities rely on "alternative text" — invisible code embedded beneath graphics that makes it possible for assistive technologies to access information⁴ — to navigate websites. Therefore, making a website accessible to disabled users centers on design and functionality. The complexity of achieving this objective varies by the "type of content, the size and complexity of the site, and the development tools and environment," [according to the World Wide Web Consortium](#). But hundreds of design options exist to make a website accessible; WCAG 2.0. alone [provides 206 options](#). These include, but are not limited to,

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providing links to definitions, removing time limits for activities, providing spoken word versions of text, and ensuring keyboard control for all website functions. Other design resources offer similar suggestions, such as WebAIM's [Principles of Accessible Design](#).

Determining the amount of time and money necessary to design or retrofit a website is difficult, and the standard for what constitutes an "accessible" website is unclear and probably will remain so until the DOJ proposes and promulgates a new rule amending the ADA, likely to occur in 2016. However, it's not too early to begin working with a website design professional who can help you understand the variety of standards that are likely to be required, receive an estimate of the time and cost for enabling accessibility, and address existing or near-future legal obligations.

Note: This article is excerpted from research conducted by Emily R. Taylor, a Porter Wright 2015 summer law clerk. Emily will enter her third year at Vanderbilt University Law School in the fall.

For more information please contact [Bob Morgan](#), [Melissa Barnett](#), [Jamie LaPlante](#) or [Mike Underwood](#).

¹ *Nat'l Fed'n of the Blind v. Target Corporation*, 452 F. Supp. 2D 946,949 (N.D. Cal. 2006).

² See, for example, *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.* (1st Cir. 1994), *Stoutenborough v. Nat'l Football League, Inc.* (6th Cir. 1995), *Nat'l Fed'n of the Blind v. Target Corp.* (N.D. Cal. 2006), *Nat'l Ass'n of the Deaf v. Netflix, Inc.* (D. Mass. 2012), *Nat'l Fed'n of the Blind v. Scribd Inc.* (D. Vt. Mar. 19, 2015).

³ *Nat'l Fed'n of the Blind v. Scribd Inc.*, 2015 WL 1263336, at *4 (D. Vt. Mar. 19, 2015).

⁴ *Target*, 425 F. Supp. 2d at 949-50.