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## DEFENSE QUARTERLY

Fall 2020

### COVID-19 Moves ADA Compliance for Websites to the Forefront

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# COVID-19 COVID-19 Moves ADA Compliance for Websites to the Forefront

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■ Adam Bialek is co-chair of Wilson Elser’s intellectual property practice and a member of the firm’s information governance leadership committee. His nationwide team of highly qualified attorneys offers clients a full range of IP and cyber/media legal services. He is experienced with all facets of intellectual property law, internet law, art law, data security and privacy, and cyber/media risk matters, including insurance coverage pertaining to these areas. Mr. Bialek is the Trademark SLG Chair for the DRI Intellectual Property Litigation Committee. Kara Thorvaldsen is a seasoned commercial litigator, representing clients from pre-suit investigation through the exhaustion of appeals. Her primary areas of focus are professional liability, intellectual property, class action defense, insurance coverage, and all types of appeals. Ms. Thorvaldsen is the Publications Chair of the DRI



Intellectual Property Litigation Committee. Lawrence Shaw and Nicholas Le Seilleur are executives of AAAtraq, a fully automated system providing remediation and training services. AAAtraq has further added an insurance program to support its system, teaming with Brit USA to provide its customers with tiered liability coverage to defend against these claims. As the subscriber’s rating increases (according to AAAtraq’s milestones), so does the available coverage.

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A generation ago, on July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law, bringing new

recognition and protection of the civil rights of individuals with disabilities. The ADA provides protection from discrimination on the basis of disability and broadly protects the rights of individuals with respect to employment, access to state and local government services, transportation, places of public accommodation, and other aspects of everyday life.

However, the ADA was enacted before the internet age, before the advent of the digital economy, and before a substantial portion of this country's economy went online. As of 2018, the internet economy was estimated to account for approximately \$2.1 trillion of the U.S. economy, or about 10 percent of the nation's gross domestic product, and it continues to expand. See David Shepardson, "Internet sector contributes \$2.1 trillion to U.S. economy: industry group," *Reuters Technology News* (Sept. 26, 2019), [www.reuters.com](https://www.reuters.com). With most of U.S. business moving online in 2020 to address COVID-19 limitations, this share is likely to increase.

### Impact of COVID-19

On April 7, 2020, *Business Wire* released the results of its review of the effect of COVID-19 on e-commerce. *COVID-19 Crisis Drives Changes in eCommerce Purchasing Behaviors, ACI Worldwide Research Reveals*, AP News, <https://apnews.com>. An analysis by ACI Worldwide, which encompassed a review of hundreds of millions of transactions from global online retailers, reported that "transaction volumes in most retail sectors have seen a 74 percent rise in March compared with the same period last year, while online gaming has seen a staggering increase of 97 percent."

Key findings in year-over-year volume in March 2020 showed that online transactions in home products and furnishings were up 97 percent, "Do It Yourself" products were up 136 percent, garden essentials were up 163 percent, and electronics were up 26.6 percent. Other reports show simi-

lar gains. A recent "Global Shopping Index" report published by Salesforce "indicated that the number of unique digital shoppers rose 40 percent year-over-year." Brian Solis, *COVID-19 thrusts e-commerce into the spotlight*, CIO (April 21, 2020), <https://www.cio.com>. Capgemini found "that consumers' appetite for online shopping and conve-

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nience will continue to grow once lockdowns are eased," finding that "59 percent of consumers worldwide had high levels of interaction with physical stores before COVID-19, but now only 24 percent expect to return to that level." These reports support the expectation that e-commerce and the use of the internet as the "public space for commerce" will continue to grow, putting more of a focus on website compliance.

### ADA Compliance

The ADA prohibits discrimination on the basis of disability in the full and equal

enjoyment of the goods, services, facilities, privileges, advantages, and accommodations by any private entity that owns, leases (or leases to), or operates any place of public accommodation. 42 U.S.C. §12182(a). In the past few years, courts have more commonly recognized that websites and mobile apps can constitute "places of public accommodation" that must be ADA compliant under the law. With the law in this area developing rapidly, there must be changes in the efforts to comply with that precept, or businesses will risk exposure to lawsuits.

### ADA Website Compliance

The inability to engage fully with websites inhibits the ability of persons with disabilities from being able to participate in many aspects of society. Today, stores, services, entertainment venues, educational institutions, and—of much significance at the moment—health care and employment have all moved online. While many brick-and-mortar businesses recognize their duty to provide equal access to individuals with disabilities, the online world has been slow to catch up.

A lack of awareness and understanding of the challenges faced by persons with disabilities and the barriers they face online, combined with a lack of technical knowledge and recognition of options, has resulted in some individuals with disabilities being prevented in the past decade and a half from fully participating in the online world. While it may be easy for an executive of a brick-and-mortar store to walk into a facility and identify areas of risk, including tripping hazards and other dangerous situations, it is less likely that an executive of that same retailer would be able to visit the retailer's website and immediately recognize the lurking exposure in failing to be ADA compliant.

It is estimated that over 90 percent of websites are not currently ADA compliant. Now, as the COVID-19 pandemic forces more businesses to shift greater or, in some cases, all operations to web- or app-based platforms (often under time-sensitive conditions), accessibility issues that may have gone unnoticed or unmentioned before will surely come to the fore.



## Government Position

The federal government has studied the issue of website accessibility, and the U.S. Department of Justice (DOJ) has taken the position that the ADA *does* apply to online operations. Indeed, a decade ago, the DOJ issued a Notice of Proposed Rulemaking (NPR), indicating that revisions of the regulations implementing Title III of the ADA “in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the [web], accessible to individuals with disabilities,” were under consideration. *Non-discrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations (NPR)*, 75 Fed. Reg. 43460-01, 2010 WL 2888003 (July 26, 2010). However, no regulations applicable to private businesses have been promulgated to date.

Notably, however, under section 508 of the federal Rehabilitation Act (29 USC 794d), the U.S. Accessibility Board has issued final rules relating to accessibility requirements applicable to federal agencies and companies that do business with federal agencies. IT Accessibility Laws and Policies, <https://www.section508.gov/manage/laws-and-policies>. Specifically, the federal government has adopted the Web Content Accessibility Guidelines (WCAG) 2.0, and made them applicable to websites, as well as other non-web electronic documents and software. Other agencies, such as the Department of Transportation, have adopted them, as well, and the DOJ has required compliance with the WCAG 2.0 standards in many consent decrees and settlements in which the United States has been a party. See *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 902 n.1 (9th Cir. 2019) *cert. denied*, 140 S. Ct. 122, 205 L. Ed. 2d 41, 2019 U.S. LEXIS 5397, 2019 WL 4921438.

Accordingly, while the WCAG guidelines do not have the force of law as applied to non-government actors or contractors because they have not been adopted by the DOJ, they are now generally held to be the appropriate standard for assessing accessibility in the private sector, as well. The guidelines, promulgated by the World Wide Web Consortium (W3C) Web Accessibility Initiative, an international consortium of

volunteers, provide criteria by which websites are judged.

These guidelines focus on several aspects of a website, including whether

- the information contained on the site is perceivable by individuals with various disabilities;
- the site is operable by individuals with disabilities;
- the site is understandable by individuals with disabilities; and whether
- the site is compatible with user tools that may be used by individuals with disabilities.

While WCAG 2.0 was released in 2008 and is still the government standard, WCAG 2.1 was made an official recommendation by W3C in June 2018 and was adopted as the standard to be used in the EU by the EU web accessibility directive that was adopted in September 2018. It includes all the existing success criteria in WCAG 2.0, with seventeen new success criteria focusing on mobile, cognition, and low vision. It is uncertain whether and when the United States will adopt WCAG 2.1.

## Reasons to Be Compliant

It is estimated that well over 90 percent of websites are not ADA compliant. Taking steps to enhance website compliance with the ADA compliance is not just the law and the right thing to do, it makes good business sense. According to the CDC, it is estimated that

- 13.7 percent of people with a disability have a mobility disability, with serious difficulty walking or climbing stairs;
- 10.8 percent of people with a disability have a cognition disability, with serious difficulty concentrating, remembering, or making decisions;
- 6.8 percent of people with a disability have an independent living disability, with difficulty doing errands alone;
- 5.9 percent of people with a disability are deaf or have serious difficulty hearing;
- 4.6 percent of people with a disability have a vision disability, with blindness or serious difficulty seeing even when wearing glasses; and
- 3.6 percent of people with a disability have a self-care disability, with difficulty dressing or bathing.

Disability Impacts All of Us, CDC, <https://www.cdc.gov>.

The same CDC document shows that 3.8 percent of the population without disabilities have heart disease. Yet, numerous commercials appear every day for heart disease, and there are businesses that devote significant advertising to lure in this demographic. The number of disabled people who are potential consumers should warrant attention for business reasons. Nevertheless, there could be millions of potential customers, clients, and consumers whose business may be lost due to a company's lack of online accessibility.

Beyond the loss of potential customers, an inaccessible website can result in costly and distracting lawsuits brought pursuant to the ADA. According to the federal government, although civil rights cases overall have declined, cases brought under the ADA “have increased three-fold in recent years.” *Just the Facts: Americans with Disabilities Act*, United States Courts (July 12, 2018), <https://www.uscourts.gov>. Most of the increase in cases is related to claims other than employment discrimination.

The number of website accessibility cases filed, in particular, has grown by leaps and bounds. The number of ADA website accessibility cases has increased from just a few in 2015 to more than 2,000 in 2018. According to Usable.net, the ADA Web accessibility cases increased 181 percent from 2017 to 2018, with 2,285 suits being filed. Jason Taylor, 2018 ADA Web Accessibility Lawsuit Recap Report [Blog], Usable.net (December 26, 2018), <https://blog.usablenet.com>. Other sources claim that the number of web accessibility lawsuits broke the 10,000 mark in 2019. *Web Accessibility Lawsuits: What's the Current Landscape?*, Essential Accessibility (May 6, 2020), <https://www.essentialaccessibility.com>. Regardless of the actual number of suits that have been filed, the frequency of filing is expected to grow exponentially as the plaintiffs' bar recognizes the opportunities in commencing such claims. If the statistics during and after the stay-at-home orders flowing from the pandemic were issued are any indication, the number of cases is likely to continue to increase.

Usable.net looked at the data since the pandemic began in the United States and recently released statistics of new filings and made certain observations of trends. While a slight slowdown in filings was seen

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at the end of March into early April, when the ability to file lawsuits may have been hampered by COVID-19, increased activity was seen in late April when lawsuits were being filed at a record pace, with one lawsuit being filed every working hour. *ADA Accessibility Lawsuits During Coronavirus*, Usable.net (June 3, 2020), <https://blog.usablenet.com>.

With such a large percentage of sites failing compliance assessments, and as more plaintiffs' attorneys learn about this area of the law, the number of lawsuits could rise significantly. At this point, many major national companies have already been targeted, and the plaintiffs' bar is now turning to smaller, regional, and even mom-and-pop businesses and organizations. It also should be noted that as of 2018, lawsuits had commenced primarily in a few targeted jurisdictions, with significant percentages of the cases being brought in New York, California, and Florida, with approximately two thirds of the cases being filed in ten states.

Liability under the ADA for accessibility claims is strict, meaning that there are no obvious defenses for failing to comply. Although plaintiffs cannot be awarded damages on these claims under the federal statute (certain states, such as California, do provide for damages to be awarded under state statutes), their successful attorneys are entitled to attorneys' fees and costs, and even beyond the potential fee awards, the costs to businesses can be significant. These types of claims are typically not susceptible to disposal on a motion to dismiss, as plaintiffs will identify at least one and often many accessibility barriers. Moreover, courts understandably have been very receptive to the claims, as they are intended to vindicate the rights of individuals with disabilities.

Suits alleging barriers to website accessibility are not solely brought under federal law, however. New York and California each have state accessibility laws that do permit the recovery of damages, unlike the ADA, which perhaps explains why those states have the highest number of cases filed. ADA violations also may carry fines. As such, injunctive relief and attorneys' fees are not the only concern a business should have.

The costs of a lawsuit and the distractions associated with a lawsuit should encourage all website operators to become compliant. Moreover, in addition to the time and money required to resolve these claims, there is a real danger of damage to the company's brand and public relations. If remedial measures are not undertaken—

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and in some cases even if they are, but they are inadequate or too slow—a company may be a target more than once.

### Examples of Lawsuits

A plaintiff may bring a claim under the ADA where he or she is disabled within the meaning of the ADA and believes that he or she

has been denied a full and equal opportunity to enjoy the services that the defendant provides in connection with owning, leasing, or operating a “place of public accommodation.” Discrimination can come in various forms, such as (1) failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to accommodate the needs of individuals with disabilities to allow them equal access to the goods, services, and facilities that constitute the public accommodation; or (2) failure to take necessary steps to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services. 42 U.S.C. §12182(b)(2)(A)(ii)–(iii). The only exception is where modifications or provision of auxiliary aids and services would fundamentally alter the nature of the goods, services, and facilities being provided.

While in the past some courts questioned whether websites and applications constituted places of public accommodation for purposes of the ADA because they are not “physical” locations, there is a growing consensus that they should be treated as such. Certain courts, in particular the Third, Sixth, Ninth, and Eleventh circuits, held that inaccessibility of a website ran afoul of the ADA only if it affected an individual's ability to access the goods and services at the company's physical locations fully, whereas if the company had only a website and no physical locations, the ADA would not apply. *See, e.g., Nat'l Fed'n of the Blind v. Target Corp.*, 452 F.Supp. 2d 946, 949056 (N.D.Cal. 2006); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011); *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 2017 U.S. Dist. LEXIS 91187, 2017 WL 2609330, at 5 (S.D. Fla. Mar. 15, 2017); *Robles*, No. 17-55504, 2019 WL 190134, at 4; *Gniewkowski v. Lettuce Entertain You Enterprises, Inc.*, 251 F. Supp. 3d 908, 917 (W.D. Pa. 2017).

Other courts, however, including courts in the First, Second, and Seventh circuits, have held that “public accommodations” are not necessarily limited to physical facilities and can include websites, regardless of whether the accessibility of the website affects an individual's ability to access goods and services in a physical location fully.

See, e.g., *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F.Supp.2d 196, 200–02 (D. Mass. 2012); *Access Now, Inc. v. Blue Apron, LLC*, 2017 U.S. Dist. LEXIS 185112 (D.N.H. 2017); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 385 (E.D.N.Y. 2017); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456 (7th Cir. 2001). Considering that most online-only businesses in the United States are nationwide, and there is a growing trend in recognizing online-only businesses as dominant businesses in industry, it is clear that all online businesses should be concerned with accessibility in light of these rulings from the First, Second, and Seventh Circuits.

Ensuring that websites are accessible by people with disabilities is not just the concern of the United States. While the ADA is directed specifically at conduct in the United States, it is not the only country that regulates such conduct. With many businesses operating websites that target individuals in other countries, or with international businesses targeting U.S. customers, website operators have reasons to ensure that their websites are accessible. For example, a business that caters to U.S. as well as UK customers may be required to comply with the Equality Act of 2010 and subsequent regulations. And, businesses located in other countries that allow their websites to conduct business with U.S. residents can find themselves on the wrong side of the issue. For example, the Scandinavian Airline System (SAS) was directed to cease and desist providing a separate website for persons with disabilities instead of ensuring that its primary website was compliant with the WCAG 2.0 standards, and SAS was further ordered to pay a \$200,000 penalty. See *Scandinavian Airline System Order 2018-11-8*, U.S. Department of Transportation, <https://www.transportation.gov>.

At this point, it appears that many defendants settle the claims and often enter into consent decrees that impose particular monitoring and compliance requirements, while a court may retain jurisdiction over enforcement. This means that a case may be settled, but the issue is not fully resolved unless the accessibility issues are addressed. Moreover, even if a business resolves a claim with one plaintiff and takes steps to remediate the claimed deficiencies, there is nothing to prevent another plaintiff from filing a lawsuit

claiming the very same thing. Indeed, some businesses have been sued more than once.

A quick search online reveals that some of the biggest and most well-known companies in America have been sued for failing to comply with web accessibility standards, including Target, Apple, and Domino's Pizza. Plaintiffs have now moved on

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Similarly, if you fix the website as it currently exists, you will have a moment of compliance. But if you train the organization to avoid pitfalls and to ensure that future modifications are compliant, the organization can avoid falling out of compliance and risking exposure to future suits.

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to smaller companies and local businesses, and this exposure has become something that every business with any online presence or mobile application must recognize and begin to address.

#### What the Suits Claim

Many of these web accessibility lawsuits are brought by associations that represent disabled individuals, such as Access Now. Others are brought by “testers” who work with attorneys to visit multiple sites and identify accessibility barriers. A search of one of these plaintiff’s names in a court in which many of these cases have been filed will show that the same plaintiff may have filed dozens of lawsuits alleging ADA violations.

Many suits focus on visual disabilities, including blindness, low vision, or color-

blindness. In the case of blindness, an individual might access a website by using a screen reader. However, if a site uses pictures that are not described in text, that information is not accessible. Other common examples of disability barriers are the use of CAPTCHA (a challenge–response test used in computing to determine whether the user is human), ambiguous links that are not properly described, complex tables, and poor keyboard accessibility.

However, ADA suits also can assert barriers to accessibility based on physical limitations; for example, users who cannot operate a keyboard or a mouse may experience barriers. Individuals with hearing impairments also may experience barriers. Not long ago, Facebook was named in a suit by an individual claiming that her bipolar depression was not adequately accommodated. *Young*, 790 F.Supp. 2d 1110. Other individuals may have multiple disabilities that affect their ability to use websites.

#### Mitigation Strategies

Companies with non-compliant websites can address the infractions tactically, by correcting existing problems with their website, or strategically, by addressing the underlying problems that led to the infraction.

#### Retain Expert to Examine the Site—Tactical Approach

The generally accepted response to a demand or lawsuit asserting website non-compliance has been to make a settlement payment, agree to a remediation plan, retain an expert to audit the site, and—if the company is serious about compliance—begin the painstaking process of remediation. However, even if these steps are carried out, the website will again fall out of compliance before long and will again be the target of enterprising plaintiffs’ counsel. This is sometimes referred to as “tactical corrective action,” as the remediation efforts are focused on correcting the current problems with the website.

There are pros and cons to this approach. On the plus side, businesses need to understand where their sites are in terms of compliance, and assess the risks presented; the tactical approach does not address that need. It is specifically tailored to the



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organization and its business, allowing for flexibility in how remediation is carried out. However, there are some downsides. Appropriate responsive action requires significant buy-in from the entire organization in terms of cost and effort. Retaining an expert in this field can cost \$1,200 per day for an initial ten- to fifteen-day period of initial support, and ongoing costs of one or two days per month spent training staff to identify and remediate noncompliant conditions on the site. It requires ongoing monitoring by staff and hands-on supplier management. Content supplied or managed by third parties and consultants must also be compliant.

In addition, for an effective strategy, reporting and oversight by management is necessary. Another downside of the tactical approach is that manual assessment and remediation are not readily scalable for organizations with extensive internet presences, and can lead to inconsistent approaches, not to mention a lack of knowledge transfer if responsible individuals move on to other positions.

### **Strategic and Training Approach**

As an alternative to tactical corrective action, a company may choose to take a more holistic and strategic approach and try to fix the underlying issues that led to the infraction. As the sage proverb proclaims, give a man a fish, feed him for a day; teach a man to fish, feed him for a lifetime. Similarly, if you fix the website as it currently exists, you will have a moment of compliance. But if you train the organization to avoid pitfalls and to ensure that future modifications are compliant, the organization can avoid falling out of compliance and risking exposure to future suits.

Various vendors market the tactical corrective action, while others seek more of a strategic training module. Within that module, there are two approaches: (1) live training using a consultant and (2) automation. Whereas a live trainer can provide personalized instruction, once the trainer leaves, it is incumbent upon the company to retain the knowledge and continue to employ it. The trainer would work with the staff of a company to explain issues that led to the problem and how to avoid them in the future. In essence, a live trainer

would teach developers and website publishers how to ensure that the structure of the website remains compliant and that the content being posted is accessible. As with the tactical approach, the live trainer can be expensive, and is only effective as long as the trainer continues to train the developers and content providers. When these individuals leave, the company must rehire the consultant to train the new employees or attempt to do so itself.

Another approach is to eliminate the cost of a live trainer by acquiring a fully automated system, providing website remediation and risk mitigation services through demonstration of reasonable adjustment. Through automation, the most immediate challenge faced by most businesses is removed: understanding and documenting of the requirements and methods and ensuring that reasonable adjustment can be demonstrated. It provides an immediate starting point and a staged process.

While such an approach requires commitment from the company, it can provide a significant savings with continued training. With automation, processes outlined by the automated systems allow the business to take direct control of the remediation, albeit guided through the process. Essentially, the difference is that the automated process will put the compliance tools directly into the hands of businesses, effectively teaching them how to fish, rather than simply providing the fish, as the proverb cautions.

Demonstrating reasonable adjustment through automation addresses three stages: audit, an operational plan, and monitoring (through a documented audit trail). In the first phase, an independent audit is conducted to identify deficiencies and create a risk profile, which is then used to create a customized, milestone-based, compliance plan. The compliance plan comes with detailed guidance on steps to be taken to address accessibility barriers, including links to explanatory details and instructional videos. As the subscribers begin to work through the compliance plan, they are in the process of demonstrating “reasonable adjustment.” As milestones are met, some automated systems would provide continuous monitoring and will provide feedback.

Of course, as with any program of this type, there are downsides: the business is provided with a stark assessment of the shortcomings of its website, and the onus is then on the business to implement the recommended solutions. However, insofar as lack of knowledge is not a defense, it is better to know the full exposure than not. Nevertheless, if the business is not serious about compliance, the recognition of the risks without response could pose even greater problems from a public relations standpoint. The company risks being exposed to claims of indifference or worse. Accordingly, companies must be committed to “doing the right thing” and being compliant with the law.

### **Conclusion**

It is difficult to amass the specific skills, processes, and management required to bring a site into reasonable compliance without considerable expense and distraction to the business. This is an intimidating prospect for many, as it requires a degree of technical expertise, ongoing commitment, and attention, and it is sometimes perceived as a distraction from a company’s business. However, accessibility must be, and will continue to be, a core function of any business with an online presence.

Accessibility cannot be considered a one-off project or dealt with in isolation. It requires a consistent, systematic, and monitored approach. Indeed, it may require a change in company culture. In that respect, automation lends itself to greater efficiency and accountability. Confidence comes from taking control, and this is supported by progression. The ultimate control comes from having the additional backing of world-class legal support, while being shielded from cost exposure. With no end in sight to the current social distancing culture, and no guarantee that there ultimately will be a return to the old way of doing business, now is the time to take action to address accessibility barriers, increase inclusivity, and take control of at least one avoidable legal risk. Businesses that ignore this issue run a greater risk of exposure to lawsuits and potentially a public relations disaster. 