



Is Your City's Website ADA Compliant? What You Should Know!

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Stephanie Gutierrez, Associate, Burke, Williams & Sorensen, LLP
Traci Park, Partner, Burke, Williams & Sorensen, LLP

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Is your City's Website ADA Compliant?
What You Should Know

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Presentation By:
Traci I. Park, Partner
Stephanie Gutierrez, Associate
Burke, Williams & Sorensen, LLP
444 S. Flower Street, Suite 2400
Los Angeles, California 90071-2953
T: 213.236.2883; TPark@bwslaw.com

I. OVERVIEW

The Americans with Disability Act (“ADA”) has been law since 1990. This federal statute prohibits discrimination against disabled individuals in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public.

Title II of the ADA applies to state and local government, and prohibits discrimination by public entities against disabled individuals in all programs, activities, and services. Among other things, Title II requires public entities to reasonably modify its policies, practices, or procedures to avoid discrimination, and mandates that public entities ensure effective communication with individuals with speech, hearing, vision and other disabilities. California state law has similar requirements.

While most public entities offer a broad range of auxiliary aids and services, such as large print materials, assistive listening devices, or sign language interpreters, one area where many organizations fall short is with electronic and information technology. The internet age has made the provision of information about municipal programs, activities, and services such as applying for permits, paying bills, and renewing licenses online standard practice for many public agencies. However, little attention has been given to ensuring that such electronic information, access, and services are equally accessible to individuals with disabilities.

Poorly designed websites and mobile-based applications can create barriers for people with disabilities, just as poorly designed buildings prevent some people with disabilities from entering. Access problems often occur because website designers mistakenly assume that everyone sees and accesses a webpage in the same way. Many people with disabilities use assistive technology, such as screen readers, text enlargement software, or programs that enable people to control a computer with their voice instead of a mouse or keyboard.

Unfortunately, the lack of regulatory guidance on exactly what needs to be done to ensure website and mobile applications are ADA-compliant has been stalled. In 2010, the Justice Department began to draft formal regulations for websites to meet ADA goals. However, in 2017, the DOJ announced that it was withdrawing its rulemaking process in alignment with the Trump administration’s rollback of federal regulations.¹ This lack of guidance has fueled the proliferation of ADA web accessibility litigation.

II. ADA WEB ACCESSIBILITY LITIGATION IS ON THE RISE

When Congress passed the ADA in 1990, the Internet was in its infancy. However, Congress intended that the ADA “...keep pace with the rapidly changing technology of the times.”² Congress acknowledged that technological advances may “...require public accommodations

¹ <https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced>

² H.R. Rep. No. 101-485, pt. 2, at 108.

to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities.”³

An emerging legal issue is whether and to what extent the ADA protections extend to the digital world. In the last couple of years, thousands of lawsuits against both public and private entities have been filed in state and federal court. Of those, at least 4,249 arose in California federal courts in 2018 alone.⁴ While the Department of Justice (“DOJ”) has consistently maintained that the ADA applies to websites, federal and state courts are now following suit.

Among the common issues being raised in the trending ADA web accessibility litigation are websites and applications not compatible with screen readers, lack of refreshable Braille displays, lack of alternative text for images, graphics, and links, lack of closed captioning for video content, and lack of resizable text. The vast majority of these cases have resulted in settlements mandating that the business or government website be updated and made accessible to disabled users. The settlements specifically require compliance with Web Content Accessibility Guidelines (WCAG). These guidelines are intended to provide “a single shared standard for web content accessibility that meets the needs of individuals, organizations, and governments internationally.”⁵

Numerous public entities across the nation have entered into settlement agreements due to alleged violations of the ADA. For example, in 2015, as part of a settlement between Merced County and the DOJ, the County agreed to remove any barriers preventing full access to its website. The United States, pursuant to 28 C.F.R. Part 35, Subpart F, reviewed Merced County’s programs, activities, services and facilities to ensure compliance with Title II of the ADA. The United States “concluded that qualified individuals with disabilities are, by reason of such disabilities, excluded from participation in or are denied the benefits of many of Merced County’s programs, services, or activities.”⁶ Through this compliance review, the United States required Merced County to “...establish, implement and post online a policy that their web pages be accessible, create a process for implementation and ensure that all new and modified web pages are accessible.”⁷ The settlement further required the County to:

"Retain an independent consultant, approved by the United States, who is knowledgeable about accessible website development, title II of the ADA, and WCAG 2.0 to evaluate Merced County's website and any proposed online services for compliance with the ADA and, at minimum, WCAG 2.0 Level A and Level AA Success Criteria and other Conformance Requirements (WCAG 2.0 AA), and who shall be responsible for the annual website accessibility evaluation. Merced County will bear all costs and expenses of retaining and utilizing this independent consultant, including the costs and expenses of any staff. Merced

³ *Id.*

⁴ Minh N. Vu, Kristina M. Launey & Susan Ryan, Number of ADA Title III Lawsuits Filed in 2018 Tops 10,000 ADA Title III (2019), <https://www.adatitleiii.com/2019/01/number-of-ada-title-iii-lawsuits-filed-in-2018-tops-10000/> (last visited Jul 24, 2019).

⁵ w3c_wai, Web Content Accessibility Guidelines (WCAG) Overview Web Accessibility Initiative (WAI), <https://www.w3.org/WAI/standards-guidelines/wcag/> (last visited Jul 24, 2019).

⁶ Department of Justice Case No. 204 11E 383

⁷ *Id.*

County will compensate this independent consultant without regard to the outcome."⁸

In March 2019, Flagler County in Florida settled an ADA web accessibility lawsuit brought by visually impaired individuals who were unable to access PDF files of agendas and budgets posted on the County website. According to the County's Communications Director, the County website contained more than 7,500 informational documents posted in PDF format that must be reformatted and republished to make the website ADA compliant.

As a precautionary measure, some cities have even stopped broadcasting city meetings on-line until they can acquire the equipment to add closed-captioning for deaf or hearing impaired viewers.

Many state and private colleges have been the targets of ADA web accessibility actions. For example, the University of California, Berkeley, was investigated by the DOJ for failing to ensure its free audio and video content available online to the public through its YouTube channel, iTunes U platform, and its Massive Open Online Courses ("MOOCs") was accessible to individuals with hearing, visual, or manual disabilities.⁹ The DOJ's Letter of Findings concluded, "Based on our findings of accessibility barriers, we conclude that UC Berkeley is in violation of title II because significant portions of its online content are not provided in an accessible manner when necessary to ensure effective communication with individuals with hearing, vision or manual disabilities. In addition, UC Berkeley's administrative methods have not ensured that individuals with disabilities have an equal opportunity to use UC Berkeley's online content. While the University of California's Information Technology Accessibility Policy adopts the WCAG 2.0 AA technical standard, which provides clear parameters for ensuring online content is accessible to individuals with disabilities, UC Berkeley has not ensured compliance with its policy...Finally, UC Berkeley has not established that making its online content accessible would result in a fundamental alteration or undue administrative and financial burdens.¹⁰ Among other remedial measures, UC Berkeley was ordered to develop a system to monitor compliance with the technical standards embodied in its policies, develop and implement procedures to ensure that its on-line content is accessible to individuals with vision, hearing, and manual disabilities, develop mechanisms and implement procedures for UC Berkeley to solicit, receive and respond to feedback regarding any barriers to access to the online content, and to Pay compensatory damages to aggrieved individuals for injuries caused by UC Berkeley's failure to comply with title II.

Similarly, in *Aleeha Dudley and United States v. Miami University, et al.*¹¹, a blind plaintiff filed an action against Miami University alleging that Miami University uses technology in its programs, services, and activities that are inaccessible to individuals with disabilities in violation of Title II of the ADA. The case was resolved in 2016 by consent decree, under which, Miami University would, within six months, make significant improvements to ensure that all forms of technology are accessible to individuals with disabilities. The Court also identified individuals to whom Miami University will provide a monetary payment of \$25,000.00.

⁸ *Id.*

⁹ Department of Justice Case No. 204-11-309

¹⁰ *Id.*

¹¹ 2016 WL 8814603 (S.D.Ohio)

Notably, the Ninth Circuit on January 15, 2019 re-affirmed this premise in *Robles v. Domino's Pizza, LLC*.¹² Although the suit was brought forth as a violation under Title III of the ADA, the same considerations have been made in settlement agreements with public entities. Robles, a visually impaired plaintiff, accesses the internet using screen reading software. On multiple occasions, he had attempted to order a customized pizza online from a nearby Domino's. Unable to do so, Robles filed suit seeking damages and injunctive relief. The Ninth Circuit held that "the ADA mandates that places of public accommodation, like Domino's, provide auxiliary aids and services to make visual materials available to individuals who are blind."¹³ The Court furthermore found, "[t]his requirement applies to Domino's website and app, even though customers predominantly access them away from the physical restaurant: 'The statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute.'"¹⁴ The Court clarified that the ADA equally applies to Domino's app: "...Domino's website and app facilitate access to the goods and services of a place of public accommodation – Domino's physical restaurants. They are two of the primary (and heavily advertised) means of ordering Domino's products to be picked up or delivered from Domino's restaurants." Although the Ninth Circuit did not expressly outline what Domino's must do to satisfy these requirements, the Court did note that ADA accommodations must be "effective." On June 13, 2019, Domino's filed a petition asking the U.S. Supreme Court to review and reverse this decision.

Most recently, on September 3, 2019, the California Court of Appeal, Second Appellate District, Division Eight, published an opinion that affirmed the premise that the ADA mandates restaurant websites be accessible to customers using screen reader software. In *Thurston v. Midvale Corporation*¹⁵, a blind plaintiff brought a suit against Midvale Corporation alleging violation of the Unruh Civil Rights Act¹⁶ and the ADA, stating she could not access their Whisper Lounge restaurant website with her screen reader software. Unlike *Robles*, where the Ninth Circuit did not expressly outline what Domino's must do, the Court of Appeal expressly mandated compliance with WCAG 2.0 standards stating, "...the trial court determined appellant [Midvale Corporation] could not or would not redesign its website to comply with ADA standards without specific guidance, and so it selected what it believed to be a widely used technical standard to provide guidance."¹⁷ Citing *Robles*, the Court further confirmed its ability to mandate compliance with WCAG 2.0 standards stating, "A court 'can order compliance with WCAG 2.0 as an equitable remedy if, after discovery, the website and app fail to satisfy the ADA.'"

Here in California, state and federal courts have seen a significant uptick in the number of ADA web accessibility cases filed in recent months, most seeking injunctive relief, an order directing the defendant to bring its website into full compliance with the ADA, and attorney's fees and costs. Although an individual may not be awarded punitive damages in a Title II action,

¹² 2019 WL 190134

¹³ *Robles v. Domino's Pizza, LLC*, 2019 WL 190134, See also 28 C.F.R. § 36.303

¹⁴ *Robles v. Domino's Pizza, LLC*, 2019 WL 190134 citing *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006)

¹⁵ 2019 WL 4166620

¹⁶ Civ. Code § 51 et seq.

¹⁷ *Thurston v. Midvale Corporation, Supra.*

compensatory damages, injunctive relief, attorney fees, and reimbursement of costs for violation of the ADA under 42 U.S.C. § 12133 are available to a plaintiff who prevails on an ADA claim.

The Governor has also signed into law Assembly Bill 434 entitled “State Web Accessibility: Standard and Reports.” The Assembly Privacy and Consumer Protection Committee stated in its bill analysis, “[A]ccording to a 2014 Bureau of State Audits (BSA) report on state government Internet Web site accessibility (2014-131), BSA found that the state websites they reviewed were ‘not fully accessible.’ 47% of Californians report using the internet to access government services, yet despite the high levels of usage, BSA found violations of applicable accessibility standards on each department's website.”¹⁸ As a result, AB 434 requires the director and chief information officer (CIO) of each state agency or state entity to post a signed certification on the front page of the state agency's Internet Web site that it is in compliance with WCAG 2.0 accessibility standards before July 1, 2019.¹⁹ Although this new law only applies to state agencies, laws requiring the same of local governments are likely to be established in the future, and compliance with AB 434 by local governments would certainly be a best practice to avoid, or at least defend against, ADA web accessibility lawsuits.

III. COMMON PROBLEMS AND SOLUTIONS TO WEBSITE ACCESSIBILITY

There are a number of basic web-based hurdles that can lead to ADA claims. For example, vision-impaired people may use different technologies to access information displayed on a computer screen. One common tool is a screen reader, which speaks the visible text, but this technology cannot read or interpret visual data, such as images, graphics, or logos, even if words appear in those items. Thus, a photo of the mayor on a city's website would remain inaccessible to a visually impaired user using a screen reader. A relatively simple solution is to add a text caption, such as “Photograph of Mayor Smith greeting children at the library.” For more complex images, such as a map of city library locations, a text equivalent could simply provide the addresses.

Another common problem is documents posted online in PDF format. Like photos, a PDF is an image based format that cannot be viewed by a text reader. To address this barrier, documents should also be posted in HTML or RTF format, which is more compatible with assistive technologies.

Similarly, videos and other multimedia content can present access problems for hearing or vision impaired users. To address this, consider incorporating features such as audio descriptions of images and text captions synchronized to the video images.

Some visually-impaired users may only be able to see web content if it appears in certain colors, and others cannot see it at all if it is too small. Users should be able to manipulate the color and

¹⁸ California Legislative Information, Bill Text - AB-434 State Web accessibility: standard and reports., http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB434 (last visited Jul 24, 2019).

¹⁹ WCAG 2.0, a set of guidelines established by the World Wide Web Consortium, defines how to make web content more accessible to people with disabilities. Section 508 of the federal Rehabilitation Act incorporates these standards for local government websites if the government agency receives any federal funding.

font settings in their web browsers or operating systems to make pages readable. Avoid designing your agency's website so that these features cannot be adjusted by an individual user.

When navigation links are used, people who use a screen reader must listen to all the links before proceeding. A "skip navigation" link at the top of the webpage allows people who use screen readers to ignore navigation links and skip directly to webpage content.

An agency with an inaccessible website may also meet its legal obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed telephone information line. These alternatives, however, are unlikely to provide an equal degree of access in terms of hours of operation and the range of options and programs available.

III. WHAT CAN BE DONE TO MEET ADA OBLIGATIONS?

There are several things public agencies can do to ensure they are meeting their obligations under the ADA. First, establish, implement, and post a policy on your web pages indicating that it will be accessible to disabled users, and then create a process for implementation. Second, work with IT professionals to ensure your web-based content and subsequent updates are accessible to disabled users. Third, train in-house staff and contractors responsible for webpage content and development on compliance issues. Fourth, provide a way for visitors to request accessible information or services by posting a telephone number or email address on your home page and ensure a quick response to users with disabilities who are trying to obtain information or services in this way. Finally, ensure that there are alternative ways for people with disabilities to access the information and services that are provided on your website. Remember, some people may not have, or be able to use, a computer at all.

For additional resources, please see:

ADA Best Practices Tool Kit for State and Local Governments

<https://www.ada.gov/pcatoolkit/chap5toolkit.htm>

Accessibility of State and Local Government Websites to People with Disabilities

<https://www.ada.gov/websites2.htm>

Web Content Accessibility Guidelines

<https://www.w3.org/WAI/standards-guidelines/wcag/>