

LEGAL

## Is your app ADA compliant?

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As with other institutions, most enterprises across sectors including fintech are required to provide accommodation, modification of policies and services, and effective communication under the Americans with Disabilities Act (ADA).

Regulators have taken a statute that focused on bricks-and-mortar locales and applied it to digital goods and services, such as websites, mobile applications, kiosks and other technology. Requirements for online-only enterprises, however, remain somewhat unresolved.

Title III of the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."

Many sectors' facilities, including financial services', qualify as places of public accommodation, and customers with mobility, visual, hearing or mental disabilities are all protected under Title III.

Every federal court that has addressed this issue has found some legal obligation to provide accessible websites and mobile apps to customers with disabilities where there is also a tie to bricks-and-mortar spaces open to the public.

However, no mandatory regulations exist for digital technology. At this time, most of the effort is aimed at improving access for individuals with visual and hearing impairments.

Filling the guidelines gap

The World Wide Web Consortium (W3C) has developed standards and guidelines for building a Web based on the principles of accessibility.

The W3C's Web Content Accessibility Guidelines (WCAG) 2.0 became an International Organization for Standardization (ISO) standard in 2012 and were updated in 2018, resulting in the new prevailing standard of WCAG 2.1, Level A and AA.

Most of the requirements under WCAG 2.1, Level A and AA concern the accessibility of mobile applications.

Although WCAG provides three levels of compliance, with levels A and AA being considered mandatory on accessibility. AAA covers many "nice-to-have" elements that enhance usability.

accessibility, and several many sites to have elements that enhance usability.

There have been lawsuits filed by plaintiffs, the U.S. Department of Justice (DOJ), and advocacy groups based on violations of these guidelines.

WCAG 2.2 is currently in draft form and anticipated to be issued soon. This latest update will provide alternative means of conformance, such as including suggestions on auto-populating to reduce redundant entries and a constant help function, among other additions.



*Beth Joseph*

### DOJ driving decisions

For some time, the DOJ was expected to issue new regulations requiring websites and mobile applications to comply with the basics of WCAG.

While the government indefinitely postponed this action, the existing regime represents a relatively consistent set of worldwide standards that has been helpful for enterprises with international operations.

Moreover, the courts have been largely, if not unanimously, in agreement with what oversight DOJ has provided.

Across jurisdictions, primary areas of litigation include the following:

- Accessibility of websites/mobile applications
- Accessibility of in-facility technologies
- Accessible parking, signage, or facility layout

While the latter two areas may not appear to apply to online-only operations, recent legal developments indicate that these services might come under increased scrutiny.

At the federal regulatory level, the landscape has changed dramatically under the current administration.

For example, when addressing accessibility, DOJ now might expand discovery to all sorts of other operations or enterprises:

- Kiosk technology
- Covid vaccine information
- Customer communications generally
- Organizations receiving federal funding
- Pension services

As for accessibility itself, consent decrees and settlement agreements have required websites and mobile apps to become accessible within a certain timeframe, independent of the original complaint.

While DOJ has not issued regulations, it did introduce new guidance in March 2022, suggesting a renewed emphasis of the department's earlier views that even web-only businesses are subject to Title III and must be accessible to persons with disabilities.

While the DOJ's guidance states that businesses "can currently choose how they will ensure" web accessibility, it identifies WCAG as providing "helpful guidance," noting the federal government uses those for its own websites.

U.S. states take action, too

Many states have enacted their own accessibility laws, some of which allow for civil penalties and the recovery of monetary damages by plaintiffs.

In California, the Unruh Act provides for \$4,000 in damages per access violation, plus costs and attorneys' fees. The Disabled Persons Act authorizes minimum damages of \$1,000 per violation.

Other states with similar laws authorizing individual damages include New York (state and New York City law), Colorado, Hawaii, Massachusetts, South Carolina and Texas.

In June, California legislators proposed a new state law that would require WCAG 2.1, Level A and AA, as a mandatory standard for websites and mobile apps, a higher standard than what DOJ currently advocates. It would also require that websites and mobile apps themselves provide "effective communication."

Providers should stay vigilant: As written, this provision would be effective immediately upon enactment without a transition period.

Bricks-and-mortar issues still standing

Enterprises with physical edifices must be mindful of the same litigation risks of restrooms and paths of travel as other businesses.

Risk mitigation includes training associates to spot and report issues with any of the following key litigation triggers:

- Inadequate restroom signage and accessibility
- Failure to provide restroom paper towels, soap, mirrors, grab bars and hooks at the wrong levels
- Failure to wrap pipes under sink(s)
- Poor maintenance of lifts, elevators and ramps
- Inaccessible service counter heights
- Insufficient employee training to accommodate service animals, and emotional support animals in some states
- Failure to open/use the ADA-accessible teller line
- Failure to provide ADA-accessible parking and/or the appropriate signage for van accessible spaces, for example

ALL PROVIDERS should make provision for regular updates of policies.

Likewise, they should revisit audit plans on a regular basis. Then, execution is paramount: Audits should be regular, and remediations should be timely.

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