

Does Your Website Comply With the ADA? Does It Even Need To?

Webinar Q&A Document

On Tuesday, November 14, 2017, Pepper attorneys Charles S. Marion, Jeffrey M. Goldman and Tracey E. Diamond spoke on a webinar to explore whether the ADA applies to websites, analyze trends and review recent decisions in these ADA/website cases, and discuss best practices regarding whether and how your company should address the website accessibility issues that have been raised in the lawsuits filed to date. A recording of the webinar can be found at <http://www.pepperlaw.com/events/webinars/does-your-website-comply-with-the-ada-does-it-even-need-to-2017-11-14/>.

There were a number of questions that our speakers did not have time to address during the webinar. Below are answers to some of those questions. We have removed the attendee names who asked the question so we can share the answers broadly and allow everyone to benefit from the answers.

Q: Last year you addressed whether a business-to-business website, for which a password was required, could be a place of public accommodation. Is there any more authority on that issue?

A: We have not seen any case law on this question but it seems to us an argument could be made that such a private, password-protected, business-to-business website is not a "public accommodation."

Q: Private companies also constitutes private universities, correct?

A: Generally speaking, yes, private universities are treated as private companies for purposes of ADA. In other words, private universities are subject to Title III of the ADA. However, if a private university receives federal funding, it can be subject to the Rehabilitation Act and fall under the governance of the Department of Education's Office of Civil Rights. As we discussed during the Webinar, the Rehabilitation Act requires website compliance with WCAG 2.0. We would be happy to discuss this or any other compliance issues with our attendees.

Q: How will new requirements address responsive design for mobile and tablet website versions?

A: Working drafts of the updated WCAG 2.1 have noted that the principles behind WCAG 2.0 are applicable to mobile sites, including those using responsive design. The 2016 Editor's Draft addressing how WCAG 2.0 and Other W3C/WAI Guidelines Apply to Mobile identified some responsive design best practices (i.e., navigation menus may be hidden on small screen devices unless the user taps the menu button) , but did not account for how these practices may make mobile website navigation more difficult for a blind or low-vision individual. However, WCAG 2.1 has not yet been finalized, so there is room for the recommended best practices to change. Because the courts have largely accepted WCAG 2.0 AA as a standard, it appears wise to bear those guidelines in mind when developing a mobile website version, at least for the time being.

Q: A) Given the complexities and associated costs to adhere to potential compliance, what is perceived impact on small to medium cap businesses, esp those w/o IT personnel? Can you provide the ratio of small businesses versus big businesses involved in ADA-related suits? Is there consideration for financial burden for small businesses? (Many do not have the resources that large cos possess.) B) Based on current cases, what is considered reasonable time for company to address issue? C) Should a "science" tutorial event occur, thoughts on whether costs will be addressed, to include transferring such to consumers? D)With regard to discovery & the request for other users' attempts to access website, to what degree can company be in violation to existing and future data governance & protection regulations?

A: Unfortunately, there are no easy answers at this time. Both defending such claims in court, as well as hiring a consultant to bring a company's website into compliance can be costly. We have seen these cases settle for relatively modest amounts. However, depending on the scope of the business, one settlement will not prevent other plaintiffs from bringing suit. Most of the cases tend to target larger names with a national brand. However, that is not always the case.

In terms of a reasonable time for a company to address the issue, we have seen a range of six months to two years permitted to bring a website into compliance.

The Eastern District of New York court, in *Andrews v. Blick Art Materials, LLC*, 2017 U.S. Dist. LEXIS 121007 (E.D. N.Y. August 1, 2017), was the first court that we know of to mandate a science day. The court did not address the issue of costs and, presumably, each party was expected to bear its own costs and expert witness fees. In terms of discovery during litigation, some plaintiffs have attempted to seek discovery of other users' attempts to access a company website, which is quite broad and expensive. The company could object to such discovery requests. Under those circumstances, the plaintiff would have to ask the court to compel disclosure, which would give the company an opportunity to limit the scope of the discovery. Alternatively, the company could attempt to get the plaintiff to agree to a protective order that compels production of the information but limits its use. Both options could reduce liability.

In order to give you an accurate response to your other questions, we would appreciate the opportunity to discuss your company's individual situation and obtain a bit more clarity. Please let us know if you would like to schedule a call to discuss in further detail.

Q: At some point I would be interested in understanding if 3rd party web developers should be expected to guarantee / indemnify their customers that the web development work they do meets the WCAG 2.0 Guidelines.

A: More and more, we are seeing companies and universities include representations, warranties, and, yes, indemnification provisions in their agreements with third party web developers with respect to WCAG 2.0 compliance. These provisions typically favor the companies and universities. As we discussed during our presentation, there are several issues and problems with staying in compliance with WCAG 2.0, so the existence and extent of any guaranties or indemnities will really be a matter of risk tolerance and business needs on both sides of the equation. We would be happy to discuss further, at your convenience.

Q: My client is a CA nonprofit social services organization. Does the ADA apply to all content on the site, or just those parts of the website describing the services that are provided?

A: Assuming your client's website is sufficiently integrated into its brick-and-mortar operations, and assuming it is considered a place of public accommodation, then California courts would likely hold that the ADA applies to all content on the site. We have not yet seen a case in California that parses between website sections that are tied into the brick-and-mortar, and those that are not, so the safer route is to ensure total compliance (particularly in light of California's Unruh Act, which we've seen courts hold applies to websites with no connection to a brick-and-mortar!). Please don't hesitate to reach out if you or your client have further questions.

Q: If one's main location is on Ohio, but offers online services (education for private university), which jurisdiction controls? Ohio? or the resident's home?

A: There is some flexibility here under the Federal Rules of Civil Procedure, and plaintiffs have the option of bringing an ADA claim in the federal district court where the defendant is located, or in the federal district court where a substantial part of the acts or omissions resulting in the claim occurred—commonly the plaintiff's state of residence, where he or she used their computer to access the website. While either location is possible, we have seen that typically plaintiffs file actions in their home districts, which is why we see the repetitive litigation in a few federal district courts.

Q: Do the ADA compliance rules differ for non-profit companies / universities?

A: The cases interpreting the ADA and websites do not distinguish between the for-profit or non-profit nature of the company or university. Rather, the issue is whether the company or university is a place of public accommodation and, depending on the state, the degree of interconnectivity between the website and the company/university.

On the university front, note that public universities are subject to Title II of the ADA which mandates WCAG 2.0 compliance. Likewise, any university that receives federal funding can be subject to the Rehabilitation Act, and hence, must comply with WCAG 2.0. Please do not hesitate to contact us with any further questions.

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