

Locke Lord QuickStudy: Website Accessibility: Recent Attempts to Clarify Accessibility Obligations

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Despite numerous attempts to define and address accessibility standards for websites and mobile applications, whether through proposed regulatory guidance or legislation or case law, uncertainty continues. The most recent federal appellate court decision addressing whether websites are covered by the Americans with Disabilities Act (ADA), another attempt at legislation to curb website accessibility litigation, and the forthcoming WCAG 2.2 standard all are described below. The Supreme Court previously declined to weigh in on the issue, and the Department of Justice has indicated businesses have flexibility in providing accessible websites. Until the Supreme Court resolves the federal circuit split or new legislation is enacted, businesses covered by Title III of the ADA and analogous state laws are left to consider how best to improve accessibility to their websites and mobile applications despite this uncertainty.

The 11th Circuit Finds Websites Are Not Public Accommodations

There currently exists a split among the federal circuit courts of appeal as to whether websites are places of public accommodation under the ADA. The First Circuit and district courts under the Second Circuit umbrella have expressly concluded that a website can be a place of public accommodation independent of any connection to a physical location (e.g., online-only stores), and the Seventh Circuit has at least implied that it will hold similarly when properly presented with the question. On the other side, the Ninth Circuit has expressly adopted the “nexus” test, holding that a website may be considered a place of public accommodations only if there is a sufficient nexus to a physical place that is otherwise covered by the ADA. The Third and Sixth Circuits have similarly adopted the “nexus” test as to goods and services, but have not yet applied it to websites.

On April 7, 2021, the Eleventh Circuit resolved its stance on this issue, holding that websites are *not* public accommodations and declining to adopt the nexus test. Instead, the court created a new standard: whether the lack of website accessibility created a tangible barrier to the physical location of a public accommodation. In *Gil v. Winn-Dixie Stores*, the plaintiff was legally blind and relied on screen reading software in order to read and use Winn-Dixie’s websites and applications. Gil found that Winn-Dixie’s website was not compatible with screen reading software and was, therefore, inaccessible to him. So he brought suit under the ADA.

The District Court found that Winn-Dixie’s website violated the ADA, ruling that though the website was not a “public accommodation,” there was a sufficient nexus between the physical place and the website. On appeal, the

Eleventh Circuit reversed. Taking a strict, plain language reading of the ADA, the court unequivocally held that websites are not public accommodations. The court went on to opine that because Winn-Dixie's website and app had limited functionality, such as refilling prescriptions and downloading electronic coupons, and was not a "point of sale," the inaccessible website also did not constitute an intangible barrier to communicating with its physical stores.

The Eleventh Circuit distinguished its holding from the Ninth Circuit's rationale in *Robles v. Domino's Pizza*, which was the case the Supreme Court declined to take up on review, both factually (because no sales are made through the Winn Dixie website) and legally, by rejecting the "nexus" standard central to the Ninth Circuit's view. Perhaps this new split between circuits may now stimulate Supreme Court review. If not, businesses will need to continue to interpret and apply the courts' conflicting guidance as best they can as determined by their locations, and digital accessibility lawsuits will continue to be filed in forums most favorable to plaintiffs.

H.R. 1100 Seeks To Define Websites as Public Accommodations, Establish Compliance Standard

In an effort to slow down the flood of ADA accessible website and mobile app cases, Reps. Lou Correa (D-CA) and Ted Budd (R-NC), had introduced H.R. 8478, the Online Accessibility Act (the "Act") in October 2020. The bill was reintroduced as [H.R. 1100](#) on February 18, 2021, with Rep. Richard Hudson (R-NC) adding his support.

If passed, the Act would:

1. amend the ADA to add a new Title VI specifically prohibiting discrimination by "any private owner or operator of a consumer facing website or mobile application" against individuals with disabilities;
2. establish digital accessibility compliance standards to be drafted by the Access Board; and
3. create a mandatory administrative process that claimants must exhaust before filing a lawsuit.

As currently worded, the Act would confirm the ADA's applicability to websites and mobile apps; something courts cannot agree on. More importantly, the Act would establish an identifiable compliance standard by deeming as ADA compliant any website and mobile application that is in "substantial compliance" with the Web Content Accessibility Guidelines ("WCAG") 2.0 Levels A and AA, or any subsequent version of WCAG published by the World Wide Web Consortium ("W3C"). For websites that are not in substantial compliance with the WCAG, the bill would authorize an "alternative means of access" that is equivalent access to the content available on the website or mobile application, and include flexibility for small business concerns.

The Act also creates a multiple-step pre-suit process to provide businesses with pre-litigation notice and an opportunity to cure. The pre-suit process under the Act would require individuals to provide notice to the website owner or operator of alleged noncompliance, provide the owner/operator with a 90-day notice and remediation period, and file a complaint with the DOJ. The U.S. Attorney General then would have 180 days to investigate and determine whether to file a civil enforcement action. If no enforcement action is filed, only then would the claimant be able to file a lawsuit. Notably, this process would involve significant administrative involvement in regulating compliance, whereas similar oversight and pre-lawsuit notice does not exist for other accessibility issues involving public accommodations.

While this Act may not please everyone, and may not address conflicting state law issues, such legislation could

establish a standard not provided currently. Moreover, it would provide significant time for pre-lawsuit notice and curb some of the monetary incentive for initiating claims. The success of the Act, however, will depend on the guidance provided by the Access Board on how to measure compliance and what constitutes substantial compliance or an alternative means of access. Further, significant administrative oversight procedures and penalties under the proposed legislation may take the place of demand letters and lawsuits. Most importantly, it remains to be seen if this Act has the support needed to be enacted into law.

Web Content Accessibility Guidelines 2.2 Provide New Accessibility Standards

The WCAG is a set of standards published by the W3C to assist with making the internet more accessible to people with disabilities. Though not yet a regulatory requirement, courts and the DOJ have pointed to the WCAG with increasing frequency in determining whether businesses are providing adequate digital accessibility.

In August 2020, the W3C released a working draft of the upcoming [WCAG version 2.2](#), which is expected to be released in summer 2021. WCAG 2.2 extends the accessibility guidelines of WCAG 2.1 released in June 2018, and particularly focuses on improving accessibility for three groups of users, being those with:

- cognitive or learning disabilities
- low vision and
- disabilities on mobile devices

These changes would include adding nine (9) additional Success Criteria designed to increase the ability of users to see features on websites while minimizing cognitive and physical barriers (e.g., eliminating the need to enter the same information more than once; increasing the hit area of small targets when clicking with a mouse). WCAG 2.2 has also promoted the Success Criteria [Focus Visible](#) from Level AA to Level A.

WCAG 2.2 is backwards compatible—that is, where sites conform to WCAG 2.2, they will also conform to WCAG 2.1. W3C recommends that all sites adopt WCAG 2.2 in order to provide improved accessibility and to anticipate future legislative changes.

Conclusion

The legal landscape for website accessibility continues to change on many fronts, but questions remain and the onslaught of lawsuits will likely continue. Businesses will have to continue to navigate the challenging waters of website and mobile application accessibility requirements while awaiting more definitive guidance through the courts or legislation.

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