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Legal Requirements for Website Accessibility: Lessons from Case Law

will begin at 12:30 pm ET

Audio and Visual are provided through the on-line webinar system. This session is closed captioned. Individuals may also listen via telephone by dialing 1-857-232-0476 Access Code: 368564 This is not a toll-free number.

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Webinar Platform Keyboard Shortcuts

Full list – Keyboard shortcuts from the help menu on the Menu Bar.

Chat: Move cursor to the Message text box

Windows: Ctrl+M

Mac: Command-M

Speaker level Up:

Windows: Ctrl+Alt+Up Arrow

Mac: Command-Option-Up Arrow

Speaker level Down:

Windows: Ctrl+Alt+Down Arrow

Mac: Command-Option-Down Arrow

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Captioning Keyboard Shortcuts

Open Closed-Captioning window

- ❑ Window: Ctrl+F8
- ❑ Mac: Command-F8

Close Closed-Captioning window

- ❑ Windows: Alt+F4 or Ctrl+W
- ❑ Mac: Command-W

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Captioning

Real-time captioning is provided during this webinar.

The caption screen can be accessed by selecting the “CC” icon in the AUDIO & VIDEO panel.

- Once selected you will have the option to re-size the captioning window, change the font size, and save the transcript

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Listening to the Webinar

Online:

- Please make sure your computer speakers are turned on or your headphones are plugged in
- Control the audio broadcast via the AUDIO & VIDEO panel

- If you have sound quality problems, please go through the AUDIO WIZARD by selecting the microphone icon within the AUDIO & VIDEO panel

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Listening to the Webinar (cont.)

- To connect by telephone:

1-857-232-0476

Pass Code: 368564

This is not a toll-free number

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Customizing Your View

- Resize the whiteboard where the presentation slides are shown to make it smaller or larger by choosing from the drop down menu located above and to the left of the whiteboard; the default is “fit page”

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Customize Your View continued

- Resize/Reposition the CHAT, PARTICIPANT, and AUDIO & VIDEO panels by “detaching” and using your mouse to reposition or “stretch/shrink”

- Each panel may be detached using the icon in the upper right corner of each panel

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Technical Assistance

If you experience technical difficulties

- Use the CHAT panel to let us know
- E-mail ADAtraining@transcen.org
- Call 301-217-0124

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Archive

- This webinar is being recorded and can be accessed within a few weeks
- You will receive an email with information on accessing the archive

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Certificate of Participation or CEUs

- Certificates of participation or continuing education credits
- Will NOT be provided for this session

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About Your Hosts...

- TransCen, Inc.

- Mission Statement: Improving lives of people with disabilities through meaningful work and community inclusion
- Mid-Atlantic ADA Center, a project of TransCen, Inc.
- Funded by National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR), Administration for Community Living, U.S. Department of Health and Human Services

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Legal Requirements for Website Accessibility: Lessons from Case Law

Rachel Weisberg

Equip for Equality

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CLE Credit for Attorneys

- This session is eligible for 0.75 hours of continuing legal education credit for Illinois attorneys.
- We can provide certifications to attorneys in other states; some other states will accept CLE certification.
- Attorneys interested in obtaining continuing legal education credit should contact Rachel Weisberg at:
rachelw@equipforequality.org

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Outline of Today's Presentation

- Refresher on Issues of Website Accessibility
- Common barriers

- Regulations and guidelines
- Lessons from Recent Case Law
- Is compliance required without regulations?
- How to comply without regulations
- Strategies to ensure long-term success
- Diverse needs for different people with disabilities
- Beyond websites & apps (kiosks & point of sales devices)
- Title I / Employment
- Resources and Recap of Lessons Learned

Disclaimer: This presentation does not provide technical guidance on how to make a website accessible

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Common Barriers to Digital Accessibility

Examples of virtual barriers for people with disabilities:

- Conveying content visually through a graphic, image or chart without labeling with “alternative text”
- Same problem with scanned PDFs – appear as images

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Common Barriers to Digital Accessibility

More examples

- Content is not organized to allow users to navigate effectively – examples include lack of clear titles, section headings, ways to bypass blocks of content that are repeated on multiple pages

- Requiring the use of a mouse without keyboard alternatives
- Displaying content that cannot be adjusted by font, size, or color contrast
- Audio information without captioning
- Flashing visual content that can trigger seizures
- Color contrast

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Standards for Digital Accessibility

DOJ often issues regulations to help explain what it means to be “accessible”

- 2010: Published Advanced Notice of Proposed Rulemaking on Website Accessibility
- 2014/2015: Announced plans to publish Notice of Proposed Rulemaking
- Various delays
- 2017: Placed Rulemaking in Inactive Status
- Dec 2017: Withdrew Advanced Notice of Proposed Rulemaking

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

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Guidelines for Digital Accessibility

- Web Content Accessibility Guidelines (WCAG)

- Developed by Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C), and contain 12 guidelines for web access
- Has three levels of success criteria, A, AA, AAA
- WCAG 2.0: Updated in Dec 2008
- WCAG 2.1: Updated in June 2018
- www.w3.org/WAI/standards-guidelines/wcag

- Incorporated into other federal standards
- Section 508 (federal agencies)
- Air Carrier Access Act (primary website of airlines)

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Is Compliance Required without DOJ Regulations?

Lesson: Even though DOJ has not issued regulations, businesses and other Title II/III entities are required to comply with the ADA

Robles v. Domino's Pizza LLC

2017 WL 1330216 (C.D. Cal. Mar. 20, 2017)

- Plaintiff is blind
- Could not access website using JAWS software
- Could not access mobile app using iPhone VoiceOver program
- Filed a lawsuit under Title III of the ADA and state law
- Domino's: Filed a motion to dismiss arguing (among other things)

- Lawsuit violates due process principles because the ADA and its regulations do not specifically discuss websites and the relevant standards that apply
- Lawsuit should be stayed until DOJ issues regulations (primary jurisdiction doctrine)

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Is Compliance Required without DOJ Regulations?

- District court: Agreed with Domino's
- Granted motion to dismiss without prejudice
- "The Court concludes by calling on Congress, the Attorney General, and the Department of Justice to take action to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary."
- Case appealed to the 9th circuit
- Many amicus briefs filed on both sides, including from disability rights groups (NFB, ACB, NDRN, etc.)
- While case was pending...

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Is Compliance Required without DOJ Regulations?

9/25/2018: DOJ published a letter about website accessibility

- The DOJ "first articulated its interpretation that the ADA applies to public accommodations' websites over 20 years ago. This interpretation is consistent with the ADA's title III requirement."
- The DOJ "has consistently taken the position that the absence of a specific regulation does not serve as a basis for noncompliance with a statute's requirements."

- Public accommodations have flexibility without regulations
- Noncompliance with a voluntary technical standard doesn't necessarily show noncompliance with the ADA
- Calls on Congress to "provide greater clarity through the legislative process"

www.lflegal.com/2018/09/doj-cut/#Full-text-of-September-25-2018-Letter-From-the-US-Department-of-Justice

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Is Compliance Required without DOJ Regulations?

Robles v. Dominos Pizza LLC

913 F.3d 898 (9th Cir. 2019)

- 9th Cir: Found for plaintiff (Reversed/remanded)
- Three main holdings
- #1: The ADA applies to Domino's website and app because the ADA requires places of public accommodation (like Dominos) to provide effective communication
- It doesn't matter that the services are provided through a website or mobile app because the ADA applies to services of a place of public accommodation not just services in a public accommodation

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Is Compliance Required without DOJ Regulations?

- #2: No due process violation
- The ADA is not impermissibly vague
- DOJ has been clear on its position that the ADA applies to websites since 1996 (over 20 years)

- Plaintiff didn't ask the Court to find that Domino's violated the law because its website did not comply with WCAG 2.0; instead, sought compliance with WCAG 2.0 as a possible remedy
- Lack of regulations doesn't eliminate a statutory requirement
- #3: Primary jurisdiction would cause unnecessary delay
- Given withdrawal of ANPRM, delay is inevitable
- Courts are "perfectly capable" of determining whether plaintiff had effective communication

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How to Comply without DOJ Regulations?

- Rule: ADA does not specifically mandate compliance with WCAG 2.0/2.1
- Lesson: As a practical matter, comply with WCAG 2.0/2.1

Gil v. Winn Dixie

257 F.Supp.3d 1340 (S.D. Fla. 2017)

- Plaintiff is blind. Alleged that grocery store violated the ADA by having an inaccessible website
- Trial before a Judge
- Court: Injunction requiring compliance with WCAG 2.0 AA
- More on this case to come
- Note: Appeal is pending in 11th Circuit
- Other courts are waiting on decision to issue remedies

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How to Comply without DOJ Regulations?

Gomez v. General Nutrition Corporation

323 F.Supp.3d 1368 (S.D. Fla. 2018)

- Online shopper is blind; brought case against GNC
- Court: Found for Plaintiff on liability (granted summary judgment)
- Ability to buy products remotely is a service of physical stores
- Court: Case will move forward on remedy (no summary judgment)
- But said cases applying WCAG 2.0 “highly persuasive”
- Waiting on Winn-Dixie appeal

DOJ settlements all require compliance with WCAG

- Require compliance with WCAG 2.0
- Expect to see a move to WCAG 2.1
- www.ada.gov

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How to Comply without DOJ Regulations?

Private settlements are starting to reference WCAG 2.1

Settlement Agreement National Federation of the Blind, et al. & The County of Alameda

www.lflegal.com/2018/11/alameda-voting/

- Settlement includes website accessibility
- Compliance with WCAG 2.1

American Council of the Blind et al v. Hulu LLC

17-cv-12285 (D. Mass. Oct. 17, 2018)

- Hulu offers online streaming services to over 20 million subscribers; no content currently includes audio description
- Settlement (highlights):
- Website to comply with WCAG 2.1, AA
- Mobile app to comply with BBC Mobile Accessibility Standards

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Ensuring Long Term Success

Lessons:

- Draft/implement website accessibility policies
- Review policies/plans from other successful businesses

DOJ Agreement with H&R Block

- Adopt web access policy, which requires:
- Notices soliciting feedback on how accessibility can be provided are publicized; policy distributed
- A web accessibility coordinator is designated
- Annual training is provided
- Automated tests to test for accessibility are regularly conducted; enlist people with disabilities to test; use consultant to evaluate accessibility and provide report

www.ada.gov/hrb-cd.htm (Ex. A)

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Ensuring Long Term Success

Lessons: Make a plan to ensure long-term success

- Create policies and practices for ensuring third-party vendors are accessible
- Conduct website audits on a regular basis
- Conduct training on a regular basis

Gil v. Winn Dixie

257 F.Supp.3d 1340 (S.D. Fla. 2017)

- Injunction: In addition to compliance with WCAG 2.0 AA
- Website audits every three months
- Annual web training
- Compliance for third party vendors

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Ensuring Long Term Success

Lesson: Ask for feedback. And take action on that feedback.

Settlement Agreement with Sweetgreen, Inc.

16-cv-2103 (S.D.N.Y. Dec. 2016)

- Restaurant has an online portal and mobile application where customers place customized salad orders for pick-up
- Technology was not accessible
- Settlement agreement (among other requirements):

- Website will have a link for feedback on accessibility
- Within 30 days of receiving feedback, Sweetgreen will take reasonable steps toward remediation from

www.washlaw.org/pdf/sweetgreen_settlement.PDF

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Ensuring Long Term Success

Lesson: Hire the right people. And hold those people accountable.

Project Civic Access (Denver)

www.ada.gov/denver_pca/denver_sa.html (2018)

- First web accessibility settlement under new administration
- Find qualified people
- Maintain an employee as web accessibility coordinator
- Train website content personnel on how to conform content and services to WCAG 2.0 AA
- Add accessibility to performance review of employees
- Retain an independent consultant to evaluate website and online services and do annual evaluations

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Diverse Needs of People with Disabilities

Lesson: Remember the needs of people with various disabilities

Nat'l Ass'n of the Deaf v. Harvard University

2016 WL 6540446 (D. Mass. Nov. 3, 2016)

- Harvard offers online learning platform available to public
- Platform does not have captioning so the content is not accessible to users who are Deaf or hard of hearing
- Court: Found for plaintiffs (denied motion to dismiss/stay)
- No need for DOJ's technical expertise to resolve issue
- Court is aware of DOJ's position (DOJ filed amicus brief: www.ada.gov/briefs/harvard_soi.pdf)
- Rejected arguments that Title III doesn't apply to online content & captioning is a fundamental alteration of content

See also Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech., 2016 WL 6652471 (D. Mass. Nov. 4, 2016)

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Beyond Websites

Lesson: Remember that digital accessibility extends beyond websites – do you have kiosks? Point of sales devices?

- Kiosks
- Lighthouse for the Blind and Visually Impaired v. Redbox Automated Retail LLC, 12-cv-195 (N.D. Cal. settled 2014)
- Made kiosk accessible by adding standard headphone jacks, tactile keypads, and text-to-speech output on all Redbox video-rental kiosks in California

www.lflegal.com/2018/01/kiosks18/

- Point of Sales Devices

- Agreement with Raley's (grocery store) achieved through structured negotiations (2015) – requires tactile pin pads

www.lflegal.com/category/settlements/point-of-sale-settlements/

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Employment (Title I)

Lessons:

- Remember digital access for applicants and employees
- Check to ensure that your online applications are accessible
- Don't wait until you have an applicant or employee who needs access – much cheaper/easier to do it from the start

Title I: Prohibits employers from discriminating against qualified individuals with a disability. 42 U.S.C. § 12112(a)1

Possible cases:

- If an employer required all job applicants to apply for employment via an application on an inaccessible website
- Many employers are also using online tests, which can raise accessibility issues

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Employment (Title I)

Martinez v. Alorica, Inc.

30-2018-987988 (Cal. Super. Ct. April 24, 2018)

- Plaintiff, who is blind, was unable to apply for a job because the online application was not accessible

- Plaintiff's attorney sent three letters requesting barriers be removed – company did not respond
- Lawsuit: Brought under California state law
- Failure to make accommodation; engage in interactive process
- Cites DOJ statement that entities must ensure that their employment opportunities websites and online job applications comply with WCAG 2.0
- www.justice.gov/archives/opa/blog/ensuring-access-jobs-people-disabilities

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Resources: How to Check Your Website

Resources to evaluate website accessibility

- List of accessibility consultants:
www.lflegal.com/resources/#consult (thanks Lainey Feingold!)
- List of usability testing: www.lflegal.com/resources/#test
- The World Wide Web Consortium compiled a list of various sites that assess website accessibility:
www.w3.org/WAI/ER/tools/complete
- Caution: No online tool is perfect. First step only.
- Example: Can tell if “alt text” is missing but not accurate

The ADA National Network also provides technical assistance on certain website accessibility issues

- (800) 949-4ADA www.adata.org

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Recap of Lessons Learned

- Even though DOJ has not issued regulations, businesses and other Title II/III entities have obligations to comply with the ADA
- Although the ADA does not specifically mandate compliance with WCAG 2.0/2.1, as a practical matter, comply with WCAG 2.0/2.1
- Create policies/practices to require accessibility of third party vendors
- Conduct website audits on a regular basis
- Conduct training on a regular basis
- Draft/implement website accessibility policies and review others' policies/plans

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Recap of Lessons Learned

- Ask for feedback from the disability community. And take action on that feedback.
- Hire the right people. And hold those people accountable.
- Remember the needs of people with various disabilities.
- Remember that digital accessibility extends beyond websites – do you have kiosks? Point of sales devices?
- Remember digital access for applicants and employees
- Check to ensure that your online applications are accessible
- Don't wait until you have an applicant or employee who needs access – much cheaper/easier to do it from the start

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Contact Us

ADA questions

- ADA National Network
- 1-800-949-4232 V/TTY
- www.adata.org

- Mid-Atlantic ADA Center
- 1-800-949-4232 V/TTY (DC, DE, MD, PA, VA, WV)
- 301-217-0124 local
- www.adainfo.org
- ADAtraining@transcen.org

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Webinars and Training

For upcoming webinars and trainings check out:

- Training section at ADAinfo.org
- Events section at ADATA.org

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Thank You!