

## Updates



The U.S. Department of Justice (DOJ) recently entered into settlement agreements with Hy-Vee and Rite Aid in response to the DOJ's concern that the companies' vaccine registration websites were not accessible to individuals with vision impairments and other disabilities. The DOJ also recently entered into a settlement with the Champaign-Urbana Mass Transit District (MTD) that addresses website accessibility.

These agreements signal an increase in DOJ enforcement efforts around website accessibility, following almost no activity in this area during the Trump administration. With increased enforcement activity and thousands of private lawsuits filed every year over websites that are alleged to be inaccessible, companies should make digital accessibility a top priority for 2022.

## **Web Accessibility Enforcement by the DOJ**

The settlement agreements are the result of compliance reviews conducted by the DOJ in the course of enforcing Titles II and III of the Americans with Disabilities Act (ADA). Title II applies to state and local governmental entities, and Title III primarily applies to public accommodations—which include hotels, restaurants, theaters, grocery stores, clothing stores, shopping centers, banks, hospitals, private schools and universities, and other physical places that are generally open to the public.

The DOJ has authority to enforce Titles II and III of the ADA through regulatory investigations and enforcement actions. Neither the ADA nor its implementing regulations expressly address websites or other online platforms. Nevertheless, the DOJ's long-stated position is that the ADA applies to websites of state and local governments (under Title II) and public accommodations (under Title III). Courts, however, have not reached a consensus on the issue in litigation between private parties focused on whether websites are subject to Title III of the ADA. For example, some courts have determined that Title III applies to websites regardless of their connection to any physical location, while other courts have held that the ADA is applicable to a website only if the website has a nexus with a physical location. In an April 2021 decision, the U.S. Court of Appeals for the Eleventh Circuit held that websites themselves are not a place of public accommodation under Title III, but later [vacated](#) that decision on technical grounds.

For now, we expect the DOJ to assert broad enforcement authority when it comes to websites operated by a public accommodation or a state or local government entity.

## **Website Accessibility Issues Raised in the Settlement Agreements**

As seen in other DOJ settlement agreements, the Rite Aid and Hy-Vee agreements require conformance with the Web Content Accessibility Guidelines (WCAG), a voluntary set of performance criteria that have become a benchmark for courts and industry when assessing whether websites and other online content are sufficiently accessible to people with disabilities. The Rite Aid and Hy-Vee agreements specifically require conformance with [WCAG 2.1, Level AA](#). The Rite Aid agreement also states that the company may use other methods or technologies for achieving accessibility and usability, provided those methods or technologies result in equally effective or greater accessibility and usability. Both agreements point to issues found on the websites regarding unlabeled or inaccurately labeled images, buttons, links, headings, and form fields; problems navigating the website by keyboard (rather than a mouse); and pop-ups.

The two settlement agreements impose additional obligations on the companies for training employees, communicating with website users with disabilities, testing and verifying compliance, and reporting back to the DOJ.

Similar to the Rite Aid and Hy-Vee settlement agreements, the MTD settlement requires MTD to ensure that all of its websites, web content, and mobile applications conform to WCAG 2.1, Level AA. MTD is also required, among other things, to invest at least \$100,000 over the term of the agreement "to improve its services for

individuals with disabilities."

## **Implications of the Recent Settlement Agreements**

These settlement agreements signal increased DOJ enforcement activity around website accessibility after the Trump administration deprioritized the issue.

The settlement agreements are also notable for adopting the most recent WCAG standard, 2.1, as prior DOJ consent decrees and settlement agreements reference an older standard, 2.0, which has fewer conformance criteria.

The renewed enforcement activity comes even though the DOJ has not conducted a rulemaking involving website accessibility. In 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking (ANPRM), seeking public input on various topics related to website accessibility for public entities and public accommodations subject to Title II or Title III of the ADA, stating, in part, as follows:

The ADA's promise to provide an equal opportunity for individuals with disabilities to participate in and benefit from all aspects of American civic and economic life will be achieved in today's technologically advanced society only if it is clear to State and local governments, businesses, educators, and other public accommodations that their Web sites must be accessible. Consequently, the Department is considering amending its title II and title III regulations to require public entities and public accommodations that provide products or services to the public through Web sites on the Internet to make their sites accessible to and usable by individuals with disabilities under the legal framework established by the ADA.<sup>[1]</sup>

After bifurcating the rulemaking to deal separately with Title II and Title III, DOJ issued a Supplemental Advance Notice of Proposed Rulemaking in 2016 specifically addressing web accessibility under Title II.<sup>[2]</sup> In 2017, however, the DOJ withdrew the ANPRMs, stating it was evaluating whether promulgating regulations about the accessibility of web information and services is necessary and appropriate.<sup>[3]</sup>

The DOJ has not initiated any new regulatory proceedings in this area since the 2017 withdrawal. The recent settlement agreements reflect a renewed interest by DOJ in website accessibility, even in the absence of regulatory guidance and open questions about the ADA's applicability to websites.

## **Endnotes**

[1] *See* Advanced Notice of Proposed Rulemaking on Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations in 2010, 75 Fed. Reg. 43,460, 43,462 (July 26, 2010).

[2] 81 Fed. Reg. 28,658 (May 9, 2016).

[3] 82 Fed. Reg. 60,932 (Dec. 26, 2017).

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