

WEBSITE ACCESSIBILITY

Below are answers to some of the most commonly asked questions about website accessibility and the Americans with Disabilities Act.

WHAT IS WEB ACCESSIBILITY?

“Web accessibility” means that websites, mobile apps and other digital tools and technologies are fully usable by people with disabilities. “Fully useable” means that those with disabilities can perceive, understand, navigate and interact with the web to the same extent as those without disabilities.

WHAT DOES WEB ACCESSIBILITY LOOK LIKE IN THE REAL WORLD?

For a blind person it could mean equivalent alternative text, or “Alt Text,” which seeks to describe an image with words.

For an individual with limited physical mobility, it could mean keyboard inputs that would eliminate the need for a mouse – an example might be speech inputs, which is an assistive technology that mimics the use a keyboard.

For a deaf person it could mean closed captioning for video material or transcripts for audio on a website.

For an individual with speech-related disabilities, it could mean including website communication channels beyond simply providing a phone number to call.

For someone with neurological impairments, it could mean providing clear website navigation tools, a clean site layout, blinking or flickering content that can be turned off.

And, for those with color sensitivities or limited vision, the ability to change color contrasts or adjust font sizes.

WHY IS THIS AN IMPORTANT ISSUE?



One in five American adults has a **disability**.*

*U.S. Census Bureau Survey of Income and Program Participation
June-September 2005 and May-August 2010

By one government estimate, one in five Americans has a disability – that’s almost 20% of the U.S. population. Equal access and use of the internet, in many cases, means equal rights and equal opportunity. Congress has recognized this too and, in 1990, passed the Americans with Disabilities Act which seeks to guarantee equal access, equal rights and equal opportunity to those with disabilities in important areas of their lives, including education (school), on the job (workplace), and in other “places of public accommodation.”

WHAT’S A “PLACE OF PUBLIC ACCOMMODATION”?

Title III of the ADA, which applies to private businesses, discusses places of public accommodation.

42 U.S.C. §§ 12181-84 reads:

“No individual shall be discriminated against on the basis of a 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.”

More specifically, Title III identifies 12 different categories of covered entities that would be considered places of public accommodation – these include:

1	places of lodging	like	hotels
2	places serving food or drink	like	bars or restaurants
3	places for exhibitions or entertainment	like	movie theaters, concert halls or stadiums
4	places of public gathering	like	auditoriums and convention centers
5	sales or rental establishments	like	shopping centers and grocery stores
6	service establishments	like	barber shop, funeral parlors and professional offices
7	public transportation stations	like	bus or rail terminals
8	places for public displays or collections	like	museums and libraries
9	places of recreation	like	parks, zoos and amusement parks
10	places of education	like	schools, colleges and universities
11	social services centers	like	homeless shelters and food banks
12	places for exercise or recreation	like	gyms, health spas and golf courses

DOES TITLE III IDENTIFY ANY EXCEPTIONS?

Yes. “Private clubs” and “religious organizations” (or entities controlled by religious organizations) are exempt under Title III and are not considered places of public accommodation.

Unfortunately, it’s a bit more complicated than that. What if a private club leases out a portion of its space to the public (i.e., a non-member of the private club)? What about a private daycare center located in a portion of a church?

Depending on how the private club runs its business, it may not be able to claim a Title III exemption.

MANY CLUBESSENTIAL CUSTOMERS ARE PRIVATE CLUBS? ARE THEY EXEMPT?

It depends – the inquiry is highly fact-specific.

The federal district court in *Lobel v. Woodland Golf Club of Auburndale*, 260 F. Supp. 3d 127 (D. Mass. 2017) articulates an eight-part test used for determining whether a private club is truly private for purposes of claiming a Title III exemption.

Here’s a quick run-down of the facts. Bob Lobel was a longtime Boston sports broadcaster. He alleged his disability prevented him from getting around the greens at the Woodlands Golf Club and he requested the right to use a special golf cart. The club denied him the request saying it would cause expensive damage to the greens. Lobel sued under Title III, alleging that Woodland was a place of public accommodation.

District Court Judge Dennis Saylor laid out a multi-part test for determining private club status – factors included:

1. the genuine selectivity of the group in the admission of its members;
2. the membership’s control over the operations of the establishment;
3. the history of the organization;
4. the use of the facilities by non-members;
5. the purpose of the club’s existence;
6. whether the club advertises for members;

7. whether the club is profit or nonprofit; and
8. the formalities observed by the club, e.g., bylaws, meetings, membership cards

Finding that Woodland could claim the private club exemption, Judge Saylor reasoned:

“The undisputed material facts demonstrate that Woodland exercises genuine selectivity in the admission of its members; that its members control its operations; that it does not actively solicit new members from the general public through public advertising; and that non-members are not permitted regular or indiscriminate use of the facilities. All of those factors, taken together, weigh heavily in favor of a finding that Woodland is a private club within the meaning of the ADA.”

From this, we can glean (1) the genuine selectivity of the group in member admission is extremely important – perhaps the *most* important of the eight factors; and (2) “regular” or “indiscriminate use” of the establishment’s facilities by non-members contradicts private status under the ADA. This means that a private club could lose its exempt status if, say, it routinely rents out a portion of its facilities to non-members.

WHAT DOES TITLE III SAY ABOUT WEBSITES?

Nothing. Not a word.

But, this makes sense if you think about it. The ADA passed in 1990. At that time, the world wide web isn’t what it is today, almost 30 years later. While Congress did amend the ADA in 2008 to expand and clarify coverage, websites still were not addressed in any of the 12 categories.

Despite the absence of clarity, this hasn’t stopped the plaintiff’s bar from making its own arguments about why a public-facing website should be considered a “place” for public accommodation. And, as you will see from the case law history below, the plaintiff’s bar has made some significant inroads.

HOW HAS THE CASE LAW DEVELOPED IN THIS AREA OVER THE PAST 20 YEARS?

1995. *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995)

Stoutenborough dealt with NFL’s blackout rules, which prohibits live broadcasts of home football games that are not sold out 72 hours before the start of the game. Stoutenborough, who was hearing impaired, argued that the NFL’s blackout rule discriminated against the disabled because those with hearing impairments would have no other way to access the game using telecommunications technology - basically, they’d be stuck using radios. Plaintiff lost at the lower court level, and the case was appealed to the 6th Circuit. The Circuit court affirmed the lower court ruling finding there was no public accommodation at play because there was no physical place involved with the NFL’s blackout rules.

1999. *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999)

In *Doe*, the case was brought by the AIDS Legal Counsel of Chicago on behalf of two patients with AIDS. Mutual of Omaha had put a cap on lifetime benefits for HIV-related conditions, and plaintiff alleged this violated the Illinois Insurance Code and the ADA. A lower court found in plaintiff’s favor, including a finding of Title III jurisdiction, however the ruling was overturned on appeal at the 7th Circuit. Judge Posner opined on the meaning of Title III, saying:

“The core meaning of [Title III], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist’s office, travel agency, theater, website, or other facility (whether in physical space or in electronic space. . .) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facilities in the same way that the non-disabled do.”

2006. *National Federation of the Blind v. Target Corp.* (N.D. Cal. 2006)

Target was the first accessibility case where a business's website was the primary area of focus. The National Federation of the Blind in California represented a class of blind plaintiffs against Target due to alleged accessibility issues with its website. Specifically, plaintiffs alleged the website didn't include alternative text coding, and they couldn't make on-line purchases through the site.

In defense of the case, Target argued no physical place, and, thus, no public accommodation. Plaintiffs took a more expansive reading of the statute, saying, essentially, Congress never intended Title III to be so limiting. The *Target* court generally agreed with the expanded scope of Title III and said that Title III jurisdiction could be found if there was a sufficient connection, or nexus, between the business's website – considered a "service" of a public accommodation" – and a physical store (the actual place of public accommodation).

Target first introduced us to the "nexus approach" of analyzing Title III website accessibility cases.

It's worth noting that Target settled before the court issued any rulings. Target voluntarily remediated its website and covered plaintiff's attorneys' fees, which were significant (over \$3.5 million).

After *Target*, you may be thinking "What about an e-commerce business that has no physical stores?" In answering this question, we can fast forward a few years to our next big website accessibility case involving Netflix.

2012. *National Association of the Deaf v. Netflix* (D. Mass 2012)

In *Netflix*, the National Association of the Deaf sued Netflix citing its lack of closed captioning for streaming video as a violation of the ADA. Like Target, Netflix argued no "place of public accommodation" and no "service related to a public accommodation" since no physical stores involved with video streaming – thus, no nexus.

The District Court of Massachusetts responded by saying:

"It would be irrational to conclude that places of public accommodation are limited to actual physical structures. In a society in which business is increasingly conducted online, excluding businesses that sell services through the internet from the ADA would run afoul of the purpose of the ADA. It would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges, and advantages available indiscriminately to other members of the general public."

Netflix too ended up settling the claims against them – it voluntarily added closed captioning to its video streaming services and paid plaintiff's legal fees (totaling over \$700,000).

Interestingly, another Netflix case – *Cullen v. Netflix* in California – reached exactly the opposite conclusion after making its way through the 9th Circuit. In *Cullen*, the 9th Circuit harkened back to other website accessibility cases finding insufficient nexus to a physical place to support Title III jurisdiction. It should be noted that *Cullen* is an unpublished decision; the court didn't intend for it to become binding legal precedent.

Which brings us to the fireworks of 2017...

June 2017. *Carlos Gil v. Winn Dixie Stores, Inc.* (S.D. Fla. 2017)

Winn Dixie is the first website accessibility case that went through trial and a verdict. Winn Dixie is a grocery store chain; Carlos Gil, the plaintiff, was blind and had cerebral palsy. Although Mr. Gil could access websites using a JAWS screen reader, the Winn Dixie website was not screen reader-compatible – Mr. Gil could not download coupons, order prescriptions or find other store locations.

The District Court in Florida observed the split between circuits on website accessibility issues. The *Winn Dixie* court found that the Winn Dixie website was in fact "a gateway" to the store insofar as it could be used to fill

prescriptions and access coupons. The *Winn Dixie* court sided with plaintiff in finding Title III did apply to the company’s website because it was a service to a public accommodation. Significantly, the *Winn Dixie* court laid out Title III’s damages scheme and referenced WCAG 2.0 as the effective standard for compliance.

August 2017. *Andrews v. Blick Art Materials*, No. 17-CV-767 (E.D.N.Y. Aug. 1, 2017)

In *Blicks Art*, New York District Court Judge Jack Weinstein allowed a class action to move forward against Blick Art store on the basis that the company’s website was “difficult, if not impossible” for blind customers to use. Judge Weinstein noted “rigid adherence to a physical nexus requirement leaves potholes of discrimination in what would otherwise be a smooth road to integration,” and suggested public-facing websites can be places of public accommodation conferring Title III jurisdiction, basically just because. Judge Weinstein explained:

“Blick’s suggested construction of Title III would contravene the ADA’s broad remedial purpose . . . The broad mandate of the ADA and its comprehensive character are resilient enough to keep pace with the fact that the virtual reality of the internet is almost as important now as physical reality alone was when the statute was signed into law.”

HOW HAVE THE DECISIONS IN WINN DIXIE AND BLICKS ART AFFECTED NEW CASE FILINGS?

As you might imagine, in the wake of *Winn Dixie* and *Blicks Art*, new case filings have sky-rocketed (particularly in Florida and New York).



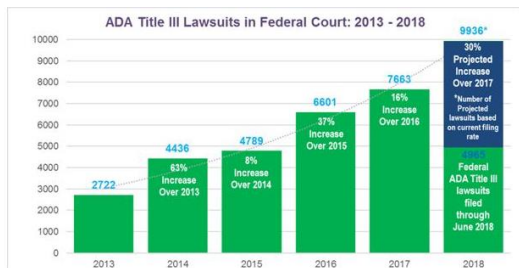
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 [Graph: Federal Website Access Lawsuits January – June 2018: At Least 1053
 Lawsuits: Ca 5, FL 342, GA 1, IL 6, MA 21, NY 630, OH 4, OR 5, PA 24, TX 7, VA 7, NC 1]



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 [Graph: Federal Website Accessibility Lawsuits 2017 v. 2018 (First Six Months): 2017: 814; First Half of 2018: 1053.]

HOW DO THESE WEBSITE ACCESSIBILITY NUMBERS SQUARE WITH TITLE III TRENDS GENERALLY?

Title III case filings are up this year, and they continue to go up – the trend has been double-digit increases since 2015.



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 [Graph: ADA Title III Lawsuits in Federal Court: 2013-2018: 2013: 2722; 2014: 4436, 63% increase over 2013; 2015: 4789, 8% increase over 2014; 2016: 6601, 37% increase over 2015; 2017: 7663, 16% increase over 2016; 2018: 4965 Federal ADA Title III lawsuits filed through June 2018, 30% Projected increase over 2017 *Number of projected lawsuits based on current filing rate.]

BREAK DOWN WHAT'S ACTUALLY AT RISK – WHAT ARE THE PENALTIES FOR NON-COMPLIANCE?

Title III allows for injunctive relief and attorneys' fees, but not actual compensatory damages. Title III also creates opportunities to moot, even foreclose, claims by eliminating barriers through a comprehensive remediation plan.

If you were under the impression that plaintiffs can win monetary damages under an ADA case, yes, that's true for Title I ADA claims, which apply to employers, both public and private. Tying that back to websites, if a portion of your website is employee-facing – think a careers page or a job application portal – this portion of your site may actually fall under Title I jurisdiction and could subject you to monetary damages for violations.

WHO ENFORCES TITLE III TO THE ADA? WHY ARE PRIVATE LAWYERS INVOLVED?

The Department of Justice is charged with enforcing Titles II (which applies to state and federal entities) and III of the ADA, but private attorneys may also bring these cases as private right causes of action, including class actions on behalf of large groups of plaintiffs. Because attorneys' fees are permitted by statute, lawsuits under Title III are an attractive option for class action treatment.

WHAT ARE THE FEDERALLY-MANDATED COMPLIANCE RULES?

At this point in time, there aren't any; although, as we learned from the case histories above, the field isn't totally wide open. Treatment of Title III website accessibility issues is still highly variable and jurisdiction specific.

Under the Obama administration, the DOJ had promised to put out definitive compliance guidelines for businesses to follow. When administrations changed, the Trump DOJ rolled back these efforts and moved the rule-making action item to the inactive list.

Frustrated by the rash of lawsuits over the past 12 months, many business owners, quite understandably, vented their frustrations to their local representatives in the House. In response, in June 2018, 103 House members penned an open letter to former Attorney General Jeff Sessions to “state publicly that private legal action under the ADA with respect to websites is unfair and violates basic due process principles in the absence of clear statutory authority and issuance by the department of a final rule establishing website accessibility standards.” The House letter urged the DOJ to “provide guidance and clarity with regard to website accessibility under the ADA.”

The DOJ responded to the House letter on September 25, 2018. Although the DOJ declined to act, and basically put the ball back in Congress's court to pass a new law, or amend the law, if they wanted to, the DOJ's letter did offer this helpful tid-bit:

“Absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication. Accordingly, non-compliance with a voluntary technical standard for website accessibility does not necessarily indicate non-compliance with the ADA.”

This statement is significant because it establishes, at least from the perspective of the DOJ, that a website may be accessible and useable by those with disabilities without being fully compliant with the privately developed WCAG standards. Said differently, the operative legal question in a website accessibility lawsuit is not whether the site conforms with WCAG, but whether a person with disabilities is able to access a public accommodation's goods, services and benefits through the website, or in some alternative fashion.

It will be interesting to see how the courts use this DOJ statement in deciding the website accessibility cases working their way through the judicial pipeline.

WHAT IS SECTION 508 AND HOW IS IT RELATED TO WEBSITE ACCESSIBILITY?

If you're a private business, then Section 508 doesn't apply to you. Section 508 of the Rehabilitation Act of 1973 only applies to federal agencies and, as a result, to federal websites.

WHAT IS "WCAG" AND WHAT IS ITS HISTORY?

Web Content Accessibility Guidelines, or "WCAG," are a set of technical standards developed through an open, collaborative process involving both individuals and organizations around the world. This group is called the World Wide Web Consortium, or "W3C," and its stated goal is to provide a single, shared standard for web content accessibility that meets the needs of individuals, organizations and governments internationally.

W3C published its first international standard for digital accessibility (WCAG 1.0) on May 5, 1999, and there have been two more updates, one major (WCAG 2.0) released on December 11, 2008, and one minor (WCAG 2.1) released on June 5, 2018. WCAG 2.1 standards include 17 total criteria, 5 at A level, 7 at AA level, 5 at AAA level. WCAG 2.1 uses the same conformance levels as WCAG 2.0.

In terms of key differences between WCAG 2.0 and WCAG 2.1, the gaps that 2.1 looks to fill involve mobile technology, low vision and cognitive disabilities. It's worth noting that in October 2012, the International Organization for Standardization established WCAG 2.0 AA as the digital standard for accessibility (ISO/IEC 40500:2012).

Despite the prevalence of the WCAG standards, in the U.S., at least for now, neither WCAG 2.1 nor the ISO standard is the law.

OUTSIDE OF THE LAW, IS THERE A BUSINESS CASE TO BE MADE FOR WEBSITE ACCESSIBILITY?

Yes, absolutely. Accessible websites, software and mobile applications can:

- Broaden the reach of audiences that can use them
- Increase traffic to the site
- Expand potential market share
- Increase search ranking potential
- Improve site and increase usability for all visitors
- Generate positive PR and brand awareness
- Demonstrate social responsibility and care for those with disabilities
- Reduce legal bills by avoiding litigation
- Protect the brand
- Standardize web design, build and maintenance
- Cut overall production costs

DOES CLUBESSENTIAL HAVE A POLICY ON WEBSITE ACCESSIBILITY?

Yes, in fact we do. Clubessential's "Website Accessibility Notice" is described at Section 15 of the company's Terms of Service – the policy is reprinted below:

WEBSITE ACCESSIBILITY NOTICE. *We are committed to providing Subscription Services that are accessible to all End Users, including those with disabilities. To these ends, we strive to ensure that the Site and our Subscription Services are in substantial conformance with prevailing WCAG 2.0 website accessibility standards. A criteria will "support" WCAG 2.0 when the functionality of a product has at least one method that meets the criteria without known defects or meets with equivalent facilitation. A criteria "supports with exceptions" when some functionality of the product does not meet the criteria. You acknowledge that implementation of functionalities which support WCAG 2.0 may require some additional action by you; for example, it is your responsibility to make sure any upload Client Content is accessible to all End Users (we cannot control, nor will we be responsible, for the content that is uploaded and/or modified by you on the Site). Where you pay for*

a Site re-design, we will use commercially reasonable efforts to implement website accessibility criteria in accordance with an Accessibility Conformance Report. If you believe we have not met a WCAG 2.0 accessibility standard, we will work with you to correct any perceived defects upon a mutually agreed-upon timeline; please note that additional fees may apply. Your only recourse for our failure to achieve an agreed-upon requisite level of website accessibility shall be your right to terminate the Agreement for cause. Notwithstanding the foregoing, under no circumstances shall we be liable for any losses or damages to you, a third party, or an End User of the Site as a result of website accessibility violation(s) associated with our Services.

WHY HAS CLUBESSENTIAL MADE A FULL DISCLAIMER WITH RESPECT TO WEBSITE ACCESSIBILITY?

Clubessential strives to be a good partner in all areas of your business, including issues related to website accessibility. We can provide useful information, and we can provide technical solutions that should, in most cases, get you to WCAG 2.0 AA standards. That said, website accessibility is complicated, and there's much in the law surrounding website accessibility that remains unsettled (including, for example, the lack of a defined federal compliance standard).

With this in mind, Clubessential's position on website accessibility is rooted in the following:

First, website accessibility is a two-way street, and doesn't stop with Clubessential handling off a compliant site. If there is content that you load to the site later, there may be things you need to do with that client content to make it website accessibility – these are your obligations, not ours.

Second, fully remediating a website to AAA standards can be an expensive proposition. While Clubessential has made significant strides in creating accessibility websites, depending on how your site may be configured or used, or what features or functionalities might be included, some WCAG 2.0 criterion may be “supported with exceptions” or “not supported.” Clubessential is not a full-fledged “ADA remediation shop,” and our very modest site design fee of \$1,500 reflects this fact. That said, we have every intention of continuing to invest in development tools and technologies that will allow us to check every box for a fully supported criterion through the AAA level.

And third, given the uncertain legal landscape underlying website accessibility, we're unwilling, at this time, to accept ADA-related liability or give related indemnity rights. Once a defined federal standard has been implemented, and we can better ensure compliance, our position on website accessibility and related disclaimers may change.