

ADA TITLE III COMPLIANCE AND THE SHOPPING CENTER WEBSITE



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EXECUTIVE SUMMARY

Title III of the Americans with Disabilities Act of 1988 provides for equal access for persons with disabilities in places of public accommodation. It's difficult to argue that the ADA has not made public spaces more accessible to more people in its nearly 30 years in existence. Its effects are present in virtually all shopping centers today. In recent years, there has been movement to extend the conformance requirement to the digital presence of places of accommodation. This will apply not just to shopping center websites, but all online digital media published by a shopping center.

Over the past few years, the number of Title III complaints and lawsuits over website accessibility have increased. This has included retailers in some cases - like Target, Peapod, and Winn Dixie. Fortunately for businesses, Title III limits liability to injunctive relief (the court will order a change or remedy a behavior - in this case the non-complying website) and legal fees for prevailing parties. Damages are not permitted. It also creates opportunities to dismiss claims by quickly eliminating barriers or through remediation and education.

Most importantly, we believe that shopping centers do face greater risk than other businesses based on the physical nature of their business and the number of consumers who use those facilities. A proactive, engaging approach to digital accessibility should be adopted by all shopping center operators.

PlaceWise has been monitoring and implementing technologies and processes that comply with the evolving standards for website accessibility. Clients who have concerns about ADA compliance can get more information from their PlaceWise account team.

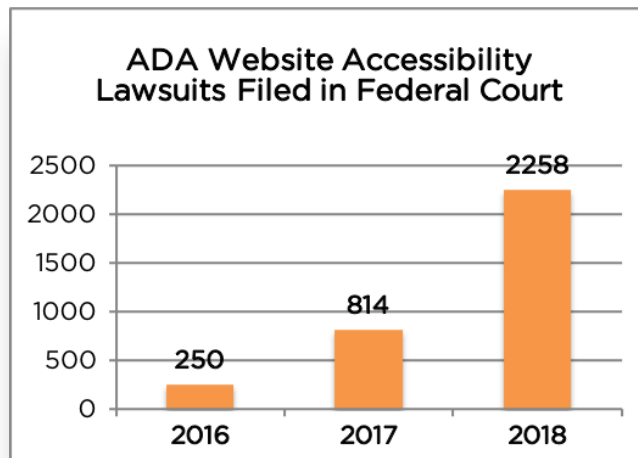
This paper will discuss the basics of ADA Title III compliance and how it applies to shopping center operators and their digital media. This is an update to our original paper in July 2017.

RECENT TRENDS

- ADA compliance cases/complaints have increased over the past three years.
- DOJ has acknowledged that ADA does apply to websites but has not cited a standard and is not pursuing enforcement actions.
- Retailers represented 20% of 2018 lawsuits, real estate companies 4%

ADA Title III website accessibility lawsuits nearly tripled in 2018 when more than 2200 cases were brought before US federal courts. This does not include simple demand letters that are sent without legal action. So while these numbers are lower compared to general ADA lawsuits (which numbered more than 10,000 in 2018), it is a trend that has emerged quickly and is expected to continue.

In 2018, the DOJ moved digital accessibility to its inactive list and has no plans to give further guidance on a specific standard - simply saying, there are many ways to meet the inclusive mandate of ADA. Furthermore, it has no plans to pursue further definition or clarification. ***This is creating an environment where actions will be taken by private groups in the form of lawsuits.*** It's this trend that represents the greatest threat to shopping centers.



WHAT ARE ADA TITLE III REQUIREMENTS?

- Ability to access the “goods, services...at any place of public accommodation.”
- It has been affirmed by the DOJ and most courts that the digital properties of a physical place of accommodation will be required to provide access.
- DOJ has not prescribed any particular standard but has indicated that the WCAG standards do conform to ADA.
- WCAG 2.0 is a guideline, not a law, and therefore is open for interpretation.
- WCAG 2.0 AA compliance is the generally accepted level of conformance.

The ADA stipulates that individuals with disabilities be extended the “goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation.” Disabilities include blindness and low vision, deafness and impaired hearing, learning disabilities, cognitive limitations, limited movement, speech disabilities, photosensitivity, and combinations of these.

As of March 2019, the DOJ has not adopted specific guidelines for compliance with Title III and has moved the issue to its “inactive” list for further consideration. The DOJ has on numerous occasions pointed to the World Wide Web Consortium’s (W3C) Web Content Accessibility Guidelines 2.0 (WCAG 2.0 AA) in statements and briefs, which is why most observers recommend this standard.

WCAG 2.0 is a standard that outlines website accessibility for a broad range of disabilities. It spells out capabilities that conform to accessibility devices and software. Its goal is to provide a single standard for web content accessibility that meets the needs of individuals, organizations, and governments internationally. While WCAG 2.0 is not the law, most legal experts will recommend complying with the DOJ statements that reference WCAG 2.0 AA.

TYPICAL ISSUES

- Assistive reading devices are unable to adequately read a website
- Plaintiffs normally send demand letters requesting compliance

Hearing and vision impaired individuals frequently use assistive devices and software to read and interpret the Internet. These devices may read aloud, generate braille text, magnify pages, or allow users who cannot use a mouse to navigate with only a keyboard or touchscreen. What's important is that your media be accessible and readable by these devices. This includes images, which require accessible descriptive text to convey the meaning of the image.

In the case of a complaint, as is similar with physical property complaints, an individual or an advocacy group usually makes a demand for compliance with Title III. It is important to acknowledge such demands and assess your state of compliance. There have been cases where at least one retailer dismissed such requests and ended up with an unfavorable judgment.

NOTABLE RULINGS AND POLICIES

While general complaints on website accessibility have most certainly risen, here are a few examples of rulings where a nexus of physical property and digital presence are concerned:

LA Agency on Deafness v. Krikorian Premiere Theatres: Originated in the physical theatre but as part of the ruling, extended to the website, namely, that information on captioning must be included on the website. Shopping centers should assume that their websites are fair game for injunctions and settlements even if the original claim itself did not originate as a digital accessibility claim.

DOJ settlement with Peapod, Inc.: DOJ concluded that Peapod's website was not adequately accessible to the blind/low vision, the deaf/hard of hearing, and individuals with limited manual dexterity, e.g., inability to use a mouse. More generally, the settlement involved, among other things, Peapod's being required to come into conformity (including on mobile applications) with WCAG 2.0 AA.

Robles v. Domino's Pizza: 9th Circuit court ruled that despite an absence of regulations by DOJ, ADA Title III was still applicable. This was a reversal from earlier 9th Circuit rulings and appears to open the 9th Circuit as a new federal court for ADA digital accessibility claims.

WHAT KINDS OF FEATURES ARE REQUIRED IN THE WCAG 2.0 GUIDELINES?

WCAG 2.0 AA Guidelines provide technical standards on the design and features of websites to enable access to individuals with a disability. The WCAG 2.0 AA Guidelines ask operators of websites to provide:

- Alternative text for non-text content so that it can be changed into other forms people need, such as large print, braille, speech, symbols or simpler language (this is hidden from a non-disabled visitor, but is discoverable by assistive devices)
- Compatibility with most assistive technologies
- Content that is easy-to-see and hear (ex: separating foreground from background)
- All functionality available from a keyboard – provide users with sufficient time to read and use content
- Content without design elements that are known to cause seizures
- Ways to help users navigate, find content, and determine where they are on the website
- Alternatives for time-based media
- Text content readable and understandable to web navigation tools
- Web pages that appear and operate in predictable ways

PLACEWISE COMMITMENT & RECOMMENDATION

PlaceWise has been monitoring and will continue to monitor developments in ADA website standards. ***Accordingly, we continue to evolve our systems and capabilities to accommodate the evolving standards.***

We believe that without a defined standard of compliance, lawsuits and demand letters will continue. This increase in lawsuits/complaints will stem from the ambiguity of what the rules are. Until legal guidelines are published, this will unfortunately be determined through lawsuits.

PlaceWise believes that regardless of the disposition of the DOJ, shopping centers should:

1. Work with their website provider to begin steps to meet the WCAG 2.0 AA standards.
2. Seek legal advice from an attorney conversant in ADA compliance.
3. Post an Accessibility Statement on your website (PlaceWise can provide a sample of this for your attorney to review).
4. Reply and respond to any demand letters they receive regarding compliance. Even if the decision not to comply is made, a thoughtful response to a demand letter can settle issues early.

However, it's about more than compliance.

PlaceWise believes that while the risk of a compliance issue might be low in terms of likelihood and cost, it remains the right thing to do for a shopping center and its shoppers. Our shopping center clients have worked hard to make their physical environments welcoming and inclusive of all members of society. We think it only natural that this would extend to the digital world.

PlaceWise is more than happy to work with any of our clients to develop an ADA Compliance strategy for your digital media.

ABOUT PLACEWISE DIGITAL

PlaceWise Digital is the leading provider of digital services to the shopping center industry. Established in 1998, the company delivers over 200 million digital engagements annually, enabling unique data driven insights and connecting local shoppers to over 800 shopping center clients throughout North America. We Make Shopping Better.