

## Access Ready Business Legal Foundation

### Business Websites and the Americans with Disabilities Act

#### **Public Access**

Title III of the Americans with Disabilities Act (ADA), covering all places of public accommodation, was enacted in 1990. The ADA requires public accommodations to ensure their communications with people with disabilities are effective. Public accommodations include twelve broad types of businesses, such as hotels, restaurants, movie theaters, sales and rental establishments, service establishments, museums, private schools, and social services. Courts have differed regarding whether internet-only businesses are covered by Title III. However, the Department of Justice has stated that, if a business falls into one of the twelve categories of "public accommodation," its web-based communications are required to be effective for people with disabilities regardless of whether it has a physical location.

Effective communication generally means people with disabilities can access or acquire the same information, engage in the same interactions, and enjoy the same products and services that a business' communications offer its sighted participants with substantially equivalent ease of use. All types of communication are covered - including internet- and information and communications technology (ICT)-based communication. To be effective, accessible communications must be provided in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability. These requirements apply to both communications the business makes to members of the public and communications it receives from the public.

The only defenses available are when the business can prove, that, using all its available resources, it is too difficult or too expensive to accomplish accessible communication or it would fundamentally alter the nature of the communication or program to make it accessible. Even if one of those defenses applies, the business is required to do everything it can to provide accessible communication up to the point where the burden becomes too great.

In addition to their own online communications, businesses may be responsible for the accessibility of content and ICT tools used on their websites, when that content or tool is necessary to access the business' goods, services, facilities, privileges, advantages, or accommodations. Thus, for example, when a business uses a third-

party online system for customers to pay, place orders, or ask questions, the business needs to ensure that third-party system is accessible.

If a person with a disability is denied effective communication, he or she can file a case in court or a complaint to the Department of Justice. Either way, the discriminating business can be required to make its communications accessible, adopt policies to ensure accessibility going forward, and to undertake any other steps necessary to remediate the problem. The discriminating business can also be required to pay the complainant's attorneys' fees and costs.

So, if a business is providing information, goods, services, programs, or activities to the public via the Internet or ICT, or if it is receiving communications from the public via the Internet or ICT, it ignores the accessibility of those communications at its own peril.

In the bygone era of just paper-and-pencil documents and in-person or telephone communications, equally effective communication generally meant providing large print, taped texts, and Braille formats for documents, and using sign language interpreters, relay services, and captioning for meetings and telephone calls. These are known in the ADA as auxiliary aids and services. As we have entered the age of internet- and ICT-based communication, auxiliary aids and services have also moved online. Nowadays, most people with vision disabilities have access to screen reader software, magnification software, or Braille displays that can translate a web page or electronic document into large print, computerized speech, or Braille. A website can, therefore, be made accessible to blind and low vision people simply by ensuring it will work with such assistive devices and software programs, that certain standards are met for images and other visual information, and that input and navigation can be achieved through keyboard commands as well as mouse commands. Now, captioning for video and audio information is readily available for people with hearing disabilities. A video or audio presentation or meeting can be made accessible to people who are deaf or hard of hearing simply by providing captions online. By making a website or online document or video accessible (i.e., screen readable, usable without a mouse, and captioned), a business can make its communications accessible without having to create separate accessible versions. The regulations implementing the ADA provide that accessible electronic and information and communications technology is a type of auxiliary aid or service required by Title III.

The World Wide Web Consortium (W3C), an international group that sets standards in various technology contexts, has developed a consensus standard for accessibility of websites and other ICT - the Web Content Accessibility Guidelines (WCAG). Version 2.1 is the current version, although Version 2.0 is still widely accepted. Level AA of these guidelines usually results in accessibility to users with

vision, hearing and speech disabilities. International governments have adopted the WCAG standards, as has the U.S. government for its own accessible technology, and the U.S. Department of Transportation has adopted WCAG as the standard for accessibility of airline websites and kiosks. While the ADA does not provide a specific standard for web accessibility, the Department of Justice and other federal agencies, as well as courts, have found WCAG 2.0 Level AA to meet Title III's effective communication requirement.

If a website or online document or video is not accessible, however, the business will have to maintain a separate system for communicating with people with disabilities. That separate accessible system, whether it is a staffed telephone line or some other means, is likely to be expensive. Worse, such a separate system is likely to violate the ADA's requirement of effective communication. A staff-based substitute for a website, for example, would need to be available 24 hours a day, 7 days a week, 365 days a year, just as the website is. The staff would need to be prepared to navigate the entire website, orally describe all the information, and carry out transactions for a blind person. The staff would need to be prepared to transcribe all the speech and describe all the audio content of videos and audio programming. And the staff would need to be prepared to accurately input any information the person with a disability wanted to communicate back to the business. All of this would need to be timely, accurate, and complete, while not placing additional burdens on the person with a disability and while maintaining their privacy and independence.

Accessible technology does not happen automatically. To avoid the expensive, noncompliant fallback system of access, businesses and their web designers, technology vendors, content creators, and communicators, must incorporate accessibility as a matter of course, not as an afterthought, both when developing or purchasing new technology or content, and as part of a planned remediation strategy.

### **Employee Access**

Businesses have legal obligations, not only to the public, but also to their employees and prospective employees. Title I of the ADA applies to the employment activities of businesses with 15 or more employees. In addition, businesses that hold government contracts are covered by Section 503 of the Rehabilitation Act, which requires both nondiscrimination and affirmative action to employ people with disabilities.

These laws do not specifically require businesses to ensure their employee-facing technology is always accessible. However, in any work environment in which technology is an important tool, an employer that does not ensure its technology is accessible will almost certainly fail to meet its legal obligations.

A business must provide reasonable accommodations to ensure its employees with disabilities can perform the essential functions of their jobs, unless doing so constitutes an undue hardship in light of all its available resources. The employer must prove any claim of undue hardship and must provide any accommodations that do not rise to the level of undue hardship. Therefore, if a business uses existing technology that is inaccessible, it theoretically has two options - 1) make the technology accessible or 2) if it is too expensive or difficult to make the technology accessible, provide a work-around for the employee with a disability (e.g., a staff person or contractor to act as a reader, scribe, or interpreter). If, on the other hand, the employer has purchased or developed employee-facing technology since the ADA was enacted, it is less likely to be able to succeed in making an undue hardship defense. That is because, if an accessible version of the technology was available or it was not difficult to make the technology accessible when it was developed, then it would not have been an undue hardship to use accessible technology. The cost of remediating a new technology should have no bearing if the technology could have been accessible from the beginning.

In addition, workarounds for inaccessible technology are inefficient, expensive, and often fail to provide equal access for employees with disabilities. For example, when an online database is readily available on-demand to employees without disabilities as they perform their duties, but an employee with a disability must await the availability of a part-time reader in order to access it, the employee with a disability is being denied an equal opportunity to perform his or her job.

Employees with disabilities are not merely entitled to the opportunity to perform the essential functions of their jobs, with or without reasonable accommodations, but are entitled to equal access in all the terms, conditions, and privileges of employment. Such terms, conditions, and privileges include the training, interoffice communication, networking, and other opportunities offered to nondisabled employees.

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