

## Access Ready Election Legal Foundation

### Voting Technology and Disability Civil Rights

Title II of the Americans with Disabilities Act (ADA), covering all state and local government activities, was enacted in 1990 and Section 504 of the Rehabilitation Act, covering all recipients of federal funding, has been in place since 1973. These laws are unequivocal: they require covered entities to ensure their public communications are equally effective for people with disabilities as for people without disabilities. The Department of Justice has made clear that Title II requires all services, programs, and activities of public entities, including those provided through the internet or other technology, to be accessible.

State and local voting systems now generally use technological means to communicate with voters for at least part of the voting process, such as online voter, election, and results information, online registration, electronic poll books, absentee or overseas ballots that are delivered and/or returned electronically, electronic ballot marking technology, and digital recording electronic voting machines. These forms of voter communication must meet the ADA's "equally effective" standard.

Equally 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 the voting system offers its non-disabled participants with substantially equivalent ease of use. To be effective, information and communications technology (ICT)-based voting 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 state or local government makes to members of the community and communications it receives from the community.

The only defenses available are when the state or local government documents in advance, and 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 government entity is required to do everything it can to provide accessible communication up to the point where the burden becomes too great. This is a high bar.

If a person with a disability is denied equally effective communication in voting, he or she can file a case in court or a complaint to a federal agency. Either way, the discriminating government entity can be required to pay damages for any extra

expenses, time, or other burdens the complainant incurred, as well as damages for the harm of being obstructed in accessing the right to vote and of experiencing discrimination. The discriminating agency can also be required to make its election systems accessible, adopt policies to ensure accessibility going forward, and to undertake any other steps necessary to remediate the problem. The discriminating agency can also be required to pay the complainant's attorneys' fees and costs. Finally, and most significantly, under Section 504, the agency can be required to give up its federal funding.

So, if a state or local government is providing voter information, voter verification, registration, ballots, or election results via the internet or ICT, or if it is receiving information, registration applications, votes, and the like from voters or prospective voters via the internet or ICT, it ignores the accessibility of those communications at its own peril.

### **Accessibility of Vote-Casting**

In the bygone era of just paper-and-pencil ballots, equally effective communication generally meant providing an assistant to read a ballot aloud to a voter with a vision disability. Thus, the Voting Rights Act of 1965 requires voters with disabilities to be permitted to use an assistant of their choice. However, these approaches undermined privacy and independence, which are key elements of voting. As we have entered the age of digital voting, auxiliary aids and services have also become digital, with direct recording electronic (DRE) voting machines available to provide ballot information and record votes accessibility. Accessible DRE voting machines are required in federal elections by the Help America Vote Act, discussed below. Accessibility of voting via DRE machines is generally accomplished by ensuring the DRE machine is capable of audibly reading the ballot aloud through headphones and casting ballots through an accessible keypad. Although the Help America Vote Act only governs federal elections, the ADA's requirement for equally effective communication extends the requirement for accessible voting to all elections. As the first generation of DRE voting machines is reaching the end of its life expectancy, state and local governments must ensure their accessible voting machines are in good working order and ready to provide accessible service in every election.

Absentee ballots must also be accessible. Both requests for absentee ballots and absentee ballots, themselves, are no longer limited to paper documents and jurisdictions that do not make available accessible electronic versions of request forms and ballots, as well as online ballot marking tools for blind voters, risk violating the ADA. See <https://www.courthousenews.com/wp-content/uploads/2017/11/OhioBlind6th.pdf>. As jurisdictions have implemented electronic absentee ballots for overseas members of the military, they have

demonstrated that it is not an undue burden to provide accessible electronic absentee ballots for individuals with disabilities.

### **Accessibility of Voter and Election Information**

Similarly, in the era of paper-and-pencil documents, equally effective communication generally meant reading election-related documents aloud or providing large print, taped texts, and Braille formats for documents regarding voter eligibility, polling place locations, and candidates and other issues on the ballot, and using sign language interpreters, relay services, and captioning for meetings and telephone calls regarding elections. These are known in the ADA and Section 504 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 of voter information, registration applications, and absentee ballots into large print, computerized speech, or Braille. Online voter information 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 pre-recorded video and audio information is readily available for people with hearing disabilities. Voter information presented through video or audio can be made accessible to people who are deaf or hard of hearing simply by providing captions online. By making a voting website or online document or video accessible (i.e., screen readable, usable without a mouse, and captioned), a state or local government can make its election communications accessible without having to create separate accessible versions.

Finally, a major point for communication between elections authorities and voters is at the polls. Poll books, used by elections authorities to verify voter addresses and identities at the polling place, are now provided in electronic formats, often on laptops or tablets. While paper pollbooks provided no option other than a poll worker reading the identity and address information aloud to a blind voter for purposes of verification, that approach interfered with the privacy and independence of blind voters. Electronic poll books, however, can be made accessible by enabling spoken voter information through headphones while providing the voter input into the process via a touch screen and/or accessible keypad, thus ensuring equal effectiveness, including privacy and independence, as the ADA requires.

In some states, voter registration is also being done at the polls. When information and communications technology is used for this process, it, too, should be accessible.

## **Other Applicable Laws**

The Help America Vote Act (HAVA) requires election jurisdictions to provide at least one accessible (and private) voting system for individuals with disabilities at each polling place in a federal election. In addition, the National Voter Registration Act (NVRA) requires that all offices that offer state-funded programs or public assistance primarily to people with disabilities also provide the opportunity to register to vote in federal elections. Because both the agency responsible for voting and the agency responsible for the assistance program have effective communication obligations under the ADA, the voter registration information and application process must be accessible.

In addition, similar to Section 508 of the Rehabilitation Act, which requires technology purchased or used by the federal government to be accessible, many state and local laws require those governments to ensure their technology purchases comply with accessibility requirements.

## **Poll worker and Employee Access**

As voter-facing election information has moved into technology, so have the systems that collect, count, authenticate, and disseminate voting results. These systems include voter registration databases, optical/digital scanning systems for ballots, and electronic tabulation, publication, and audit systems, as well as e-learning systems for poll workers and other staff involved in elections.

Volunteer poll workers with disabilities are protected by Title II of the ADA and, like the public, must be provided equally effective communication as they apply, receive training, and perform their duties. Therefore, poll worker-facing technology, such as online and ICT-based recruitment and training, and poll worker tools such as electronic pollbooks, need to be accessible to poll workers with disabilities.

State and local governments also have legal obligations, not only to the public, but to their employees and prospective employees. Title I of the ADA applies to the employment activities of state and local governments with fifteen or more employees, Title II of the ADA applies to the employment activities of smaller governments, and Section 504 applies to employment by state and local governments that receive federal financial assistance.

These laws do not specifically require jurisdictions to ensure their employee- and volunteer-facing technology is always accessible. However, any jurisdiction that does not ensure its technology is accessible will most likely fail to meet its legal obligations.

If a state or local election agency 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 or volunteer with a disability (e.g., a staff person or contractor to act as a reader, scribe, or interpreter). If, on the other hand, the state or local government has purchased or developed employee- or volunteer-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 or volunteers with disabilities. For example, when a voter registration 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.

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