Blogs
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Key Updates:

- Earlier this month, the Department of Justice (DOJ) adopted a final rule under Title II of the Americans with Disabilities Act of 1990 (ADA) aimed at ensuring web content and apps are accessible to people with disabilities.
- Specifically, the new rule requires that public entities covered by Title II, which includes state and local governments as well as special purpose districts, Amtrak, and other commuter authorities, conform their websites and apps to the Web Content Accessibility Guidelines (WCAG) 2.1, Level AA. WCAG 2.1 is widely accepted as an industry standard for achieving accessibility online and forms the basis for other regimes such as the EU's harmonized standards under its Web Accessibility Directive.

- Public entities must comply within two to three years, depending on their size. The DOJ's rule only contains narrow exceptions, as described below.
- The DOJ's move foreshadows the potential for similar action under Title III of the ADA, which applies to public accommodations owned by private entities, such as restaurants, shops, movie theaters, daycares, and private hospitals.

The DOJ has long indicated that accessibility obligations extend to web content and apps in addition to physical spaces. The DOJ considered codifying its position in 2010 when, in an Advanced Notice of Proposed Rulemaking, the DOJ sought comment on accessibility standards for web content under both Title II and Title III. However, in late-2017 the DOJ withdrew those proposed rules in a regulatory sea-change during the Trump administration. In 2022, it issued guidance on the topic.

Now, the DOJ has formally adopted a technical standard for the first time in the form of WCAG 2.1, Level AA. WCAG is an international standard that identifies a set of broadly applicable guidelines designed to foster web accessibility such as specifying the requirements for captioning video content. The new rules specifically incorporate version 2.1 of WCAG, which the DOJ found to be the most prudent approach given its success in promoting accessibility and broad adoption. But the rules also allow public entities to use alternative designs, methods, or techniques as long as the public entities can prove the alternatives provide the same or greater accessibility and usability (known as "equivalent facilitation") as WCAG 2.1. An equivalent facilitation could include newer versions of WCAG, such as version 2.2 released last fall, which the DOJ declined to adopt at this time.

The new rules permit only limited exceptions from compliance with WCAG 2.1, Level AA. First, the DOJ limits the use of "conforming alternate versions" to instances where a technical or legal limitation prevents making inaccessible web content accessible. In other words, absent a technical or legal limitation, public entities may not provide an accessible web page or app that is separate from and essentially copies an inaccessible version of the same because users with disabilities have a right to equally access content on the same page as users without disabilities. Second, the DOJ specifically excludes certain types of content from the rules, including (i) archived web content, (ii) pre-existing conventional electronic documents, (iii) content linked to or posted by a third party, unless the third party posted such content under a contractual or other arrangement with a state or local government, (iv) documents about a specific individual that are password protected, and (v) pre-existing social media posts.

State and local governments with more than 50,000 people must comply within two years of the date on which the final rule is published in the Federal Register. All other public entities subject to Title II must comply within three years. Additionally, it is widely believed that the DOJ will pursue similar standards under Title III (as it sought to do in 2010), which would extend web accessibility obligations to a large number of private entities that operate places of public accommodation.

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