What New Web Content Accessibility Guidelines Mean for Your Web Page

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The latest iteration of the Web Content Accessibility Guidelines became effective with the publication of version 2.1. on June 5, 2018. The newest version adds an additional 17 success criteria for compliance with WCAG, 12 of which are part of success level 2, the level that has become a de facto standard for the ADA. I've shared my thoughts on how this may change the ADA litigation landscape elsewhere. In this blog I'd like to consider the deeper questions posed by this revision: Who gets to decide what discrimination means?

It is worthwhile to start with a look at the stated purpose of the ADA itself. The declaration of policy in 42 U.S.C. §12101 never uses the word "accessible" and refers to "access" only with respect to public services. The focus of the ADA is discrimination, and standards for accessibility are only part of Congress' intent to "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." (42 U.S.C. §12101(b)(2)).

The first of these standards concerned physical accessibility and took the form of the ADAAG, a set of construction requirements that are "as precise as they are thorough" according to the Ninth Circuit Court of Appeals. The original standards were replaced and expanded by the 2010 Standards now in effect, but a facility built when the old ADAAG were in effect still meets the requirements of the ADA. If you do it right the first time, you don't have to keep re-doing it as standards for accessibility change.

This is notable because it is an example of the kind of compromise built into the ADA. Not making a facility accessible according to statutory standards is "discrimination" as defined in the ADA, but the statute was not intended to require that businesses perpetually update their physical premises as standards change. There are other compromises as well. The required door widths, slopes, and so forth are all based on what is accessible to most disabled individuals; not all. Those compromises were worked out over many years through the regulatory process with input from disability rights advocates, technical experts and the affected businesses. More recently adopted standards for ATM's, movie theaters and the like were worked out the same way, balancing the degree of access with the cost of existing technology. In every case businesses were allowed lead times of many years to adapt to the new standards. No one was expected to become accessible overnight.

Until, that is, the Department of Justice decided that the internet should be accessible and that the ADA was the means to enforce that accessibility. DOJ prosecuted internet access cases long before it had begun work on accessibility standards for the internet, and then deep sixed regulations that were almost complete for political reasons. The business community, usually not anxious to be regulated, is now trying to persuade Congress to force DOJ to publish regulations in order to end the chaos brought on by a lack of standards.

In the meantime, we have the Web Content Accessibility Guidelines, now in version 2.1. They are published by the World Wide Web Consortium, a private organization made up of tech companies and academics from around the world. The Guidelines were developed with input from experts in accessibility, but not, it appears, members of the business community most affected by the Guidelines; that is, people who sell things on the internet or use web sites in support of ordinary physical businesses. The Guidelines were intended to

be private and non-binding, so naturally they do not take into directly into account either the time or cost of implementation; after all, if there were no ADA a business could take as long as it needed to implement them, and could limit its implementation if cost were an issue. They are being used as government regulations without the process and compromises that such regulations ordinarily require.

This is not the fault of W3C of course. It is merely fulfilling its mission of providing web standards, with accessibility standards being just one such standard. It is disturbing though that an international NGO with no political or financial accountability has been delegated the job of regulating American business by the political paralysis of DOJ and the Congress and the willingness of the Courts to entertain website accessibility lawsuits. For businesses the only effective response is to assume that WCAG 2.1 will be the basis of a new round of lawsuits claiming that the definition of “discrimination” under the ADA was changed overnight by the publication of WCAG 2.1, and to begin updating their websites accordingly.

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