

ALERTS

Labor & Employment Law Alert - U.S. Department Of Justice Continues Enforcement Of Accessibility Requirements For Websites And Mobile Apps – But Its Rulemaking Still Awaits

November 18, 2014 | [Atlanta](#) | [Chicago](#) | [Columbus](#) | [Delaware](#) | [Elkhart](#) | [Fort Wayne](#) | [Grand Rapids](#) | [Indianapolis](#) | [Los Angeles](#) | [Minneapolis](#) | [South Bend](#)

On Nov. 17, the U.S. Department of Justice (DOJ) announced that it had entered into a settlement agreement with Ahold U.S.A., Inc., and Peapod, LLC, regarding the accessibility of [www.peapod.com](#) and its associated mobile application. This follows on the DOJ having earlier this year entered into a consent decree with H&R Block (which culminated from a lawsuit originally initiated by the National Federation of the Blind) regarding the accessibility of its website, online tax preparation product and mobile application.

Both agreements require that the websites and mobile applications be made compliant with the Level AA Success Criteria of the Web Content Accessibility Guidelines 2.0 (WCAG 2.0). WCAG 2.0 are voluntary guidelines issued by the World Wide Web Consortium in December 2008. Existing regulations and accessibility standards issued under the Americans with Disabilities Act (ADA) do not expressly address accessibility requirements for websites and mobile applications. In the absence of such legal standards, both the DOJ and private plaintiffs have relied upon WCAG 2.0 as criteria for making websites and mobile applications accessible.

In July 2010, the DOJ issued an advance notice of proposed rulemaking indicating its intent to promulgate regulations under both Title II (state and local government programs) and Title III (public accommodations) of the ADA to address requirements for website accessibility. To date, DOJ has not yet issued its notice of proposed rulemaking (NPRM) under either title of the ADA. In its most recent semiannual regulatory agenda, issued in May 2014, the DOJ had anticipated issuing its Title II NPRM in August 2014, and its Title III NPRM in March 2015. DOJ's Title II NPRM currently is under review by the Office of Information and Regulatory Affairs (OIRA) pursuant to Executive Order 12866. The U.S. Access Board's separate NPRM under Section 508 of the Rehabilitation Act to adopt WCAG 2.0 with respect to websites and other electronic and information technology maintained by the U.S. Government, also is currently under review at OIRA. The U.S. Department of Transportation has already issued final regulations under the Air Carrier Access Act requiring that airline websites comply with WCAG 2.0 Level AA Success Criteria.

Notwithstanding the delay in the DOJ's rulemaking, entities covered under the ADA are well –advised to assess the accessibility of their websites and mobile applications. Through its enforcement activity, the DOJ has signaled a clear intent to rely on WCAG 2.0 Level AA Success Criteria as defining “accessibility” for websites and mobile applications under the

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ADA, notwithstanding the fact that it has not yet adopted WCAG 2.0 as legally enforceable standards. Additionally, as evidenced by the Peapod settlement, the DOJ is pursuing enforcement in this area as part of its authority to conduct “compliance reviews” under the ADA, even if no individual has filed an administrative complaint. Whereas the DOJ previously has included website accessibility in its compliance reviews conducted under Title II as part of its Project Civic Access program, the Peapod settlement appears to be the first instance in which the DOJ has done so under Title III.

With respect to third-party content provided on its website or mobile application, the Peapod settlement requires that Peapod seek a commitment from the vendor to provide content which either conforms, or can be made to conform, to WCAG 2.0 Level AA Success Criteria. The settlement also requires PeaPod to designate a Website Accessibility Coordinator (for both the website and mobile applications); to adopt a Website and Mobile Application Accessibility Policy; to solicit customer feedback on how accessibility of the website and mobile applications can be improved; to modify its policies regarding “bug fixes” so that bugs which create nonconformance with WCAG 2.0 are remedied with the same level of priority as other bugs; to acquire and use an automated accessibility testing tool with respect to both the website and mobile applications; to conduct annual tests utilizing individuals with different disabilities; to retain an independent website accessibility consultant; and to train Peapod’s website content personnel on website accessibility. The settlement also requires that Peapod submit annual compliance reports to the DOJ.

The complete Peapod settlement is available at http://www.ada.gov/peapod_sa.htm.

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