

From the Louisville Business First:  
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## Business of Law: How businesses should consider ADA compliance on the web

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After Cyndi Masters was in an accident that left her unable to leave her house, the internet was her gateway to the world.

“I was so isolated, and the internet let me not be isolated,” she said. “And [it] let me participate fully, at least in that one fraction. I thought, ‘Gosh, a blind person should be able to [use this], a deaf person [too.]’”

This realization caused her to make a career pivot toward the industry that she’s still in today — with a mission of making the internet easier to navigate for people with disabilities. Masters is the founder and CEO of Louisville-based DBS Interactive, a full-service digital agency, focused primarily on building accessible websites.

“If the internet is responsible, the world can be fair,” Masters said. “It means that somebody that’s in a wheelchair or blind can experience the internet, and you can’t do that anywhere else. If you can only use one finger, you can still shop, you can have community, you can participate.”

### **‘To me, that’s the beautiful part of the internet.’**

But on the flipside, building fully accessible websites has been a challenge for businesses, and in some cases, has led to lawsuits.

The Americans with Disabilities Act — more commonly referred to as ADA — was signed into federal law in 1990 with the broad mission of prohibiting discrimination against individuals with disabilities, including making physical public spaces accessible to them.

But in the 30-plus years since the ADA’s passage, the definition of “public spaces” has broadened to include the internet.

Some of Louisville’s small businesses have been sued over their websites not meeting ADA requirements. Area lawyers and web developers are trying to help clients avoid these suits.



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ADA compliance on the web has become increasingly important for small businesses.

“It makes practical sense that the ADA’s protections would apply to websites, but the text of the law itself just does nothing to help in that regard because it wasn’t contemplating this particular issue at the time it was drafted,” said Sarah Laren, an attorney at Dentons.

Locally, Louisville Vegan Jerky Co. and A Taste of Kentucky Inc. have faced lawsuits over their websites’ alleged lack of compliance to the ADA.

The lawsuit against LVJ closed in August. It was filed in June in the U.S. District Court for the Southern District of New York, where the plaintiff, who is blind, claimed LVJ failed to “design, construct, maintain and operate its website to be fully accessible to — and independently usable by — plaintiff and other blind or visually-impaired people who use screen-reading software,” the complaint reads.

LVJ couldn’t be reached for this story. The case ultimately was closed in a voluntary dismissal filed by the plaintiff, stating the parties had reached a “settlement in principle.” The case closed without costs to any party, according to documents filed with the court.

The plaintiff in the LVJ case has filed more than 30 similar suits against other websites in the Southern District of New York, court filings show, all in 2022.

The suit against Taste of Kentucky also was filed in the Southern District of New York, and similarly alleges Taste of Kentucky’s website wasn’t “equally accessible to blind and visually impaired consumers.” The site now has a tool which offers different modes to accommodate for different disabilities.

Taste of Kentucky recently issued a statement to Louisville Business First: “When informed of the ADA issue, we reacted immediately, made the appropriate changes, and are now 100% ADA compliant. We feel both our physical store and website must be both enjoyable and accessible to all potential customers.”

As with LVJ, the plaintiff in this case has filed similar suits against multiple sites and companies, court filings show.

Suits such as these have been filed since the rise of the internet, but the amount of lawsuits have ramped up over the past few years.

Bruce Paul, a member at McBrayer PLLC in Louisville, said that the nature of e-commerce brings Kentucky-based companies nationwide — explaining why these suits involving local companies were filed in the Southern District of New York. This isn’t exclusive to the ADA, but just a function of e-commerce.

“Kentucky companies and California companies and Georgia companies are all finding themselves in the Southern District of New York, because that’s where the judges were liberally applying the statute,” Paul said.

### **Understanding ADA digital compliance on websites**

Masters started DBS in 2000.

“Nobody really understood digital compliance because digital was so new,” she said.

Masters said the first types of companies to face these suits were e-commerce websites. In fact, nationwide retailer Target Corp. was the subject of one such lawsuit in 2007 — National Federation of the Blind v. Target Corp. — where the plaintiff alleged Target failed and refused to make its website accessible to persons who are blind.

Minneapolis-based Target reached a settlement with the Federation for the Blind and promised to ensure that its website met the guidelines.

Drake Hatfield, president and CEO of Hatfield Media, a web design firm based in Louisville, said he is a big fan of the ADA, especially because of the physical improvements it made to the lives of people with disabilities.

“The problem, to me, is that the law does not take into account modern web design,” Hatfield said. “The internet is inherently a visual medium, so to try to translate that to other senses such as audio is very difficult.”

He said a fully ADA friendly website is nearly impossible to achieve because it would eliminate interactive elements, animation and even PDFs, because they don’t include site reader capability.

But there is a difference between compliance to the law and full accessibility.

Masters said compliance refers to creating a website that follows the law within its guidance, but fully accessible refers to sites that are completely available to everyone.

The Department of Justice issued guidance in March of this year on how to comply with the ADA online, Laren, the attorney at Dentons, said, but it isn’t as clear as the physical requirements. You can find some of that guidance in the graphic below.

“There’s just not as much concrete guidance in the area, so that means that sometimes employers don’t know exactly what they need to do to comply,” Laren said. “It also means that there’s maybe a little more room to make a claim that somebody’s not complying.”

Another reason for this uptick in litigation could be an after effect of the Covid-19 pandemic, where individuals relied more on websites for their daily needs. Also during the pandemic, Laren said ADA litigation spun out of a lack of compliance on vaccine registration forms. Fillable forms such as those have been a recurring pattern in complaints, Laren said.

Paul has represented clients in suits such as these. But in 2020 — when more people were working from home and using the internet for shopping and many aspects of their lives — he anticipated more suits being filed.

“Sitting at home where the physical spaces that the ADA was created for closed, I really thought that this was going to be a bigger issue for good reason,” Paul said.

Hatfield emphasized that the recent guidance is just that, guidance, and not law.

“[It’s] in the same way that we received guidance for Covid on the best practices.” Hatfield said. “ADA is a recommendation, a best practice. Businesses need to put forth their best effort to be compliant. If it were to be enforced as law, social media sites would be the first to receive lawsuits for sharing images without alt tags [alternate attribution or description].”

“The government’s original intentions were extremely positive for the disabled community, and unfortunately have been warped by people who take advantage of the way laws are written in order to file frivolous lawsuits,” Hatfield said. “That remains the biggest ongoing concern for business owners as well as web developers. Additionally, each operating system from Android to iOS to Windows has accessibility settings which are independent from web browsers. Each one is unique and regularly updated. ADA does not take this into account.”

### **Are the plaintiffs in ADA lawsuits ‘real’?**

With this uptick in cases, some have claimed lawsuits are being filed even when the plaintiff didn’t personally try to use the small business’ website.

A case in the 10th circuit of the U.S. Court of Appeals, *Laufer v. Looper*, involved a plaintiff alleging harm by a hotel’s website not being ADA compliant. The court ruled that the plaintiff had not experienced concrete harm by not being able to access that website.

“The court basically said, that’s not enough,” Laren explained. “You can’t just go around trying to find situations where a website might not be up to snuff. It has to be concrete and particularized — an individual injury to you as a plaintiff. That’s an interesting point, and it kind of represents a little bit of a pushback on this uptick in lawsuits that we’re seeing. It’s not unheard of for plaintiffs’ firms to partner with individuals who kind of go around from place to place looking for these issues.”

Masters said the business owners themselves have become a victim in these situations when they don’t know this is a problem to watch out for. There’s also a question of who’s filing the lawsuits.

“The majority of people who are visually or hearing impaired aren’t the ones who file lawsuits,” Hatfield said. “People who file lawsuits find a very specific thing and they find candidates that are willing to settle, which is a shame.”

Masters said she thinks it’s true that sometimes bad actors are using the ADA for lawsuits in a non-genuine way, but there are still well-intended people that should be accommodated.

“For the most part, whether people are well-intended or not, it doesn’t matter,” Masters said. “You are legally responsible to have an accessible website. And if it’s not accessible, you, especially in our country, are liable to get sued. ... So no matter why people are doing this, you still have to ask yourself, ‘Why didn’t I comply with law?’”

Masters admits this isn’t easy.

“You’re responsible for what you know and what you don’t know when you own a company,” she said. “It makes it very hard. I’m a

small business owner. It makes it very hard.”

### **How ADA compliance can help your website, plus red flags to watch out for**

Masters thinks that building responsible websites allows businesses to broaden their reach. She said Google favors websites that are ADA compliant, which gives businesses a better search result.

If done correctly, accessibility separates your website from the pack on Google in terms of search engine optimization, Masters said. She said it also makes it easier for the search engine to translate it into other languages if you do global work.

“Ultimately, it will pay big dividends because you do better in search, you get better leads, you have a larger reach in audience,” Masters said.

The best piece of advice Hatfield could give to a small business owner on their websites compliance is to “do your best,” he said.

“For most businesses, that looks like applying a tool on your website, which allows people to have more access and more control over how the content on your website is displayed,” he said.

There are several accessibility tools that exist that adapt content — this could include screen readers, the ability to adapt the colors to a high-contrast mode and the ability to reduce epilepsy triggers on video content. Hatfield said it’s on businesses to make sure these tools are installed and that they work efficiently.

Laren emphasized that these tools are helpful, but businesses should still self-monitor their website because some mistakes may not be caught, like how spelling and grammar check tools don’t catch everything.

It’s also important to have an area of your website where people are able to report accessibility issues.

“The responsibility from a visitor’s perspective is if something is critical and not functioning correctly ... they should submit a complaint to the business rather than filing a lawsuit.” Hatfield said.

“If you truly want to interact with a brand and you’re unable to do so because of something inherent in the website’s design, notify them so they can resolve it.

The vast majority of businesses will be more than happy to accommodate reasonable requests.”

Another big issue over the influx of suits is sometimes the plaintiffs are using outdated technology to access the websites, Hatfield said. Operating systems with a native accessible layer — this includes Apple, Windows, iOS and Android — have different ways that allow users to customize how their content is displayed.

### **Best practices for ADA compliance**

Laren said one of the simplest solutions to ADA compliance is to look for color contrast between the text and its background on your website. She also recommended including captions in all videos and alternative text for any graphic you use as well.

“The people that are actually using it, are they able to use it effectively?” Laren said. “If not, you get a sense of what the common issues are. What are people consistently reporting and is this something we can fix and how can we fix it? I think that’s a good way to self-monitor.”

One of the easiest ways to make sure your website is compliant is to ensure that individuals can navigate through the entire site with just the tab button, Masters said.

Laren said there was an effort on the federal level to set some concrete rules for ADA on the internet that ultimately was scrapped in 2017. It set some guidelines in March of this year, and while it was helpful, Laren said it left a lot of open questions.

“It’s just that it’s guidance, it’s not a rule,” she said. “I think there is going to be this continuing tension between, ‘How do we create rules and guidance that are concrete enough to let business owners know what they need to do to be compliant and to allow people with disabilities to access their websites without making it so rigid, that it’s difficult to comply?’”

Laren said ultimately there may need to be a “give and take” with whatever the right amount of regulation is. She said it would be up to the DOJ to issue more guidance beyond what it did earlier.

Another challenge is that technology and the internet is constantly evolving.

What is good practice for accessibility now could be outdated in three years, Laren said.

In the future, Hatfield said the majority of ADA regulations that need to take place is to serve the elderly, who he said seem to be the most neglected by technology.

“I do think [ADA compliance] legitimate concern,” Paul said. [It] makes business sense to make your websites available to as many people who could use them. I know that my clients very much want people with visual disabilities and people with auditory disabilities to be using their websites and doing these things. ... Whether you like the law or don’t like the law, this is probably something everyone should investigate.”

**Laurel Deppen**  
Reporter  
*Louisville Business First*



