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Mobile app-*cessibility* — getting one step ahead

By Mae Hau and Jill H. Gordon

The explosion of mobile health applications (apps) on the market brings potential accessibility issues—such as private litigants seeking to bring disability claims or regulators looking for headline-grabbing enforcement actions—to the legal landscape. Companies like Grubhub and various ride-sharing providers have all been hit with lawsuits alleging that their mobile apps violate the Americans with Disabilities Act (ADA) because they contain access barriers that make it difficult, if not impossible, for disabled individuals to use the apps.[1] Moreover, the U.S. Department of Justice (DOJ) has recently stepped up its enforcement of the ADA regarding accessibility of mobile apps.

Noncompliance may not only result in costly litigation, but lead to long-lasting reputation damage. Once the DOJ is involved things can get even more complicated. Companies have been subject to measures that go far beyond merely implementing changes to the mobile apps. Indeed, to date, settlements, with the DOJ have required such things as retaining an independent consultant to provide a written evaluation concerning the mobile app and submitting reports to the DOJ every nine months detailing compliance and/or lack thereof with the settlement agreement.

All companies, particularly those that seek, specifically, to serve the disabled—such as health care providers—can minimize exposure to the tide of litigation and enforcement actions by immediately evaluating and expanding the accessibility of their mobile apps to individuals with disabilities.

Regulatory framework

Multiple federal and state laws may be implicated when web technologies are not equally accessible to disabled individuals. Most prominent among the federal laws are the ADA and the Rehabilitation Act of 1973. Titles II and III of the ADA require state and local governmental agencies and private businesses, respectively, to make their goods and services as accessible to individuals with disabilities as they are to those without disabilities. Section 504 of the Rehab Act prohibits disability-based discrimination and requires accommodations by federal agencies and any entity that receives federal financial assistance. Additionally, Section 508 of the Rehab Act bars the federal

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[1] *Reed v. Grubhub Holdings, Inc., et al.*, No. 1:17-cv-4946 (N.D. Ill. June 30, 2017); *Robles v. Calvin Klein, Inc.*, No. 2:17-cv-00919 (C.D. Cal. Feb. 3, 2017); *Nat'l Federation of the Blind of Tx. v. Ride Fare, LLC*, No. 1:16-cv-1082 (W.D. Tex. Sept. 20, 2016); *Nat'l Federation of the Blind of Tx. v. Get Me, LLC*, No. 1:16-cv-1083 (W.D. Tex. Sept. 20, 2016)

government from procuring electronic and information goods and services that are not fully accessible to those with disabilities.

While there are clear guidelines for making *websites* accessible for disabled individuals, the same cannot be said for *mobile apps*. The Health Insurance Portability and Accountability Act (HIPAA) provides guidance as to the collection, storage and transmission of protected health information on mobile apps, but does not address how such information on mobile apps can be made more accessible to disabled individuals. Neither does the Health Information Technology for Economic and Clinical Health Act (HITECH)—which was created to stimulate the adoption of electronic health records and supporting technology in the United States. The problem is further exacerbated by the DOJ's decision to delay the publication of its proposed rules regarding website and mobile app accessibility until 2018—eight years after the agency began the rulemaking process.

Compliance without clear guidance?

Despite the absence of formal rules, all signs point to WCAG 2.0 Level AA (WCAG 2.0) as the likely standard to use when working to improve the accessibility of mobile apps. WCAG 2.0 is published by the World Wide Web Consortium (W3C), an international community of organizations that develop protocols and standards for the World Wide Web. It is a comprehensive set of technical specifications and techniques to make web content more accessible to people with a range of disabilities.

The DOJ has used WCAG 2.0 as the standard for making mobile apps accessible to persons with disabilities and ADA-compliant in its settlements and consent decrees with various organizations.[2] In addition, WCAG 2.0 is the standard that is contemplated under the Affordable Care Act (ACA). Section 1557 of the ACA requires "covered entities" (i.e., health care providers, health plans and clearinghouses) to ensure that health programs and services provided through Electronic and Information Technology (EIT) devices and systems be accessible to individuals with disabilities unless doing so would result in undue financial and administrative burdens (in which case the entity must provide the information in an equally accessible alternative format) or a fundamental alteration in the nature of the health program or activity. Although Section 1557 regulations do not require conformance to a specific standard, the Department of Health and Human Services has stated that covered entities "should consider following the widely accepted industry standard for web accessibility in the [WCAG] 2.0."[3]

Strategies for mitigating and managing risk

WCAG 2.0 does not specifically address mobile devices and applications, but its principles and success criteria are relevant to mobile applications. WCAG 2.0 guidelines include:

– **Text alternatives.** Ensure that all non-text content is also available in text. This allows electronic text to be easily enlarged, spoken aloud (so that it is easier for people with reading disabilities to understand), or rendered in whatever tactile form best meets the needs of a user.

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[2] *See edX, Inc. Settlement Agreement*, DJ No. 202-36-255 (Apr. 1, 2015), available at: https://www.ada.gov/edx_sa.htm; *National Federation of the Blind et al. v. HRB Digital LLC and HRB Tax Group, Inc.*, No. 1:130cv010799-GAO (D. Mass. Mar. 6, 2014), available at: https://www.ada.gov/hrb-cd.htm; *Peapod, LLC Settlement Agreement*, DJ No. 202-63-169 (Nov. 17, 2014), available at: https://www.ada.gov/peapod_sa.htm.

[3] Guidance and Resources for Electronic Information Technology: Ensuring Equal Access to All Health Services and Benefits Provided through Electronic Means, U.S. Dep't of Health and Human Services, Office of Civil Rights (Dec. 21, 2016), available at: https://www.hhs.gov/sites/default/files/ocr-guidance-electronic-information-technology.pdf

- *Multimedia.* All media—audio and video—must provide a text transcript with synchronized captions.

- *Colors.* Color and text formatting should not be the only means of communicating information. Providing the information conveyed with color through other visual means ensures that users who cannot see color can still perceive the information. For example, instructions at the top of a form should explain that required fields are labeled with red text and also with an icon whose alternative text says, "Required."

- *Dynamic content.* If there is dynamic content (e.g., contextual content or hidden menus that are triggered by user selection), ensure that the assistive technology is aware and can work with the dynamic content where changes could happen in real time.

- *Error handling.* Ensure that users are aware that an error has occurred and can determine what is wrong. The error message should be as specific as possible.

W3C guidance specific to mobile apps

In addition to WCAG 2.0, the W3C has issued draft guidelines as to how WCAG 2.0 can be applied to mobile web content and mobile apps. Though not yet final, the W3C guidelines provide useful guidance:

- *Small Screen Size.* Small screen size is one of the most common characteristics of mobile devices. The screen's small size places practical limits on how much information people can actually view at one time, especially when magnification is used by people with low vision. Some best practices for helping users make the most of small screens include:

  - Minimize the amount of information that is put on each page compared to desktop/laptop versions by providing a dedicated mobile version or a responsive design.
  - Provide a reasonable default size for content and touch controls to minimize the need to zoom in and out for users with low vision.

- *Zoom/Magnification.* To serve people with visual impairments or cognitive disabilities, the following methods might be used:

  - Ensure that the browser pinch zoom is not blocked by the page's viewport meta element so that it can be used to zoom the page to 200%.
  - Provide support for system fonts that follow platform level user preferences for text size.
  - Provide on-page controls to change the text size.

- *Touch Target and Spacing.* The high resolution of mobile devices means that many interactive elements can be shown together on a small screen. These elements must be big enough and have enough distance from each other so that users can safely target them by touch. Best practices for touch target size include:

  - Touch targets are at least 9 mm high by 9 mm wide.
  - Touch targets close to the minimum size are surrounded by a small amount of inactive space.

- *Buttons Placement.* Mobile apps should position interactive elements where they can be easily reached when the device is held in different positions. When designing mobile web content and

apps, many developers attempt to optimize use with one hand. While this can benefit people with disabilities who may only have one hand available, developers should also consider that an easy-to-use button placement for some users might cause difficulties for others (e.g., left- vs. right-handed use and assumptions about thumb range of motion). Therefore, flexible use should always be the goal.

– *Changing Screen Orientation.* Some mobile apps automatically set the screen to a particular display orientation (landscape or portrait) and expect that users will respond by rotating the mobile device to match. However, some users have their mobile devices mounted in a fixed orientation (e.g., on the arm of a power wheelchair). The mobile app should therefore try to support both orientations. If this is not possible, then the app should ensure that it is easy for all users to change the orientation to one their device supports.

Concluding remarks

The DOJ has made clear that it deems accessibility of mobile apps an integral part of ADA and Rehab Act compliance. All companies, health care providers and insurance companies in particular, should take proactive measures now to make their mobile apps conform to WCAG guidelines to avoid becoming targets of disability discrimination litigation, even as the law on mobile apps continues to develop.

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