ADA Title II Revisions: What You Need To Know

[00:00:00.14] JACLYN LAZZARI: For everyone just joining us, thank you for being here today for today's session, entitled ADA-- or entitled New Department of Justice, Title II Web Accessibility Regulations. My name is Jaclyn, and I'll be moderating today's session. I use she/her pronouns. And I'm on the marketing team here at 3Play Media.

[00:00:21.65] All right. With that all taken care of, I'm happy to welcome today's speaker, Ken Nakata. Thank you for being here today, Ken. With that, I'll pass it right off to you for what I'm sure will be a wonderful presentation.

[00:00:34.31] KEN NAKATA: OK, well, thanks, Jaclyn. I appreciate that introduction. Today, we're here to talk about the new Title II DOJ web accessibility regulation that is causing quite a stir. By way of background, my name is Ken Nakata. And I used to be a senior trial attorney at the US Department of Justice in the Disability Rights Section. That's the section that created these new regulations.

[00:01:02.85] And during the first half of my career, so for about this first six years, I focused mostly on traditional accessibility, built environment, cases. Did a lot of work on things like modifications of policies and new construction and alteration cases, the kinds of cases that I think most of us associate with traditional ADA work.

[00:01:31.70] And then during the second half of my career, I focused more on digital accessibility. That was driven in large part by working-- by the passage of Section 508 of the Rehabilitation Act. And I worked with my colleague, Mary Lou Mobley, who's now over at OCR in the Department of Education, on implementing Section 508 for the federal government.

[00:01:56.61] By way of background, for those of you who don't know, Section 508 is one of the really essential laws for making sure that digital technology is accessible. And it required, back in 2000, that the federal government make all of its electronic and information technologies accessible for people with disabilities. And around that same time, I was also working in the Justice Department to update our ADA regulations. And so I helped shape the policies for what private sector and public sector organizations had to do for web accessibility.

[00:02:33.62] So anyways, today's agenda is going to cover roughly four topics, five topics. First, we're going to talk about what web accessibility looked like for the public sector, for state and local governments, before these new regulations. And then we're going to shift to talking about the regulations itself. And in that, we'll talk about what it includes and what it doesn't include.

[00:03:01.40] And then we'll talk about, well, OK, what does this mean also for private sector? Is a private sector regulation around the corner? And we'll also touch on, what are the specific implications for higher education and education in general? And then I'd like to finish up by talking about some of the recent Supreme Court cases you may have heard about, like Loper Bright Enterprises that overruled the Chevron case from back in 1984, and how that may affect everything that we're talking about.

[00:03:36.14] So with that said, let's dive right in. So web accessibility really comes about because it's a form of communication. And communication is covered by subpart E in the Title II justice regulation and in the ADA under the term effective communication. Or you may know of it as the provision of auxiliary aids and services.

[00:04:04.35] So this covers things like, for instance, the obligation to provide sign language interpreters. Or say if you're in a private sector, if you go to a restaurant and the waiter hands a blind patron a printed menu, that includes things like, well, reading out the contents of the menu so that the blind individual can understand what menu choices are available.

[00:04:33.96] It's really a question-- it's a flexible requirement just to make sure that a person can meaningfully participate in programs and services if you're a Title II entity or to take advantage of goods and services if you're a Title III entity. And when you think about it, websites really aren't that different from that printed menu. It's a form of communication that's offered by a state or local government.

[00:05:06.21] Let's go back to focusing on state-- limiting this to state and local governments to keep it simple. So for state and local governments, the lead case was from way back in 2002, Martin versus MARTA, which was from the Northern District of Virginia. And in that case, the Metropolitan Atlanta Rapid Transit Authority, or MARTA, was sued by a number of plaintiffs, some of whom were blind.

[00:05:38.73] And the blind plaintiffs alleged that they couldn't get information for taking part in the program of understanding how to get from one point in Atlanta to another point in Atlanta through a combination of taking buses and taking the MARTA trains. How could they go most efficiently from one location, through public transportation, from one section, from one address to another address?

[00:06:06.63] And MARTA said, well, we're perfectly fine in accommodating people with disabilities. If you want a Braille schedule, we're happy to send you a Braille schedule. If you call us, we'll tell you how to get from-- our operators will tell you how to coordinate your trips so you can take the right buses and trains to get from one location to another. And also, you can always visit our website.

[00:06:31.20] And the plaintiff said, well, that's all well and good. But whenever I get the Braille schedules, it takes months to get them, and they're always out of date by the time I get them. You don't answer the telephone when I call. And by the way, your website is inaccessible. And a district court agreed that, yeah, in that case, program access was not being provided. And there wasn't effective communication.

[00:06:57.55] So what's interesting is that the court didn't specifically say that making the website accessible was necessary for providing effective communication. It's just that given all these different ways in which the entity could have provided that information, the website was part of the inaccessible ways that that information was being provided.

[00:07:24.91] So after Martin versus MARTA, we've got some Project Civic Access settlement agreements that were issued by the Department of Justice. So by way of background, the Project Civic Access is where the Department of Justice pretty much randomly picks a town or a county and says, hi, we're from the federal government, and we're here to help. We'd like to investigate every program, service, or activity that you offer and examine its accessibility and also look at all the architectural accessibility features of all of your facilities.

[00:08:03.07] And it's a monstrous undertaking for a local government to go through. And at the end of it, the Department of Justice settles with an informal settlement agreement. And in those settlement agreements, since about 2012, I'd say, 2013, they've always required a requirement that state and local governments comply with WCAG.

[00:08:25.28] At the same time, they've also issued guidance that suggests that state and local governments make sure that their websites are accessible. And before I left the Justice Department, I wrote one of those. And it was way back in 2004, where it basically said that if you're a state or local government, you have to make sure that your programs, services, and activities are accessible. And this includes your websites.

[00:08:56.24] And in order to do that, you can comply with WCAG or the Section 508 standards. But you don't absolutely have to. That's one thing you can do. If you decide that you don't want to do that, then an alternative is to provide a telephone line that people-- that was available that people would answer and as long as you're providing effective communication. So that was back in 2004.

[00:09:31.10] Fast forward to July of 2022. The Justice Department issues more guidance. And it said basically exactly the same thing that they said in 2004. And I blogged about that at the time. And I really was not happy with the Justice Department because they didn't provide any additional information. And so I was thinking, oh, there's not much happening in web accessibility.

[00:09:58.64] Then in January of 2023, the Justice Department made a notice to the-- notified the Office of Management and Budget that they were thinking about creating a Title II regulation. So this is only, what, three months after-- four months after they came up with this guidance. They said, we're going to come up with a regulation. The reason why they did that is because agencies always have to advise OMB about any significant regulations that they're thinking about issuing in the coming year.

[00:10:31.31] So they said, well, sometime around April, in 2023, we'll come up with our notice of proposed rulemaking for a new Title II regulation. Well, April 2023 came and went. Time kept ticking by. Finally, in August of 2023, they came up with their notice of proposed rulemaking. And at the time, I thought it was just a disaster. It was both too-- it was too stringent in some respects because it required WCAG 2.1 A and AA compliance without providing any kind of flexible alternative.

[00:11:09.31] Yet at the same time, it also exempted huge swaths of content and basically threw under the bus, as far as I was concerned, every student with a disability because educational

content that was password protected, that you had to use a login to get to, was basically exempt from the Title II-- the NPRM.

[00:11:33.41] Well, after that, there's a 90-day comment period. And then in April of 2024, they issued their final regulation. This is the new subpart H of the Title II regulation. And it requires, by April 24 of 2026, that every larger public entity, which means 50,000 residents or more, has to comply with WCAG 2.1 A and AA.

[00:12:05.71] And if you're a smaller organization, you get an extra year. You get to comply by April 24 of 2027. And it includes a number of limitations. It includes, of course, the traditional limitations, such as if making your website or web content comply with WCAG constitutes or imposes an undue burden or constitutes a fundamental alteration, then you don't have to do it. Those are basic traditional ADA defenses.

[00:12:38.68] The direct threat defense isn't specifically stated, but I think it's pretty clear that that's also there. But I can't imagine too many cases where that is really going to arise. Maybe that's the reason why it's not specifically stated. And it also includes WCAG's allowance for conforming alternate versions of web content if you really can't make your main content comply.

[00:13:04.58] There's also a couple other limitations that I didn't really spell out here, the most significant of which is you're allowed to have inaccessible web content if doing so imposes minimal impact on people with disabilities. And I think that that gets around-- that, in a sense, includes that alternative of a telephone.

[00:13:31.50] But it's a really limited defense. You don't want to rely on it because it's always going to be a very case by case determination. And so your lawyers are going to be telling you that you don't want to rely on that, because if you do, they're going to have to prove that that plaintiff was not substantially impacted by your decision not to make your web content accessible.

[00:13:57.53] It's interesting to me, also, that they came up with the regulation in April of 2024, because, as we all know, we have a new election coming up. And it's very possible that the administration and the legislature, the Congress and the Senate, might change parties.

[00:14:23.25] And if that happens, then there's another law that can kick in called the Congressional Review Act that would enable Congress, just by a simple majority, to overturn any regulation that was issued by the previous administration within 60 calendar days of the new administration coming in.

[00:14:45.66] And 60 calendar days, it's not a traditional measurement of-- well, it's not calendar days. It's legislator days. It's session days. It's a number of days that Congress is actually in session. So if you count backwards, they were under the gun to make sure that their final regulation wasn't issued after July of this year. And we'll talk about how that impacts also the possibility of a private sector regulation in a minute.

[00:15:15.95] So yeah, I'm just looking over my notes here. I think that's-- yeah, that's primarily what I wanted to talk about in terms of the overall structure of the Title II regulation.

[00:15:28.19] It also includes a number of very controversial exceptions. And these are cases in which you don't actually have to comply with WCAG. In fact, if you fall in one of these exceptions, you really don't ever have to, according to the new DOJ regulation. These exceptions include archived web content, pre-existing conventional electronic documents, content that's posted by a third party, individualized password-protected documents, and pre-existing social media posts.

[00:16:01.96] And as I mentioned earlier, the NPRM also included in these controversial exemptions basically anything that was educational content that was behind a login. And thankfully, they removed that limitation. The big one here for me is the fourth one, the individualized password-protected documents, because what this would exempt are basically anything that is a password-protected document or any kind of document that's behind a secure login.

[00:16:41.94] And that would include, for instance, things like if you go to your doctor and have a cholesterol test done, then that cholesterol test is probably going to come back in a PDF. And in order to access that PDF, you have to go through a login screen to get to it because it's secured. That PDF won't have to be made accessible.

[00:17:07.74] And yes, the Justice Department says, yeah, it's not that big of an imposition because ultimately you're going to have to provide effective communication with that document anyways if you're a public sector entity. But that really doesn't help that much in my opinion because the document itself doesn't have to be made accessible. The doctor could simply tell you what your cholesterol values are. And that's going to suffice.

[00:17:37.17] And that causes, too, big limitations. One is that-- the first one is that it's part of a system of records to me. And the value of one individual cholesterol test is useful. But it's not-- the real value of it lies in the trend that you get from looking at all the other cholesterol tests that you've had. And none of those documents have to be made accessible. So it limits your ability to take part.

[00:18:07.74] And this also includes things like-- in the educational context, it would include things like your transcripts. The school could simply tell you what your grades are for a semester. But they don't actually have to make that PDF accessible.

[00:18:23.56] The other problem with this limitation is that almost all of these documents are templated. They almost always follow exactly the same format. And so making that document accessible for everybody really isn't that big of a stretch. And even though we all made comments about that to the Justice Department, they didn't include it in their final regulation.

[00:18:48.24] So let's see. To me, the way in which this should have worked is that if the public entity knows that a person has a disability, then they should make those things-- then they should always make that document accessible for that person that they know has a disability. Or if on

first request that any of these documents-- once they are made accessible, they should always be kept as accessible, so even, for instance, the pre-existing conventional electronic document.

[00:19:22.02] So that includes the things that are already on state and local government websites. If they're currently inaccessible and you decide, well, OK, somebody requested an accessible PDF, I made the accessible PDF, that public entity's not obligated to keep that accessible PDF, which seems unfortunate to me, because if documents are made accessible upon request and kept, then over time, then the entire system becomes accessible. But because they didn't include that requirement, a future reality isn't as likely to happen.

[00:20:03.33] So let's talk about what the implications are for the private sector. Well, I mentioned that Congressional Review Act. And it's already end of July. And so if Justice came out, even if they came out with their final regulation today, it would be subject to-- it would likely be subject to the Congressional Review Act, and a new administration will toss it out. So that's one problem.

[00:20:33.28] A second problem is, as we'll talk about in a couple of slides when I talk about what's happened with the Loper Bright decision and the Supreme Court and how they have overturned Chevron, there's a huge ambiguity in Title III about web accessibility because Title III for private businesses affects what we call places of public accommodation. That's the language that's in the statute and the regulations.

[00:21:00.99] And so, naturally, courts ask, where's the place when it comes to a place of public accommodation? And then you get into this whole discussion about the so-called nexus requirement in the Ninth Circuit and the Eleventh Circuit, which requires that there be some sort of connection or nexus between the website and the place of public accommodation and all of that. And it gets horribly complicated, even though it really doesn't have to.

[00:21:28.26] And I really don't agree with any of that analysis because, ultimately, I don't think that you're really ever determining whether a website is a place. I think that a website is ultimately a form of communication of a place. That makes more sense to me. But that's not the way in which the courts interpret this. But hey, I'm not a federal judge. So it's a huge ambiguity. And that creates huge problems in this new world of what the Supreme Court has decided.

[00:22:03.44] Nevertheless, for the public sector, we've got things like HHS has created a new Section 504 regulation. And Section 504, as those of you who are in higher ed no doubt know, Section 504 covers federal agencies as well as any federally funded activity.

[00:22:29.63] And so HHS's regulations that they just came up with, that they just updated to include the new Title II web accessibility requirement, affects basically anybody who's a health care provider or a social service establishment. They're all basically covered under this huge umbrella of HHS's 504 regulation.

[00:22:53.91] And as other agencies create their 504 regulations, it's going to be very likely that a huge amount of the private sector's going to get covered because they're going to be covered by some kind of federal funding, whether direct or indirect, in some way. And I think the real

linchpin here would be if DOJ came up with a new 504 regulation that required web accessibility.

[00:23:24.38] That would require then, because of a separate executive order, executive order 12250, would require that all the other federal agencies make their regulations harmonize with that. And so that would be-- yeah, that would be huge.

[00:23:43.97] The other thing that might happen here-- well, I should back up. The Section 504 regulations are not nearly as controversial and not as ambiguous-- it would cover an area that's not nearly as big of an ambiguity or as big a gap as Title III's coverage of places of public accommodation. And it would be-- it would be a lot harder for a court to use Chevron-- or the post Chevron-- to throw out those kinds of regulations, in my opinion.

[00:24:19.08] Then we've also got state laws. There's a bill going through the California legislature, Senate Bill 1486, that's going to have a lot of impact on private sector as well. But we're not here to talk about private sector. But that's ultimately where private sector is headed is state laws as well as Section 504.

[00:24:41.52] What about education? Well, the new regulation basically has no impact on any private sector college or university, unless, of course, the Department of Education comes out with a web accessibility requirement in their Section 504 regulations. However, for public sector entities, you basically have to comply with this new Title II regulation.

[00:25:07.63] Now, it's unclear to me how some of these limitations are going to play out, those four or five controversial limitations, like pre-existing electronic documents and individualized password-protected documents. It's unclear to me how OCR is going to-- what the OCR's position's going to be on that. I suspect that what they'll say is that you still have to make those documents accessible because of Section 504, but not because of ADA Title II.

[00:25:41.51] But I'm not from Department-- I'm not from OCR Department of Education, so I really can't tell you what they are definitely-- what their final position is going to be. But that's my suspicion.

[00:25:56.13] So I wanted to spend a bit of time talking about something which really wasn't on the agenda, but it really is in some respects because it ultimately is going to affect us all. And that's this new Supreme Court decision of Loper Bright Enterprises versus Raimondo, which overturned the earlier 1984 Supreme Court decision in Chevron versus Natural Resources Defense Council.

[00:26:23.70] So it's kind of ironic that the way things and the way politics and judicial opinions turn out because Chevron involved a challenge to a Reagan era limitation to an EPA regulation. And at the time, anybody who was a liberal hated the Chevron decision.

[00:26:53.14] And the reason why is because, at that time, the Reagan administration, as you may recall from the 1980s, they were really trying to-- they're trying to take the federal agencies and deregulate a lot of things that were previously being regulated. So the EPA regulations was

about, I think, smokestack requirements or something like that. And the regulation made it easier for companies to pollute.

[00:27:20.62] And so the environmentalists challenged it. And the Supreme Court basically said that the law really wasn't clear in this area where the EPA had created a regulation. But in those gaps and ambiguities, in those areas where Congress isn't specifically clear, that's the job of the federal agencies to come in and clarify it.

[00:27:48.28] And if they clarify it, then their interpretation should be given a lot of deference by the court unless they really messed up. It clearly goes against what the statute required. And that was a Chevron opinion at the time, a position at the time.

[00:28:06.59] And the funny thing is that later on, when I was at the Justice Department, we turned that on its head. And we cited Chevron all the time so that people-- so that courts would pay attention to us-- because we were the Department of Justice-- when we were interpreting the ADA. And it bought us a lot of cover for some fairly controversial positions that we were taking. So at the time, it really was quite controversial.

[00:28:40.85] It's ironic that the current Supreme Court overturned it because, originally, the arch conservative justice, Justice Scalia, was a huge fan of Chevron. He really believed that agencies should have the ability to interpret in these areas.

[00:29:03.15] So the idea also is that in these gaps and ambiguity, areas where there's gaps and ambiguities, that federal agencies have experts in those areas. So the federal agencies like EPA have experts in environmental law. So they're the ones who should be interpreting what makes sense in those gaps and ambiguities.

[00:29:25.14] So in Loper Bright, the Supreme Court justice, just in the last two months, threw out the Chevron decision. And now, the law is completely the opposite. Instead of giving deference to the federal agencies, any court, any district court, can question or overturn a federal agency's interpretation if it falls within one of those gaps or ambiguities.

[00:29:55.41] So in Loper Bright, it was about-- the case involved-- let me see. It was about fishermen, herring fishermen on the Atlantic coast, as far as I remember. The Department of Commerce is able to regulate fishermen. And one of their requirements is that they provide an observer on the boat to make sure that the fishing boat isn't, I think, exceeding its catch limitations while it's out there fishing.

[00:30:30.51] And the law said that there are certain classes of fishermen that definitely have to do this. But one of those classes of fishermen was not herring fishermen. So there's a gap there. And so the Department of Commerce came up with a regulation that said oh yeah, by the way, herring fishermen have to do the same thing as all the other fishermen. They've got to pay for an observer on their boat.

[00:30:55.51] And naturally enough, the herring fishermen said, well, we don't want to have to pay for a guy on our boat that just sits around and just watches us catch fish. And so they

objected. And they filed a case against the Department of Commerce, and they won. And the Supreme Court basically said that it's the job of Congress to clarify what those gaps or ambiguities are. And if there are gaps in ambiguities that still remain, it's really the job of the federal courts and not the federal agencies to fill that gap.

[00:31:30.95] And while an agency can try to come up with an interpretation, it's not entitled to any kind of deference or any real deference by the courts, which seems to me to now be the most undemocratic thing that you can possibly do, because when you think about, for instance, the way in which agencies create regulations, they have to go out through a notice of proposed rulemaking.

[00:31:55.61] They have to solicit-- get the feedback. They have to read all the comments that the public submits. And then they have to explain what their final position is and explain why they did that in light of all of the comments that they received. And that is ultimately, to me, a very transparent, democratic process. It's much more transparent and democratic than the way in which Congress creates laws, which is we have no idea what our congressmen do.

[00:32:27.52] Well, we do. We do have a pretty good idea of what our congressmen do. But we don't have any impact on what our congressmen do. And even that process is much more democratic and transparent than what judges do. So a judge can come along and just say, well, I just don't like that opinion, I don't like that interpretation, and can throw it out.

[00:32:47.56] One of the limitations to the Loper Bright decision-- actually, it came in the very last paragraph of the majority opinion in Loper Bright-- was an exception to this idea that you could just toss out any federal regulation. And that's in the area where Congress expressly delegates authority to an agency to do something. And fortunately, in the case of the ADA, Congress expressly delegated to the Department of Justice and to the Access Board to come up with regulations for what Title II and Title III require.

[00:33:28.30] The problem is, to me, that Congress is also really explicit about-- it's very clear when they tell agencies to create standards, like the ADA standards for accessible design or when they told the Access Board to come up with the Section 508 standards for electronic and information technology. It's very explicit in the language that it uses.

[00:33:55.20] And Congress told the agencies to come up with standards under the ADA for vehicles to make sure we had accessible transportation vehicles as well as facilities. And it didn't say create standards for web accessibility. So the web regulation, to me, is vulnerable after Chevron, after Loper Bright.

[00:34:22.29] It's vulnerable in the sense that-- in the requirement around WCAG 2.1, requiring WCAG 2.1 A and AA. But that's just my opinion. I think that, ultimately, it is-- otherwise, I think that the Title II regulation is pretty safe. But it may be vulnerable based on the fact that they just pulled in WCAG 2.1 A and AA.

[00:34:53.91] Title III of the ADA, though, has that huge gap that I mentioned before around whether places of public accommodation are covered. Congress was silent there about whether

websites constitute places of public accommodation. And the courts have been all over that so far and have taken very different opinions about that. And so I think that if the Department of Justice did try to come up with a Title III regulation for web accessibility, it would be a prime candidate for being tossed out based on the Loper Bright opinion.

[00:35:31.92] But that doesn't apply to a Section 504 regulation, because there, it's much easier to say that, just like Title II applies to programs, services, and activities, it's much easier to say that Title II, which also-- that 504, which also covers programs, services, and activities, that DOJ or OCR or anyone else could create a regulation that covers those sorts of activities.

[00:36:08.83] So I wanted to make sure to leave a lot of time for questions and answers because we have a lot of participants. And we had a number of questions that came in even before the webinar started. So with that, I'm going to turn it back over to Jaclyn.

[00:36:28.34] JACLYN LAZZARI: Hi, everyone. Thank you so much, Ken. Yes, we have a ton of questions coming in. A lot of discussion right now around the password protection on documents and just some curiosity around whether that applies or what is the scope of that application.

[00:36:54.36] So is there a distinction between individual password-protected documents, such as health records, versus a password-protected learning management system? Is only the latter subject to the Title II requirements? It seems the language feels a little confusing. And people would, I think, love some clarity on that one.

[00:37:18.23] KEN NAKATA: Yeah, I don't think that the things that are in a learning management system would be covered by this. Again, I'm not-- this isn't a definitive interpretation, obviously. This is pretty much my opinion based upon having looked at this regulation a million times, just like everybody else. But I think a really strong argument could be made that it is not intended to cover content in a learning management system for two reasons.

[00:37:48.62] One, it isn't as individualized, like the health care record or a student's transcript, for instance. That's one reason. The second reason, which I think is more compelling is the fact that they had the opportunity to exclude stuff in learning management systems when those controversial limitations were much broader. And they decided not to go that way because of public comment.

[00:38:22.83] And so originally, yeah, things in learning management system were definitely excluded because it was course content that was behind a login. And then they took that out. And pretty much, to me, that says that unless you're talking about content that's going to a specific person as opposed to a specific group of people, like people that are enrolled for a class, unless it's so individualized that's going to a specific person, then it's not included in the exceptions.

[00:39:02.84] JACLYN LAZZARI: Great. So to clarify, your opinion is that the course content would not be included as an exception.

[00:39:11.56] KEN NAKATA: Not anymore.

[00:39:13.07] JACLYN LAZZARI: OK. Thank you for that. There was a lot of discussion there, and--

[00:39:16.64] KEN NAKATA: Yeah, I bet you there is.

[00:39:18.11] JACLYN LAZZARI: Yeah.

[00:39:19.39] KEN NAKATA: Yeah.

[00:39:20.96] JACLYN LAZZARI: Follow-up question. If pre-existing electronic documents are an exception, does that mean they don't need to be made accessible by 2026-27? Does that include PDFs?

[00:39:33.47] KEN NAKATA: Yes. Yeah. Yeah. I think that--

[00:39:38.72] [INTERPOSING VOICES]

[00:39:38.93] KEN NAKATA: --is much easier to just answer with a simple yes.

[00:39:42.77] JACLYN LAZZARI: Absolutely. And who exactly must comply, just the government, state and federal, or government funded, or both?

[00:39:52.94] KEN NAKATA: Not government funded unless you are subject to a 504 regulation, like the HHS one.

[00:40:02.78] JACLYN LAZZARI: I see. And can you talk a little bit about, in your opinion, how compliance would be measured under the new regulations? How would that be monitored and regulated?

[00:40:17.61] KEN NAKATA: Yeah, well, we've always had a problem in web accessibility around, how do you measure compliance? I've always had a problem with regulations that simply require thou shalt make your website access-- WCAG 2.1 A and AA compliant by a particular date because websites are naturally in flux. They always change. And you can always have inaccessible content appear one day and disappear the next.

[00:40:50.64] Also, it seems like there's always going to be some content lurking in some corner of a website that nobody's ever looked at or touched forever, forever, basically. So you can't-- I don't think you can ever really truly say, with a big enterprise website, that you can guarantee that you're fully WCAG 2.1 A and AA compliant.

[00:41:19.97] Unfortunately, no one has been able to figure out a measurement for what would constitute, I guess, substantial compliance, if you will. At the end of the day, the thing that ultimately is the measure is whether somebody is impeded in getting access to your website. And yeah, that's as good as we can do. It's a challenge for everybody that's dealing in web accessibility.

[00:41:48.84] JACLYN LAZZARI: Absolutely. And going back to the previous question on who exactly must comply, you spoke a moment on Section 504. So would you be able to highlight the main differences between Section 504 and Section 508?

[00:42:06.17] KEN NAKATA: Oh, yeah, between 504 and 508? Sure. 508 only applies to the federal government. It doesn't apply anywhere else. There are states that have created their own Section 508. So some states require that all of their electronic and information technology is accessible. But that's 508 analog. That's not really 508.

[00:42:32.04] Even if they use exactly the same processes as the federal government, Section 508, in its pure form, it only applies to the federal agencies. It doesn't apply to any federal fund recipients. It also is-- it should be best thought of as a procurement law because, oh, this gets a little complicated.

[00:42:55.97] But Section 508 requires that the federal government's electronic and information technology's accessible whenever the federal government does four things-- develops, procures, maintains, or uses that electronic and information technology. However, Section 508(f) says that the law is only enforceable when it comes to technology that's procured.

[00:43:23.68] So that means that you can only enforce 508 when an agency messes up in procuring electronic and information technology, which is why we have so much emphasis on 508 on the VPAT and accessibility conformance reports and all that stuff, because those are really procurement-related documents.

[00:43:46.45] GSA's taken the position that if you have contractors in the federal agency that are developing things on your behalf, that that constitutes a procurement. So that adds a little wrinkle to it, but it really affects procurement at the end of the day.

[00:44:04.64] Section 504 is different from that. It's like Title II. It protects any qualified individual with a disability whenever they're taking part in any program, service, or activity of a federal agency or in a federally-- or taking part in a federal-- in an activity of a federally funded entity, basically. And in that case, 504 is basically just like Title II of the ADA in that broad program access coverage.

[00:44:40.06] It includes the same effective communication requirements as Title II. And in that sense, it basically is Title II. And the reason it's relevant to us in, say, the higher education context is because that's how you get to private universities and schools and things like that.

[00:45:02.02] For public entities, for public schools and universities, their obligations are basically the same under 504 and Title II. It's just that the remedies are different. Under 504, the remedy is possibly fund termination, which would be disastrous, obviously, to any college or university because it means that basically you can't receive student loans.

[00:45:31.32] And for Title II, the remedies are quite a bit more limited. It's basically injunctive relief and maybe some damages if you can prove that it was intentional discrimination. But otherwise, Title II and 504, in terms of what entities actually have to do, are basically the same.

[00:45:55.06] JACLYN LAZZARI: Thank you. Thank you for covering those or clarifying the difference between those two. And then we got a few questions around this. Can you speak to whether this new rule-- or where third sector and nonprofits fall under this new rule?

[00:46:13.84] KEN NAKATA: So not-for-profits aren't covered at all. What was the other group?

[00:46:19.27] JACLYN LAZZARI: Third sector.

[00:46:22.33] KEN NAKATA: You mean third parties?

[00:46:23.84] JACLYN LAZZARI: Yes, third party. Thank you.

[00:46:26.41] KEN NAKATA: Not really at all except that, ultimately, it's the obligation of the public entity, which is going to, in this case, be a state or local government. It's their obligation to comply with the law. If they use a third party to make that program or service or activity available, it's their responsibility to make sure that whoever they use is providing it in an accessible way.

[00:46:59.21] So if you're, say, a web developer or you're a company that provides web content that's being used by a state or local government, you're not going to get sued. But what's going to happen is you're probably going to lose business because the state or local government still has to make sure that whoever they use is going to be accessible.

[00:47:27.56] JACLYN LAZZARI: Absolutely. Yeah, that's a great point. And we are getting a few questions about PDFs and third-party content as a whole. So can you maybe provide some examples of typical content procured from third parties? And would that include PDFs from academic databases you have from a college library, for instance? What are some examples of that?

[00:47:54.57] KEN NAKATA: Oh sure, yeah. If we're talking about public sector-- or we're talking-- I'm sorry, if we're talking about higher education, then yeah, there are a lot of easy examples, like electronic textbooks, for instance, or the PDFs that a professor creates for students based upon clippings that they may have or selections out of different texts that they want their students to read for some upcoming classes.

[00:48:29.95] All of that would be-- yeah, that would be definitely electronic content. If it's already prepared, then, yeah, then it's pre-existing electronic content. And I think that, in that case, if it's pre-existing, then based on the new Title II regulation, yeah, that wouldn't have to be made accessible. But going forward, any new content that they create would be.

[00:49:03.76] JACLYN LAZZARI: And we are getting a lot of questions or requests to just clarify the regulations for higher ed online course content. What is the scope there for these regulations?

[00:49:19.98] KEN NAKATA: Well, we don't really have anything specific for higher ed because these regulations are geared towards any state or local government. So currently, for instance, right now, I work with a lot of towns and cities and counties in Colorado because they have a different web accessibility requirement that kicks in. Actually, it kicks in right now to make sure that their stuff is fully accessible.

[00:49:52.48] And I think that that's really what DOJ had primarily in mind when they came up with this regulation was all the things that government is providing, local governments are providing to their residents. But in terms of higher ed, I think that if you're a Title II entity, if you're a public university or a public college, yeah, then these regulations definitely affect you. And you should have this on your radar.

[00:50:28.58] If you're a private entity, it shouldn't really affect you at all. But having said that, Department of Education and OCR has been taking a really strong position, well, basically forever, when it comes to education and digital accessibility. And they've long been requiring WCAG 2.1 compliance anyways.

[00:50:57.23] And so I think that in the high-- I think that, really, higher education and really education in general is one of the areas that is going to be least affected by this regulation because OCR has been so aggressive and has really tried to make sure that digital content's accessible.

[00:51:20.04] JACLYN LAZZARI: Mm-hmm. Yeah. And speaking of accessible content, we are getting a lot of questions around video accessibility requirements. So perhaps we can cover a couple of those.

[00:51:34.79] KEN NAKATA: Sure.

[00:51:36.74] JACLYN LAZZARI: So someone said we have a video player that had certain restrictions until recently. Closed captions are assigned to all video content, no matter the language. Are subtitles required as well for all of the hosted videos, and are transcripts required to be available on our player with the video?

[00:52:00.92] KEN NAKATA: Well, if you're providing captioning now, then you don't have to provide the transcript. Transcripts are a best practice, I think. But now, WCAG will require you to caption it. And as long as it's not-- well, if you're doing a live broadcast and a live video on WCAG, then you don't have to. But if you are doing anything with pre-recorded video in web content, then, yeah, then that has to be captioned. And it has to be captioned and audio described the moment that you post it.

[00:52:50.22] JACLYN LAZZARI: Mm-hmm. And OK, so that actually might cover the follow-up question, which was, does media need to be captioned right when it's posted? Or does the requirement allow a window of time to add those captions?

[00:53:03.41] KEN NAKATA: I wish that they gave you a window of time. They don't.

[00:53:06.83] JACLYN LAZZARI: Yeah. And what is the time limit for archived materials? This attendee said it seems that anything developed prior to April 2024 is pre-existing. But do you know the-- can you confirm when that is?

[00:53:24.46] KEN NAKATA: I think it's April '26 or '27, depending upon what your coverage date is, I think. That's a really good question. But I would assume that the date in 2026 or 2027 is the effective date, if you will, for those entities, depending upon what your size is.

[00:53:51.89] Not to say that I would discourage anybody from making your stuff accessible right now because it's going to take some time to iron out the kinks. And so you want to have a system in place by 2026 that you know works.

[00:54:13.40] And so the best way to make sure it works is to start making the stuff accessible now and messing up and then making sure you refine it and fix it and making sure that everything is in place so that you can easily meet the-- so you can easily meet the requirement going forward when your effective date starts.

[00:54:35.45] JACLYN LAZZARI: And in the regulations, is there any language around accuracy level for captioning, and what, if any, language is there or any sort of guidelines to follow?

[00:54:53.01] KEN NAKATA: Not really, as long as it's effective and accurately conveys the meaning or purpose. And so that means that potentially, you could get away with automated captioning to some extent. But I would always double-check that. I would never fully rely on using automated technology once it's prerecorded and up there.

[00:55:25.86] So for instance, if you have a course lecture that a professor is teaching a course, and then you post it immediately, if you post it immediately, like, right after he does it, sure. Automated captioning is probably fine. But because it's such-- it's done in such a quick-- you have to get it out there really quickly. And that's the best you could do. But the moment it starts sitting there for more than a day, I'd say, you really should make sure that that captioning is super accurate.

[00:56:02.92] JACLYN LAZZARI: Yeah, absolutely. Well, we're coming up on time here, Ken. What a whirlwind of questions. Thank you, everyone. But in closing, Ken, I'd like to thank you so much for your presentation and the conversation today. And thank you, everyone, for joining and all your insightful questions. So with that, I thank you all again. Thank you, Ken. And I hope everyone has a wonderful rest of the day.

[00:56:27.87] KEN NAKATA: Thanks.