

# Transcript for an Accessibility.com pre-recorded event about accessibility law featuring Craig Leen partner at K&L Gates

The video length is 20 minutes and 34 seconds. Contextual subheadings are included throughout the following transcript with timestamps marking minutes and seconds.

## Introduction

(Timestamp 00:06 – 00:48)

Hello. My name is Craig Leen. I'm a partner at K&L Gates in Washington, D.C. Before working with K&L Gates, I was the Director of the Office of Federal Contract Compliance Programs (OFCCP) at the U.S. Department of Labor.

Before that, I was the Coral Gables City Attorney. In addition to my work at K&L Gates, I also work with several disability organizations on their boards. I'm on the Advisory Board for Respectability. I'm on the Advisory Board for Disability in D.C. Metro. I also am on the DC Advisory Committee for the US Commission on Civil Rights.

## Diversity, equity, inclusion and accessibility

(Timestamp 48:12 – 02:12)

I have a lot of different experiences in the area of accessibility, in the area of diversity, equity, inclusion and accessibility (DEIA). And in fact at K&L Gates, a big part of my practice is advising companies on DEIA programs, on pay equity, on accessibility generally, accommodations, affirmative action, OFCCP and Employment Opportunity Commission (EEOC) compliance. It's a real pleasure to be here today at the AccessibilityPlus 2022 conference.

I spoke last year at this conference and am very happy to be invited back. I look forward to talking about web accessibility today, particularly looking at it from the legal perspective. A lot of my work in the DEIA area is focused on best practices, helping companies to do best practices.

Web accessibility is something that every company should look at as part of their DEIA program. It's something that's helpful and important in terms of making sure that you're being inclusive and accessible employer and corporate citizen ensuring that everyone can be part of whatever services that you offer. Accessibility tends to be a very significant part of DEIA programs.

## Including people with disabilities

(Timestamp 02:12 – 03:15)

I saw a study recently saying that only about 5% of DEIA programs or DEI programs, Diversity Equity Inclusion programs, include people with disabilities or accessibility type focus. You know, DEIA programs should include people with disabilities. And that's something that should be a priority.

I would highly recommend you looking at the studies. You will see that a lot of disability organizations show through studies they've done is that more inclusive and accessible companies tend to be much

more productive and more successful. Find you find is that these programs help employees with disabilities, but it also helps other employees, too working in a more accessible workplace.

### Captions and visual descriptions

(Timestamp 03:16 - 04:21)

For example, having captioning on our discussion today is helpful to everyone. It's helpful to those who are hard of hearing, of course, or who are deaf. But it's also helpful if you're just having difficulty hearing what I'm saying or there's a problem with the connection.

A lot of times people watch things with captioning on no matter what. It is also helpful to offer a visual description. Let me do a visual description of myself.

Example, I'm a white male with black rimmed glasses, brown hair, but it's really looks white. I have a gray coat on, a striped shirt. I have a bookcase in my background with a lot of books on it. And a photo of my daughter Alex, who has Autism, and I often talk about in these presentations. That's a description of myself. And my pronouns are he and his.

### Accessibility statutes and regulations

(Timestamp 04:21 - 06:19)

Let's go back to the topic of today which is accessible websites. First, let me give you a brief overview of what statutes and regulations you should be thinking about. First is the ADA, the Americans with Disabilities Act. You want to look at Title II, which applies to state and local governments, and Title III, which applies to places of public accommodations.

In addition to that, you want to look at Section 503 of the Rehabilitation Act if you're a federal contractor. The OFCCP does take the position that accessible websites are part of Section 503 Compliance. You should also be familiar with what the EEOC and the Department of Justice (DOJ) say in terms of web accessibility. DOJ just published an updated set of guidelines.

You also want to also look at the Web Content Accessibility Guidelines (WCAG). You want to look at 2.0 and 2.1, there are more versions coming. That's the standard of what's usually looked to for web accessibility. Additionally, Section 508 of the Rehabilitation Act standards, while they don't necessarily apply to private, businesses except for in certain circumstances, where they're recipients of federal funds. Section 508 is what is used by the federal government for its own agencies.

### Coral Gables City focuses on disability-inclusion

(Timestamp 06:20 – 07:57)

You really should have an accessible website. I was the Coral Gables City Attorney. I've often talked about how I felt that the city could do a lot to increase its accessibility in programs generally, and in employment, in various aspects. And I won't go into that again today, but I did speak about it last year and am very proud of everything that the city of Coral Gables has done to promote accessibility, to promote disability-inclusion, with a very strong focus on Autism inclusion, and making sure that there are programs for people with Autism.

It's a very broad program that they continue to focus on. Every city should have a focus on these issues. Coral Gables also adopted the City Commission Principles of Inclusion that dedicated the whole city,

including all its administrative staff and leadership, to disability-inclusion. This includes granting accommodations, putting in accessible features, etc.

You can go on their website to look at it. There's so many wonderful accessible programs and features that you will see. It gets a lot of positive feedback in the city area for for people who are involved with local governments, who talk about local government.

### Tips to improving low vision accessibility

(Timestamp 07:57 - 09:19)

I went to other cities when I was Coral Gables City Attorney to talk about the Coral Gables program. So, we got a lot of very positive feedback, but there's also the legal requirements. So, if you're a City Attorney, or as or an Assistant Attorney General, and you work in this area, under Title II of the ADA, you should be looking at website accessibility. Typically, that's going to be applicable to you because you have people with disabilities who are going to use your website.

Here's some tips that you should look at. In the area of city commissions, you should go in and make sure that all your city commission meetings are captioned, including past ones, so that if someone goes online and looks at your city commission meetings, and they need captioning to be able to access it and watch it, that they can do that.

You should be looking at your pictures on your website and make sure that a screen reader will be able to read it for someone who is blind or low-vision and be able to tell provide them with a visual description like I did earlier of what can be seen on the screen. You should be looking at the font size, the color of the font to ensure inclusion for someone that may be color blind.

Be mindful of page design and color. Putting everything in red, for example might not be something that someone would be able to see. Always consider following the top standard.

### Title II accessibility laws – government organizations

(Timestamp 09:44- 11:05)

Section 508 and Web Content Accessibility Guidelines 2.1. 2.0 is the general standard. But 2.1 also includes people with cognitive and learning disabilities. People with Autism or people who have Dyslexia, or other or have learning disabilities generally, also need to have access to you website.

Let's talk a little bit about the law. Like I mentioned before for Title II, you're talking about state or local governments particularly in a Democratic Administration that just issued new guidelines. If I were you, I would assume that if you don't follow these guidelines and the Department of Justice gets a complaint or they find out about it, they're likely going to take action.

So you should absolutely be looking at the guidelines that they just issued. They're very comprehensive, they're helpful, they're written in a helpful way. This is something that I think both Democratic and Republican Administrations will continue to focus on. When I was at OFCCP, I was in a Republican Administration, and we were very focused on web accessibility under Section 503.

### Title III accessibility laws – private business

(Timestamp 11:06 - 11:52)

This is absolutely something that you should be doing in the local, state, and local government area. Now, let's move to private businesses, to Title III of the Americans with Disabilities Act, which applies to places of public accommodation. Now, you know, just as a baseline, places of public accommodation are required to be accessible to people with disabilities.

Companies should be as accessible as possible. Private companies, even ones that are not places of public accommodations, should be applying these guidelines. That's an important part of diversity, equity, inclusion, and accessibility programs. So that is something I want to say at the beginning.

### [Court involvement in accessibility law](#)

(Timestamp 11:53 – 13:37)

To what extent does the law require you to have an accessible, a fully accessible website consistent with the standards? There's a court circuit split that's out there between an individual Gil Roble and a pizza company. The individual filed a suit saying the company website was not compliant, specifically for those with visual impairment.

The 9th Circuit, which is the older case, found fairly generally that if you're a place of public accommodation, that your website needs to be accessible, and you need to be applying the standards. That also is the Department of Justice's perspective. However, DOJ has not issued formal regulations and some people will use that as an argument with these types of cases.

Down the line, that's what I think you may see the Department of Justice do at some point. And building out formal regulations will allow for a comment from companies, which is useful, because, you know, the government is not always correct in the way they proceed.

So it's something you absolutely should look at if you're a business. The guidelines are not necessarily as binding as they would be if they were regulations. And you may see some companies take the position that they're not binding at all. But the point is those guidelines are out there. And as a best practice, at the very least, I would look at them.

### [Different court positions on web accessibility law](#)

(Timestamp 13:38 – 15:11)

The 11<sup>th</sup> Circuit was previously involved with the Robles case, but departed from it. Their position differed from that of the 9<sup>th</sup> Circuit. They basically said that the public accommodation law principally applies to places of physical accommodation. If a website is included as part of that physical location, there would need to be something on the website that cannot be obtained at the physical store.

Sometimes websites are a point-of-sale location, for example, the 11th Circuit distinguishes that. But in terms of situations where the website does not add something that you can't get at the store, the 11th Circuit has said that the web accessibility sort of requirement doesn't apply because websites are not places of public accommodation.

There are a lot of lawsuits in this area, but I will tell you that DOJ, because they have these guidelines that have national jurisdiction, they're prioritizing these issues.

### [Department of Justice on accessibility](#)

(Timestamp 15:12 – 16:22)

Go on the web and look at DOJ's announcement. They've indicated that they're going to be quite aggressive in enforcing guidelines on web accessibility. And they mentioned several consent decree type settlements they've reached with companies that have major names. I won't mention them here and they indicate that they're going to be trying to do more of those.

If you're looking at it more just from a risk management, legal compliance standpoint, it looks like DOJ is going to be focusing on this issue quite a bit as a top priority. So it makes a lot of sense to make your website accessible even if you're not doing it as a best practice.

It's something that you should look at from a risk management perspective. But if you're sued, you absolutely should talk to counsel because there is a circuit split. It's quite a complex issue. One other thing you should look at is you're making points of sale, then you need to look at the 11th Circuit language.

### Major questions doctrine

(Timestamp 16:23 – 17:20)

This is an unsettled issue of law. One thing that the 11th Circuit said was that Congress needed to come in and really speak to this issue because of the way the ADA is worded. And one thing I've seen recently in administrative law, and I practice in administrative law, is a real focus on what's called the "major questions doctrine".

This came up in the vaccine lawsuits. But this idea that if Congress hasn't spoken very clearly on something that's a major issue that could affect a lot of companies, then, you know, potentially the courts will defer to Congress and ask them to do it.

So anyhow, the purpose of this discussion today is not to go at length into the complex issues of law, is to tell you that if you're a local, state, or local government, you should be having an accessible website and looking at Title II of the ADA.

### Accessible websites are best practice

(Timestamp 17:21 -18:12)

If you're a private business, you should be looking at Title III of the ADA and also the Department of Justice's guidelines. As a best practice, at the very least, you should have an accessible website. But in terms of legal compliance, you should absolutely talk to counsel about what you need to do because of this circuit split, this complexity, and also be aware that the Department of Justice is taking a much more of a focus in this area.

And then finally, in terms if you're a federal contractor under Section 503 of the Rehabilitation Act, you should be aware that OFCCP has prioritized web accessibility and will be looking to see whether you have an accessible website. So that's a general overview of the current state of the law.

### More case law coming down the pipeline

(Timestamp 18:13 – 19:03)

You're likely to see more cases brought, and so you're likely to see more case law. Congress may end up speaking on this as well. This is a developing issue, particularly with the pandemic, with so many people

using the web. I would expect this to continue to be a focus of the regulatory agency. To conclude my legal talk, it's incredibly important to stay up to date on the law.

But one other thing is that wherever the law is on these points, I also practice in Environmental, Social and Governance (ESG) and diversity, equity, inclusion, and accessibility. ESG is focusing on concerns at the board level for companies, I can tell you that in the ESG and DEIA area, they're way ahead of where the law is.

## Conclusion

(Timestamp 19:04 – 20:34)

You can't just say, well, the law says this, or the law says that. If you have a robust DEIA program, believe me, web accessibility is likely to be a significant part of it. Boards are going to be very focused on having a best practice. I mean, even in the Roble verse Domino case, the company immediately published a press release saying that they have a fully accessible website under WCAG 2.0, and that regardless of what the lawsuit says, they are committed to that.

Many companies are really committed and interested in complying with these guidelines. I predict you will see more companies incorporating accessibility and disability into their DEIA programs. Usually, the top line item in those issues, along with a centralized accommodation system and employee resource groups for people with disabilities, is website accessibility.

Thank you very much. It's a pleasure being here today.