

SETTLEMENT AGREEMENT
UNDER THE AMERICANS WITH DISABILITIES ACT BETWEEN
THE UNITED STATES OF AMERICA
AND
THE KROGER CO.

BACKGROUND

1. The parties to this Settlement Agreement (Agreement) are the United States of America (United States) and The Kroger Co. (Kroger) (collectively, the Parties).
2. Kroger owns and/or operates www.kroger.com, which is available through the Internet to computers, mobile devices, tablets, and other similar devices. Through its vaccine registration website, currently found at <https://www.kroger.com/health/pharmacy/covid-care> (Vaccine Registration Portal), Kroger provides the ability to privately and independently obtain information about, and schedule an appointment to receive, a COVID-19 vaccination at Kroger-branded store locations.
3. The United States initiated a compliance review under Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12181–12189, and its implementing regulation, 28 C.F.R. pt. 36, to determine whether individuals with disabilities have full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations offered by Kroger through its Vaccine Registration Portal.
4. Following this review, the United States determined that Kroger’s Vaccine Registration Portal was not accessible to some individuals with disabilities, including those who use screen reader software, in violation of the ADA. For example, individuals with disabilities who use screen reader software to access Kroger’s Vaccine Registration Portal encountered (1) buttons that were unlabeled or had inaccurate labels; (2) pop-up windows, menus, and a timer indicating how long the user has left to reserve their appointment that were not reported to screen readers; and (3) buttons and links that had low color contrast with the website’s background. Appointment selection buttons erroneously told screen reader users that available appointment times were unavailable and incorrectly reported the day of the week that an available appointment was on. Because of such barriers, individuals with disabilities were unable to fully and equally access the Vaccine Registration Portal to privately and independently obtain information about the COVID-19 vaccination and/or schedule a COVID-19 vaccination appointment.
5. Title III of the ADA, 42 U.S.C. §§ 12181–12189, and its implementing regulation, 28 C.F.R. pt. 36, prohibit discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation by any private entity that owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. § 12182(a); 28 C.F.R. § 36.201(a).

TITLE III COVERAGE

6. Kroger is a private entity that owns and/or operates sales and service establishments whose operations affect commerce. 42 U.S.C. §§ 12181(7), 12182(a); 28 C.F.R. §§ 36.104, 36.201(a).

Kroger is a public accommodation subject to Title III of the ADA. 42 U.S.C. § 12181(7)(E)–(F); 28 C.F.R. § 36.104.

7. The Attorney General is authorized to conduct periodic reviews of covered entities' compliance with Title III of the ADA. 42 U.S.C. § 12188(b)(1)(A)(i); 28 C.F.R. § 36.502(c).
8. The Attorney General is also authorized to bring a civil action on behalf of the United States in federal court if the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of discrimination or any person with a disability or group of persons with disabilities has been discriminated against and such discrimination raises an issue of general public importance. 42 U.S.C. § 12188(b)(1)(B).
9. Kroger expressly denies that it has violated Title III of the ADA, and by entering into this Agreement, does not admit any wrongdoing. This Agreement is the result of a negotiated compromise, and terms of this Agreement shall not be deemed to constitute an admission by Kroger of any violation or liability under Title III of the ADA or any other law or regulation. Kroger agrees to conform to WCAG 2.1 AA (as defined in Paragraph 13) for the limited purpose of this Agreement, but expressly denies that WCAG 2.1 AA is binding or has the force of law or regulation with respect to Kroger's website accessibility obligations, except as otherwise stated in this Agreement, unless and until legislation is passed requiring conformance with, or the United States Department of Justice promulgates final ADA Title III regulations adopting as the applicable technical standard, WCAG 2.1 AA.
10. Kroger asserts that, since the implementation of the Vaccine Registration Portal and on an on-going basis, it has undertaken reasonable efforts to ensure that individuals with disabilities have the opportunity to participate in and benefit from the goods, services, facilities, privileges, advantages, and accommodations provided through its Vaccine Registration Portal. Kroger also provides a telephone number on the webpage for those who have difficulty using the portal to contact Kroger for further support.
11. Given the importance of ensuring that all individuals, including those with disabilities, have a full and equal opportunity to access information about the COVID-19 vaccination and to schedule a COVID-19 vaccination appointment at a Kroger location, the Parties agree that it is in their best interests, and the United States believes that it is in the public interest, to voluntarily enter into this Agreement. The Parties agree to the following provisions.

GENERAL NONDISCRIMINATION REQUIREMENTS

12. As required by Title III of the ADA and its implementing regulation, Kroger:
 - a. Shall not discriminate on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations provided through its Vaccine Registration Portal. 42 U.S.C. § 12182(a); 28 C.F.R. § 36.201;
 - b. Shall not deny individuals with disabilities the opportunity to participate in and benefit from the goods, services, facilities, privileges, advantages, and accommodations provided through its Vaccine Registration Portal. 42 U.S.C. § 12182(b)(1)(A)(i); 28 C.F.R. § 36.202(a);

- c. Shall not provide individuals with disabilities an unequal opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, and accommodations provided through its Vaccine Registration Portal. 42 U.S.C. § 12182(b)(1)(A)(ii); 28 C.F.R. § 36.202(b);
- d. Shall take the necessary steps to ensure that individuals with disabilities are not excluded, denied services, segregated, or otherwise treated differently because of the absence of auxiliary aids and services (including accessible electronic and information technology), unless Kroger can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden. 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303; and
- e. Shall not utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability. 42 U.S.C. § 12182(b)(1)(D); 28 C.F.R. § 36.204.

ACTIONS TO BE TAKEN BY KROGER

13. Vaccine Registration Portal Accessibility Conformance. As long as Kroger continues to offer the Vaccine Registration Portal, within thirty (30) days of the Effective Date (Conformance Date), and for the Term of the Agreement, Kroger shall ensure that the Vaccine Registration Portal, any direct links on Kroger's website leading to the Vaccine Registration Portal, and any other information about the COVID-19 vaccine on Kroger's website (Vaccine Content) conforms to Web Content Accessibility Guidelines 2.1, Level AA (June 5, 2018), published by the World Wide Web Consortium, available at www.w3.org/TR/WCAG/ (WCAG 2.1 AA). As used in this Agreement, WCAG 2.1 AA incorporates the Level A and Level AA Success Criteria. Vaccine Content includes, but is not limited to, all of the information, resources, files, images, graphics, text, audio, video, multimedia, services, included within Vaccine Content.
14. Compliance with this Agreement. For purposes of this Agreement, the Parties agree that:
- a. Achieving conformance with WCAG 2.1 AA, as defined in WCAG, will satisfy the obligation in Paragraph 13.
 - b. Nothing in this Agreement requires Kroger to modify, or seek the modification of, third-party content, except where the third-party content is required for the user to schedule a vaccination appointment or complete vaccination-related forms on the Vaccine Registration Portal.
 - c. Nothing in this Agreement shall require Kroger to modify Vaccine Content to exceed conformance with, or provide a greater level of accessibility and usability than would be achieved through conformance with, WCAG 2.1 AA.
 - d. It shall not constitute a material breach of this Agreement for Kroger to use methods or technologies for achieving accessibility and usability that are not specified in WCAG 2.1 AA, provided that these alternative methods or technologies result in equally effective or greater accessibility and usability of Vaccine Content. If Kroger chooses to rely on this

provision to satisfy its obligation, in the event of a dispute, the burden for demonstrating equally effective or greater accessibility and usability rests with Kroger.

- e. If Kroger is unable to comply with Paragraph 13 in a particular, discrete circumstance, it may provide the United States with a written request for a limited exception, which the United States shall not unreasonably deny. The request shall set forth the reason(s) limiting Kroger's ability to comply with Paragraph 13 in the specific instance and the steps Kroger will take to enhance accessibility.
 - f. A limited number of isolated instances of noncompliance with Paragraph 13 during the Term of the Agreement shall not constitute a material breach of this Agreement if those failures would not prevent a person with a disability from accessing the substantive information Kroger provides about the COVID-19 vaccine, scheduling a vaccination appointment, or completing vaccination-related forms on the Vaccine Registration Portal.
15. Website Accessibility Notice and Feedback. Within fifteen (15) business days after the Effective Date of this Agreement, Kroger shall provide a notice, prominently and directly linked from the www.kroger.com homepage and from the Vaccine Registration Portal, with a statement of Kroger's policy to ensure that persons with disabilities have full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of Kroger through www.kroger.com. The notice shall include a link to send an email and a toll-free telephone number (which shall accept calls made using video relay services) where customers with disabilities can request assistance if they experience technical difficulties with the website.
 16. Automated Website Accessibility Testing. Kroger shall continue to utilize its current automated accessibility testing tool to evaluate conformance of Vaccine Content with WCAG 2.1 AA. Kroger shall conduct automated accessibility tests of Vaccine Content prior to scheduled web content releases after the Conformance Date for the Term of this Agreement to identify any instances where Vaccine Content is no longer in conformance with WCAG 2.1 AA, and Kroger shall resolve any instances of nonconformance consistent with Paragraph 22 below.
 17. Website Accessibility Consultant and Evaluation. Kroger shall continue to retain its current independent consultant (Website Accessibility Consultant) who is knowledgeable about accessible website development and WCAG 2.1 AA, throughout the Term of the Agreement. The Website Accessibility Consultant's duties shall include: (1) advising Kroger on how to conform Vaccine Content to WCAG 2.1 AA and stay compliant; (2) verifying that Vaccine Content conforms to WCAG 2.1 AA by the Conformance Date and for the Term of the Agreement, including by conducting both automated and manual testing; and (3) establishing the criteria for selecting testers with disabilities and reviewing the results of the tests.
 18. User Accessibility Testing Group. Within twenty-one (21) days after the Conformance Date and every thirty (30) days thereafter for the Term of this Agreement (unless no Vaccine Content was updated or released within the preceding thirty (30) days), tests for accessibility of Vaccine Content shall be conducted by individuals with different disabilities. Testers shall include individuals who are blind, individuals who have low vision, and individuals with disabilities who have difficulty using a mouse. Testing required by this Paragraph shall include the usability of the webpages that are essential to the use of Vaccine Content by customers and the public, such as the webpages required to register for a COVID-19 vaccination appointment. Kroger shall resolve any instances of nonconformance with WCAG 2.1 AA identified through testing required by this paragraph consistent with Paragraph 22 below.

19. Website Accessibility Training. Within thirty (30) days after the Effective Date of this Agreement, and at least once annually thereafter for the Term of this Agreement, to the extent Kroger has not already done so, Kroger shall provide training to all Kroger employees who design, develop, maintain, manage, or otherwise have responsibility for the content and format of www.kroger.com (Website Content Personnel). This training shall include instruction on how to conform Vaccine Content with WCAG 2.1 AA (Website Accessibility Training). Kroger will require that contractors and consultants (other than consultants retained for their web accessibility expertise) used for the design, development, maintenance, and/or management of the Vaccine Content shall, prior to commencing work for Kroger, either are, or at some point in the one (1) year prior to working with Kroger have been, provided with Website Accessibility Training. For persons who must receive Website Accessibility Training pursuant to this Agreement, but who did not receive training on a designated annual training date required under this Agreement (for instance, because they were on leave or because they began their affiliation with Kroger subsequent to the training date), Kroger shall provide the Website Accessibility Training to such persons within ten (10) days after the individual's hire or return from leave.
20. Recordkeeping and Reporting. Within ninety (90) days after the Effective Date of this Agreement, and every ninety (90) days thereafter for the Term of this Agreement, Kroger shall submit a report via email to the United States detailing Kroger's compliance or lack thereof with this Agreement, including the itemized requirements identified in Paragraphs 13-19. Each report shall include issues identified as a result of Website Accessibility Notice and Feedback (Paragraph 15), communications provided by users of www.kroger.com pursuant to Paragraph 15, an explanation of each action Kroger has taken in response to each issue, or if no action is taken in response to a particular issue, Kroger shall include an explanation of why no action was taken. This report shall also include the results of all testing conducted pursuant to Paragraphs 16-18, an explanation of each action Kroger has taken in response to nonconformance identified through this testing, or if no action is taken, Kroger shall include an explanation of why no action was taken, the priority of the issues, the date the issue was reported and the date the issue was resolved. Nothing in this Agreement shall be construed as an admission by Kroger as to the discoverability or admissibility of any reports or other information created, prepared, or provided by Kroger pursuant to this paragraph.
21. Delivery of Information to the Department. All reports and materials required pursuant to this Agreement to be delivered to the Department shall be delivered to the undersigned counsel via electronic mail at anne.langford@usdoj.gov and joy.welan@usdoj.gov, or other persons subsequently specified by the Department.
22. Remediation Timeline. For purposes of Paragraphs 16-18, Kroger shall be in conformance with this Agreement as long as issues of nonconformance identified and/or discovered as a result of the above requirements are addressed in accordance with the following definitions and timelines:
- a. Critical Issues. Confirmed barriers that prevent a person with a disability from accessing the substantive information Kroger provides about the COVID-19 vaccine, scheduling a vaccination appointment, or completing vaccination-related forms on the Vaccine Registration Portal will be resolved within ten (10) days of identification of the barrier.
 - b. Other Issues. All other instances where Vaccine Content is not in conformance with WCAG 2.1 AA will be resolved within thirty (30) days of identification of the nonconformance.

OTHER PROVISIONS

23. Effective Date. The effective date of this Agreement is the date of the last signature below.
24. Term. The duration of this Agreement will be thirty (30) months from the Effective Date.
25. Non-Waiver. Failure by the United States to enforce any provision or deadline of this Agreement shall not be construed as a waiver of its right to enforce any provision or deadline of the Agreement.
26. Titles. Titles and other headings contained in this Agreement are included only for ease of reference and shall have no substantive effect.
27. Timelines. Any timelines for performance fixed by, or pursuant to, this Agreement may be extended by mutual written agreement of the Parties.
28. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same Agreement. Electronic signatures are acceptable.
29. Severability. If any term of this Agreement is determined by any court to be unenforceable, the other terms of this Agreement shall nonetheless remain in full force and effect.
30. Binding Nature of Agreement. This Agreement shall be binding upon Kroger (as well as the agents, contractors, and employees of Kroger).
31. Authority. The signatories represent that they have the authority to bind the respective parties identified below to the terms of this Agreement.
32. Entire Agreement. This Agreement constitutes the entire agreement between the Parties on the matters raised herein and no other statement or promise, written or oral, made by any party or agents of any party, that is not contained in this written Agreement shall be enforceable.
33. Modification of Agreement. Any modification of this Agreement shall be by written agreement of the Parties.
34. Consideration. In consideration of the terms of this Agreement as set forth above, the United States agrees to refrain from filing a civil suit under Title III as a result of the investigation leading to this Agreement, except as provided in this paragraph and in Paragraphs 35-36. Nothing contained in this Agreement is intended or shall be construed as a waiver by the United States of any right to institute proceedings against Kroger for violations of any statutes, regulations, or rules administered by the United States or to prevent or limit the right of the United States to obtain relief under the ADA for violations unrelated to this matter.
35. Dispute Resolution. Any disputes under this Agreement shall be resolved according to the following procedure:

- a. Notification in Writing. Counsel for a Party shall promptly notify counsel for the other Party in writing of any perceived non-compliance with the terms of this Agreement, or any other perceived dispute(s) related to the terms, processes, or obligations set forth in this Agreement.
 - b. Meet and Confer. Unless otherwise agreed to by the Parties in writing, with respect to any particular perceived non-compliance or dispute(s), the Parties agree to meet and confer in good faith within fifteen (15) business days after receipt of a written notification of any perceived non-compliance or dispute(s) pursuant to part (a) of this Paragraph 35.
 - c. Application for Further Relief. If the meeting required by part (b) of this Paragraph 35 does not lead to a resolution of the dispute, then, no sooner than fifteen (15) business days after providing the other Parties with written notice of an intent to terminate the meet and confer process, any party may seek to enforce the terms of this Agreement with an appropriate Federal District Court.
36. Review and Enforcement. The United States may review or monitor Kroger's compliance with this Agreement or the ADA at any time. Subject to the terms set forth in Paragraph 35, if the United States believes that the Agreement or any requirement thereof has been breached, the United States may institute a civil action in an appropriate Federal District Court to enforce this Agreement or the ADA.
37. Other Violations. This Agreement is not intended to remedy any potential violations of the ADA or any other law, other than those specifically addressed by this Agreement. Nothing in this Agreement shall preclude the United States from filing a separate action under the ADA for any alleged violation not covered by this Agreement.
38. Continuing Responsibility. This Agreement does not affect Kroger's continuing responsibility to comply with all aspects of the ADA.

By their signatures below, the Parties respectfully consent to the execution of all aspects of this Agreement.

FOR THE UNITED STATES OF AMERICA:

KENNETH L. PARKER
United States Attorney

REBECCA B. BOND
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/s/

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1/27/22

Date