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TECHNOLOGY MARATHON

Digital Accessibility for All: How the ADA Is
Applicable to Fintech Platforms and Apps

Annie Estevez and Beth Joseph

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Overview

- Public accommodations under Title III of the ADA
- Significant recent developments and trends
- Practical tips to reduce litigation risk

Introductions

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Presenter



Anne Marie Estevez

Miami

+1.305.415.3330

annemarie.estevez@morganlewis.com

Anne Marie Estevez defends clients in complex, class, and collective action employment, Americans with Disabilities Act (ADA), public accessibility, and consumer class action cases in US federal and state court. In addition to her litigation experience, Anne Marie regularly advises clients on compliance with the ADA Title II and Title III and comparable state and local accessibility laws in all areas, from “brick and mortar” to technology issues. Clients regularly seek her advice on class action avoidance programs, compensation programs and issues, wage and hour issues, and a host of other employment-related topics.

Anne Marie also serves as co-chair of Morgan Lewis’s Retail & eCommerce Industry Initiative.

Presenter



Beth Joseph

Miami

+1.305.415.3308

beth.joseph@morganlewis.com

Beth S. Joseph litigates Americans with Disabilities Act (ADA)-related cases across the United States, emphasizing Title II and III matters. She counsels and conducts training for clients on all aspects of federal and state public accommodations laws, including electronic information technology compliance. She also appears before administrative agencies and interfaces with the US Department of Justice on matters related to Titles II and III. Beth co-authored the 2003–2021 editions of *Public Accommodations under the Americans with Disabilities Act: Compliance and Litigation Manual*.

Beth also represents management facing employment and labor claims in US state and federal court, conducts investigations for clients, and drafts ADA- and employment-related policies and manuals.

Public Accommodations Under Title III of the ADA

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Title III of the ADA

- Title III of the ADA prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a).
- Financial services facilities qualify as places of public accommodation
- Customers with mobility, visual, hearing, and/or mental disabilities are all protected under Title III.
- Customers with disabilities are entitled to equal access to provided products and “full and equal enjoyment” to all services provided to members of the public.
- Compliance with Title III may require accommodation, modification of policies and services, and effective communication.

Title III of the ADA (cont.)

- There are numerous specific regulations under Title III of the ADA requiring physical modifications in facilities open to the public in order to accommodate individuals with disabilities.
- The current set of guidelines is the 2010 ADA Standards for Accessible Design with some limited exceptions for elements that were compliant under the prior set of guidelines, the 1991 ADAAGS, which would then be “grandfathered” in as long as they have not been modified since the effective date of the 2010 standards.
- Under Title III ADA, tenants and landlords/owners are equally liable for Title III ADA violations.

Website, Mobile Application & Other Digital Accessibility

- Title III has been expanded well beyond brick and mortar into the digital space, e.g., websites, mobile applications, kiosks, POS devices, and other technology
- Every federal Circuit that has addressed this issue has found at least some legal obligation to provide accessible websites and mobile apps to members of the public where there is also a tie to brick-and-mortar spaces open to the public
- However, no mandatory regulations exist for digital technology like the ADA regulations for physical spaces
- Majority of effort is aimed at improving access for individuals with visual and hearing impairments
- Owners and operators of websites/mobile apps equally liable

W3C Web Content Accessibility Guidelines

- The W3C's Web Content Accessibility Guidelines (WCAG) 2.0 became an International Organization for Standardization (ISO) standard in October 2012.
- In June 2018, the guidelines were updated, and the new prevailing standard is WCAG 2.1.
- WCAG provides three levels of compliance, in increasing order of accessibility and usability for people with disabilities: A, AA, and AAA.
- Levels A and AA are considered mandatory, while AAA covers many "nice to have" practices that enhance usability.
- For some time, the DOJ was widely expected to issue new regulations requiring websites and mobile applications to comply with the WCAG 2.0, Level A and AA.
- However, in July 2017, the government indefinitely postponed issuing formal website accessibility regulations.



WCAG 2.1

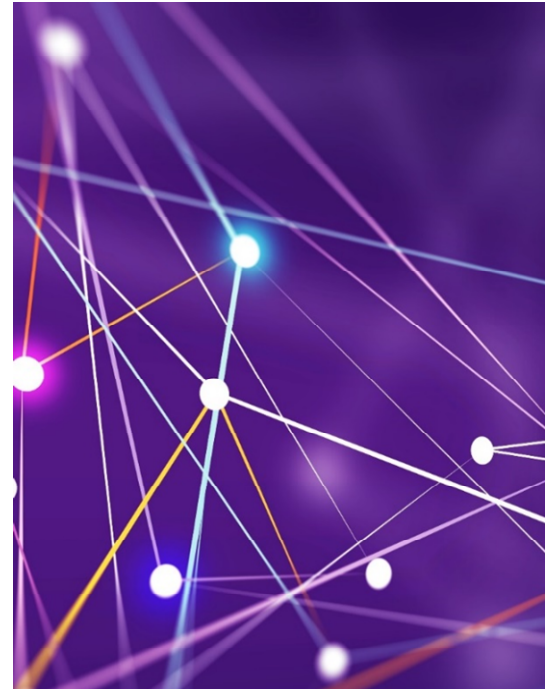
- WCAG 2.1 tracks and builds upon WCAG 2.0 just as 2.2 (expected soon) builds on 2.1.
- Most of the requirements under WCAG 2.1 concern the accessibility of mobile applications.
- Plaintiffs/DOJ/advocacy groups are investigating and suing based WCAG 2.1 guidelines.
- WCAG 2.2, currently still in draft form, should be issued shortly but can be referenced.
 - Content that conforms to 2.0 and 2.1 will also conform with 2.2.
 - 2.2, however, will provide alternative means of conformance and it's a good idea to start becoming more familiar with 2.2. It contains, e.g., suggestions on auto-populating information so there are not redundant entries, a constant help function, etc.

Cases related to WCAG 2.0

- Several courts have required defendants to comply with WCAG:
 - In *Andrews v. Blick Art Materials, LLC* (Dec. 2017), the Eastern District of New York approved of a website accessibility settlement agreement and stated that it determined that WCAG 2.0, Level AA was the appropriate standard to determine compliance with the ADA's accessibility requirements.
 - In *Frazier v. E.L.I. Trading Inc.* (Jan. 2018), the Western District of Pennsylvania issued an injunction requiring the defendant to retain a consultant to make its website compliant with the WCAG 2.0, Level AA standards, conduct training, and conduct monthly testing for two years; and allowing plaintiff's counsel to monitor the website for two years and recover monitoring costs.
 - In *Gomez v. GNC* (Aug. 2018), a Southern District of Florida judge granted a plaintiff's motion for summary judgment in part finding that the defendant's website remained inaccessible and finding highly persuasive use of the WCAG 2.0 guidelines to meet compliance standards.
 - DOJ has also "blessed" WCAG Guidelines as an appropriate standard to use (although not required).

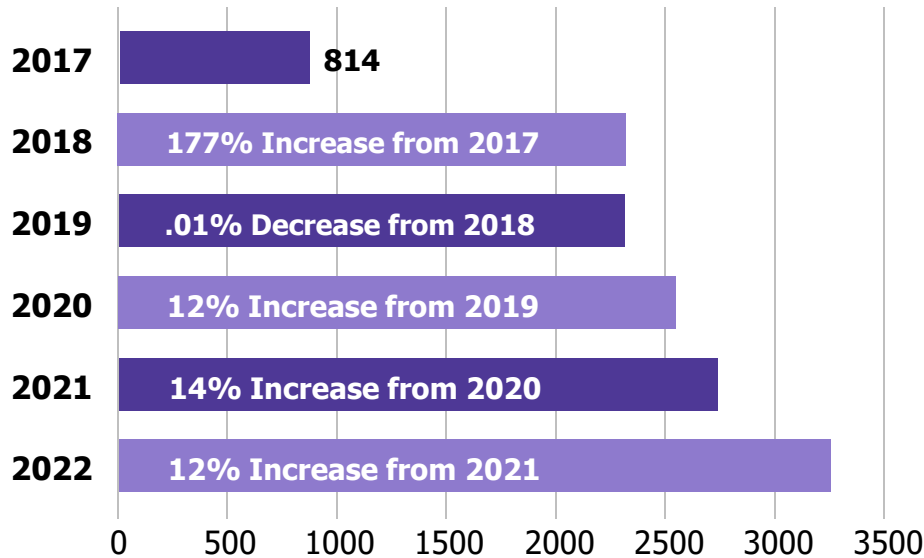
Digital Accessibility

- Continuing trends from the past couple of years, private litigants continue to file and threaten thousands of website accessibility lawsuits, including class actions.
- Plaintiff's attorneys have sent hundreds of demand letters, threatening lawsuits over website accessibility as well as mobile applications.



Title III ADA Litigation Trends

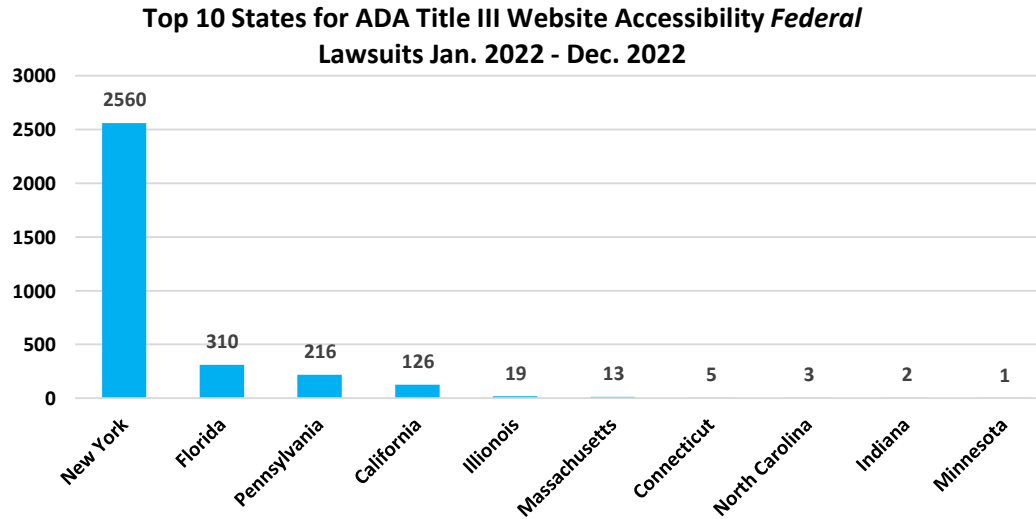
FEDERAL TITLE III ADA WEBSITE ACCESSIBILITY LAWSUITS FILED



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- Approximately 2,500 federal ADA Title III lawsuits were filed in 2021. In 2022, there was an 12% increase over the previous year for a total of 3,225, continuing a trend from the last several years. This was 37% of total ADA federal lawsuits filed, also up from about 25% in 2021.
- Primary areas of litigation:
 - Accessibility of websites/mobile applications
 - Accessibility of in-facility technologies
 - Accessible parking, signage or facility layout (e.g., lowered transaction counters, narrow aisles, restrooms)

Litigation Trends (cont.)



- More website lawsuits were filed in New York than in any other state, followed by Florida, California, and Pennsylvania.
- Newer trend: lawsuits involving mobile apps and their accessibility and looking at accessibility of investor relations portion of a website; large dropoff in cases filed in CA.
- Claims under similar state public accommodations laws likewise are increasing, particularly NY, CA, FL, TX and PA.

Recent Court Developments

- The Eleventh Circuit in a 2021 decision, *Gil v. Winn-Dixie Stores, Inc.*, held that a website that is inaccessible to users who are blind or vision-impaired does not violate Title III unless the barrier then causes the user to be excluded, treated differently, or denied services in a physical space but then subsequently vacated this decision. It is unclear whether this reasoning will continue to be used within the Eleventh Circuit.
- In June 2022 decision, *Gomez v. Trinitas Cellars, LLC*, the Northern District of California found that there was no website accessibility violation where the main issue was the plaintiff's inability to read various logos on the site and there was a lack of color contrast because there was no connection between those issues and the plaintiff's ability to visit the related physical location or any of its services.
- In August 2022, in the *Martinez v. Cot'n Wash, Inc.* decision, the California state Court of Appeal joined several federal courts, including the Ninth, Third, Fifth, and Sixth Circuits, in holding that a "place of public accommodation" must be a physical place. Because the defendant operated online only—i.e., its website did not have any connection or nexus to a physical facility—it was not subject to Title III of the ADA or California's state accessibility law.

Recent DOJ ADA Title III Activity

- Recent Title III activity by the DOJ includes investigations (and related settlements) of electronic information technology in a kiosk setting impacting individuals with visual impairments, architectural barriers; policies, practices and procedures to ensure equal access for customers with service animals; accessible audio and written communications to customers; and wheelchair accessible transportation services.
- DOJ has significantly increased its investigative activity over the past several months, including issuing guidance on website accessibility.



March 2022 DOJ Guidance on Website Accessibility

- DOJ released new guidance on March 18, 2022, suggesting a renewed emphasis of the department's earlier views that all public-facing websites—including websites of web-only businesses—are subject to Title III and must be accessible to persons with disabilities.
- The guidance did not specify any website accessibility standards and instead makes clear that businesses “can currently choose how they will ensure” web accessibility.
- DOJ did, however, identify the “Web Content Accessibility Guidelines (WCAG) and the Section 508 Standards, which the federal government uses for its own websites,” as “helpful guidance” for companies subject to Title III of the ADA.
- DOJ further provided non-exhaustive “[e]xamples of what businesses should do to make websites accessible,” such as text alternatives for images, synchronized video captions, and providing users with a means for reporting accessibility issues.

State Laws Including Unruh Act

- Many states have enacted accessibility laws, some of which allow for civil penalties and the recovery of monetary damages by plaintiffs.
- California's Unruh Act provides for a minimum of \$4,000 in damages per access violation, plus costs and attorneys' fees (Cal. Civ. Code § 52).
 - For construction-related accessibility claims, minimum statutory damages may be reduced to \$1,000 per violation if all complained-of violations are remediated within 60 days of service of the complaint and there is a Certified Access Specialist (CAsp) inspection.
- California's Disabled Persons Act authorizes minimum damages of \$1,000 per violation (Cal. Civ. Code § 54.3).
- Other states with similar laws authorizing individual damages include New York (state and New York City law), Colorado, Hawaii, Massachusetts, South Carolina, and Texas.

California Assembly Bill 1757/SB 585: Website Accessibility

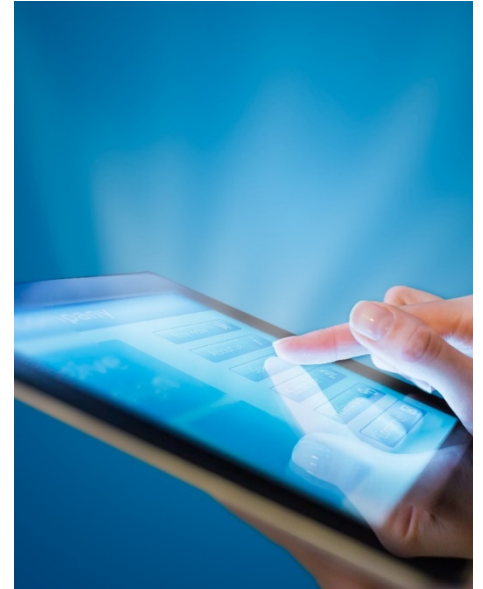
- New proposed CA state law related to web accessibility
- Would require WCAG 2.1, Level AA as mandatory standard for websites and mobile apps
 - This is a higher standard that DOJ is stating should be currently met
- Also requires that websites and mobile apps themselves must provide “effective communication” (which can be done by meeting the 2.1 Guideline under the proposed law)
- As written, it would be effective immediately without transition period
- Provides for statutory damages but plaintiff would have to prove either that they personally encountered a barrier that caused them to experience a difference in their access to, or use of, the website as compared to other users, as specified, or that they were deterred
- AB 1757 will be heard July 11 by the Senate Judiciary Committee

Challenges to On-site Technology

- Plaintiffs' bar is always looking for new causes of actions under Title III
- Many of the challenges are from customers with visual or hearing impairments or advocacy groups
- Affected technologies include:
 - Mobile applications
 - On-site kiosks
 - Electronic handheld devices
 - Closed captioning for videos
 - ATMs
 - Vestibules (card swipes)

Title I of the ADA

- As website accessibility lawsuits increase, companies should expect ADA Title I issues to follow, e.g., requiring or permitting employment applications to be completed and/or submitted online; inaccessible intranet.
- Employers should provide reasonable accommodations in connection with the submission of applications for employment, including online applications.
- Employers should include language in the footer of the Careers section of their websites that advises applicants about how to request a reasonable accommodation.
- Application pages of websites should have the same accessibility features and should be screen-readable like other website pages used by customers.
- Employers may also consider having alternative methods for individuals to submit applications.



Architectural Barrier Issues

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Accessible Restrooms and Path of Travel

- High litigation risk items: restrooms, paths of travel
- Best practices to reduce litigation risk in these areas include training associates to spot and report issues with any of the following key litigation triggers:
- Restrooms should be marked with appropriate signage and available to customers with disabilities during business hours
 - They *cannot* be used as temporary storage areas
 - This can also be a violation of state law
- Routinely refill the accessible paper towel, toilet paper and soap dispensers when all other dispensers are refilled
- Ensure that the pipes underneath the sink(s) are wrapped
- If the property contains a lift, elevator or ramp, maintain regularly and ensure all are in good working condition and don't require a key (or staff is trained on providing key access promptly)

Accessible Restrooms and Path of Travel (cont.)

- Ensure no trashcans, plants, or other items block the accessible path to or from lifts, elevators or ramps
- Ensure boxes, display racks or other equipment/fixtures do not block the maneuvering clearances required at the doors of accessible entrances
- Ensure that accessible exits – including accessible emergency exits – are maintained at all times
- Path of travel should be kept clear, i.e., sales racks or fixtures should not intrude on accessible paths of travel
- Have door pressure on restroom and entrance doors (if doors aren't automatic or power-assist) tested at least annually
- Keep door locks in good working order; replace missing locks

Accommodations Within a Facility

- Lowered service counters
 - These should be manned or associates should be trained to offer customers with mobility disabilities service at the lowered counter or signage can be posted with this option (more consistent and defensible option).
 - Need to emphasize that it is the customer's choice where to be served.
 - Complicated by COVID-related distancing and plastic shields, impacting customers with hearing-impairments.
- Welcome service animals (dogs and miniature horses only under the federal law)
 - Associates should be trained to assist customers with service animals.
 - No requirement for identifying tags, vest, or licenses.
 - Some states also provide protection for service animals in training and emotional support animals.

Significant Recent Developments in Architectural Barriers

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Increased Scrutiny of Emotional Support Animals

- Title III of the ADA requires public accommodations to permit the use of service animals—*i.e.*, dogs and miniature horses trained to do work or perform tasks for the benefit of individuals with disabilities.
- “Emotional support animals” are not considered service animals under Title III but could be protected under various state laws.
- California for example protects service animals, service animals in training, and psychiatric service animals but not emotional support animals in all public places.
- Testers



Emotional Support Animals (cont.)

- In January 2018, United Airlines barred a passenger from bringing a purported “emotional support peacock” onto a flight. However, Delta did allow an emotional support turkey on one of its flights just a few years earlier.



Developments in Accessible Parking Cases

- Lawsuits alleging accessible parking violations under the ADA and state laws continue to be filed for both single-location claims and class action claims following a class action ruling that favored plaintiffs.
- In a case against a major restaurant chain, the court certified a class of all persons with mobility disabilities who encountered barriers in the restaurant's parking areas and paths of travel at their stores throughout the United States. The decision found that the restaurant's alleged lack of a companywide ADA compliance policy that effectively finds and remedies ADA violations was a classwide violation warranting certification of the class under Rule 23.

On the other hand, in *Mielo v. Steak 'N Shake* (3d Cir. 2018), the Third Circuit reversed a class certification ruling on similar claims finding insufficient evidence of numerosity and commonality within the "extraordinarily broad class."



Florida's Accessibility of Places of Public Accommodation Act (APPAA) (Fla. Stat. § 553.5141)

- Pursuant to a law that went into effect in Florida in July 2017, a business that hires a “qualified expert” to inspect its premises to either verify conformity with ADA accessibility requirements, or to develop a compliance plan, can have that information considered in Florida state court if the certification of conformity or remediation plan has been filed with the Department of Business and Professional Regulation.
- The court “must consider” any such remediation plan or certification of conformity when the court “determines if the plaintiff’s complaint was filed in good faith and if the plaintiff is entitled to attorney fees and costs.”
- California has similar legislation.

Mitigating risk

- Update policies
- Update audit plans
- Regularly audit and remediate

Questions?

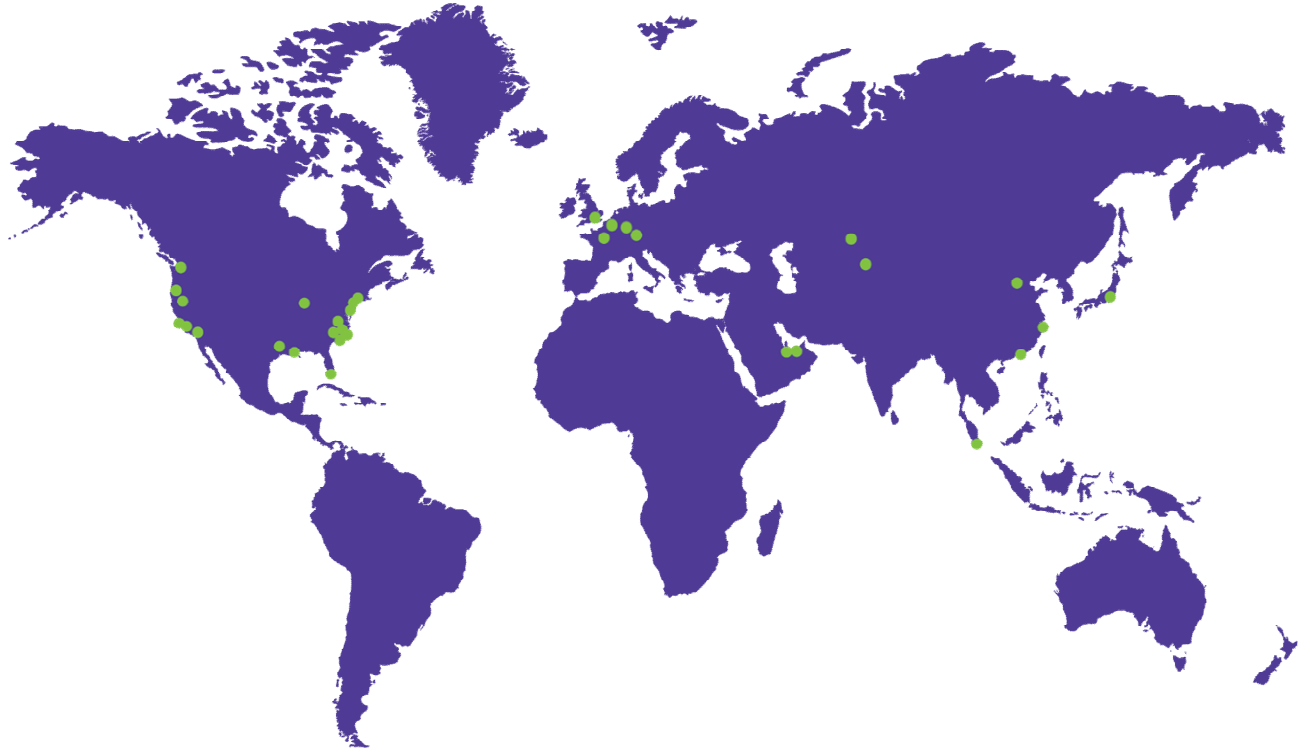
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