

Five Quick Tips to Help Protect Your Organization from Website Accessibility Litigation

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These days, virtually every business establishment knows that it must have a web presence in order to be a commercially viable enterprise. But what many business owners fail to realize is that their websites may be opening them up to significant legal risk including becoming targets for accessibility lawsuits.

Title III of the Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities by businesses open to the public¹. Websites that are poorly designed can create accessibility barriers for the visually impaired and others with disabilities, thus preventing their full and equal enjoyment of the organization's goods and/or services. The number of websites being targeted with website accessibility claims continues to rise, with no indication that they will slow down in the near future. According to UsableNet, more than 4,000 such lawsuits were filed in state and federal courts in 2021, with more than 10 lawsuits being filed every day². The vast majority of claims are brought in California, New York, and Florida. E-commerce websites account for nearly 74% of such lawsuits³. Most of these cases are brought by a small number of plaintiff law firms representing visually impaired consumers.

On March 18, 2022, the U.S. Department of Justice ("DOJ") for the first time provided guidance on how businesses can make their websites accessible to the public under the ADA but stopped short of adopting a regulatory standard for what constitutes a legally "accessible" website⁴. (The DOJ's guidance on website accessibility can be found [here](#).) The DOJ is leaving it up to state and local governments to determine whether a website is ADA compliant. Because of the lack of detailed formal standards concerning ADA website compliance and the limited case law on the issue, a cottage industry has emerged, oftentimes with plaintiff-friendly results. Notably, multiple website accessibility lawsuits can be filed against a single business. The fact that an accessibility claim was previously filed against a company does not preclude plaintiff law firms from filing additional accessibility lawsuits against the same company. Indeed, nearly 500 of the 4,000 lawsuits (i.e., 15%) filed in 2021 were against companies that had prior website accessibility complaints brought against them⁵. Plaintiff firms also are starting to target mobile applications with ADA accessibility claims.

The statutory schemes currently in place and lack of applicable case law (given that the vast majority of these cases settle) allow plaintiffs' firms to continue bringing these types of claims regardless of their merit due in part to the statutory incentives created by the successful plaintiff's ability to recover their attorneys' fees. In California, cases are typically brought under the California Unruh Civil Rights Act ("Unruh Act"),⁶ which is more expansive than the federal ADA. The Unruh Act seeks to deter discrimination by "all business establishments of every kind whatsoever," whereas Title III of the ADA seeks to prevent discrimination at a "public place of accommodation." A finding of an ADA Title III violation results in an award of injunctive relief and attorneys' fees, but no compensatory damages to remedy the violation. In contrast, under the Unruh Act, the *prevailing plaintiff* is entitled to recover actual damages *and* an amount up to three times the actual

¹ Title III of the ADA applies to, among other things, retail stores, banks, hotels, hospitals, restaurants, theaters, and sports arenas.

² UsableNet's 2021 Year End Report can be found [here](#)

³ *Id.*

⁴ See <https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act>.

⁵ *Id.*

⁶ Cal. Civ. Code § 51 *et seq.*

damages for each violation, or alternatively, statutory minimum damages of \$4,000.00 *per violation* plus attorneys' fees⁷. Significantly, a violation of the ADA also constitutes a violation of the Unruh Act⁸.

Website accessibility complaints are usually preceded by a demand letter to the website owner, followed by a settlement proposal that includes the business' agreement to improve the website's accessibility and payment of the plaintiff's attorneys' fees and costs.

Quick Tips

As we become increasingly reliant on accessing services via the Internet, it is important that businesses implement policies to ensure their websites are accessible to people with disabilities. Below are five quick tips to accomplish this task while also helping to protect your business from a website accessibility claim:

1. Audit your website to ensure it complies with current industry standards as set forth by the Web Content Accessibility Guidelines ("WCAG") 2.1 or a subsequent version, as published by the Web Accessibility Initiative of the World Wide Web Consortium. Any audit should include a manual, live-person audit of your website to identify potential access barriers. For example, visually impaired users utilize screen reader software to navigate the Internet (i.e., NVDA, JAWS, and VoiceOver). Make sure the audit you conduct includes a test of the website using screen reader software by a visually impaired user.
2. Address and correct any accessibility issues revealed by the audit, especially those in high-traffic areas of the website (e.g., home page, registration, purchasing interface, and key content pages). These corrections should include but certainly not be limited to issues concerning poor color contrast, alternative text for images, and captions for videos. Try to keep website layouts consistent.
3. Adopt and maintain a policy to ensure your website remains accessible as updates are made to the website over time. This includes periodic audits of the website, testing by disabled persons, and accessibility training for those responsible for web page and content development.
4. Add an accessibility statement to your website with a reliable method for users to contact you (i.e., telephone number or email address on your home page) should they encounter any accessibility issues on the site.
5. Avoid automated software solutions that claim that they can maintain your website as accessible without any human testing or monitoring. These are band-aid solutions that often fail to ensure actual compliance with the WCAG and ADA. There is no substitute for manual testing.

Bonus Tip

If your business is located outside California, consider adding a "clickwrap" agreement to your website which requires a user to acknowledge or accept (i.e., an "I Agree" checkbox) the website's terms of use policy before accessing the website. Include a provision in your terms of use policy that requires all claims or disputes to be brought in your local state or federal court. For example, if your company is located in Nevada, require users, as a condition of using your site, to submit to the exclusive personal jurisdiction of a court within the State of Nevada for any and all disputes related to the website.

If you receive a website accessibility demand letter, do not ignore it. Consult an attorney experienced in website accessibility claims to assist you.

If you have any questions please reach out to **Amy L. Bess** at abess@vedderprice.com, **Mindy M. Wong** at mwong@vedderprice.com or the Vedder Price attorney(s) you normally work with.

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⁷ Cal. Civ. Code § 52(a).

⁸ Plaintiff lawyers bringing claims under the Unruh Act have asserted (with some success) that repeated visits to a website constitute multiple violations.