

When Good Sites Go Bad: The Growing Risk of Website Accessibility Litigation

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For a growing number of companies, websites are not only a valuable asset, but also a potential liability risk. In recent years, the number of website accessibility lawsuits has significantly increased, where plaintiffs with disabilities allege that they could not access websites because they were incompatible with assistive technologies, like screen readers for the visually impaired.

If you have never asked yourself whether your website is “accessible,” or think that this issue doesn’t apply to your company, read on to learn why website accessibility litigation is on the rise, what actions lawmakers and the courts are taking to try to stem the tide, how to manage litigation risk, what steps you can take to bring your company’s website into compliance, and how to handle customer feedback on issues of accessibility.

The Growing Risk of Website Accessibility Litigation

In recent years, there has been a nationwide explosion of website accessibility lawsuits as both individual lawsuits and class actions. Plaintiffs have brought these claims in federal court under Title III of the Americans with Disabilities Act (ADA) and, in some cases, under similar state and local laws as well. In 2018, the number of federally-filed website accessibility cases skyrocketed to 2,285, up from 815 in the year prior. In the first half of 2019, these cases have increased 51.7% over the prior year’s comparable six-month period, with total filings for 2019 on pace to break last year’s record by reaching over 3,200.

Why Website Accessibility Litigation is on the Rise

The ADA was enacted in 1990 to prevent discrimination against people with disabilities in locations generally open to the public (known as public accommodations). The ADA specified the duties of businesses and property owners to make their locations accessible for people with disabilities, but it was enacted before conducting business transactions over the internet became commonplace. With the rapid growth of internet use, lawsuits emerged arguing that websites were places of public

accommodation under the meaning of the ADA.

These claims have presented serious questions about whether, when, and how website owners must comply with the ADA. There is no legislation that directly sets out the technical requirements for website accessibility. And while the U.S. Department of Justice (DOJ) has stated that [“the ADA applies to public accommodations’ websites.”](#) it has not clarified exactly what standards websites must meet to comply with the law. In the absence of clear guidance, courts considering the question have frequently looked to the [Web Content Accessibility Guidelines](#)(WCAG), first developed by the World Wide Web Consortium (W3C) in 1999, but most recently updated in 2018.

In 2017, federal district courts in [Florida](#) and [New York](#) ruled that business websites failing to meet WCAG guidelines can violate Title III of the ADA, opening the door for litigants to bring an onslaught of claims in these courts. As a result, the rate at which these suits have been filed has skyrocketed, especially in New York and Florida, reaching businesses based throughout the U.S. and internationally. With the pace of these suits showing no signs of slowing, it is critical that every business operating a website consider how to manage the growing risk of litigation.

A Future Fix?

Some recent developments suggest that lawmakers or courts may soon stem the tide. Congress may decide to enact precise standards, or the DOJ might give clarification or promulgate new rules. At the state level, lawmakers in New York have announced plans to address [website accessibility suits](#) based on an outcry from the business community.

Recent decisions in the [Southern District of New York](#) and the [Fourth Circuit](#) suggest that companies can successfully move to dismiss accessibility suits after mooting claims by taking swift remedial action or by showing that the plaintiff was neither eligible nor in a location to receive the goods or services provided on the website. In addition, the [Eleventh Circuit](#) and the [Supreme Court](#) may soon weigh in on whether Title III of the ADA categorically applies to all websites and apps.

How to Manage Litigation Risk for Website Accessibility

Knowing your level of exposure is an important first step. Individual risk is currently based on three factors:

- **Location:** Brick and mortar locations, the delivery of products, or the performance of services in New York or Florida heighten a company’s exposure.
- **Industry:** The present trend shows that retail, food service, hospitality, banking, entertainment industries, and educational institutions are especially at risk.
- **Current website structure:** Sites with e-commerce functions or purchased from third-party developers not currently in compliance with WCAG standards are popular targets.

Unfortunately, it is often difficult to predict the cost and complexity of bringing a website into WCAG compliance based simply on viewing it. An audit of the source code is often required. That said, you can start with a review of your site and develop plans and processes for accessibility. The first steps can include:

- **Assess current compliance:** Use free online tools like [wave](#) and [chrome vox](#) and/or enlist a third-party audit to help you understand your current level of accessibility.
- **Plan for future compliance:** Create an overall plan for achieving accessibility on a timeline that makes business sense.

- **Take immediate action:** Adopt first-step improvements that can be implemented immediately, and create a process for considering accessibility before all future implementations.

Bringing your business into compliance with WCAG web standards does not need to be a standalone project. By integrating accessibility into regular updates, redesigns, and new pages, you can make meaningful improvements as part of your existing process. And if you don't have a process for ongoing maintenance and updates on your website, consider whether your website is still looking fresh and modern and if it is still an accurate expression of your corporate brand.

Include in-house and third-party development teams as stakeholders in the process. Make accessibility a discussion in all new engagements and set expectations for accessibility going forward for new and existing teams:

- **Increase accessibility awareness:** Make accessibility the topic of the next all-hands meeting with all stakeholders.
- **Ask third-party developers and vendors:** Specifically discuss your website's current accessibility and which site options are readily available.
- **Integrate accessibility in projects:** Ensure that agreements for ongoing and future site additions and upgrades incorporate accessibility. Seek representations, ask about compliance levels, and consider seeking warranties and indemnification.

Good customer care is always good business, but making thoughtful use of feedback on your website is a critical step to reducing your risk of an accessibility lawsuit. Everyone on the customer care team should be trained on the risk posed by non-compliance, and they should be empowered to carefully consider and respond to website feedback. The development team should also ensure that the site, whatever its level of WCAG compliance:

- **Encourages feedback:** Provide a way for users to give feedback on and receive assistance with accessibility.
- **Supports engagement with feedback:** Document, consider, and carefully respond to user feedback.
- **Reflects expert input:** When receiving feedback, notices, complaints, or threatened litigation, consult with legal counsel and website accessibility experts as early as possible to ensure that your next steps limit potential liability.

Website accessibility is a fast-moving area of law that is primed for reform. With an increasing number of conflicting decisions and the possibility of new legislation or Supreme Court guidance, we will be closely monitoring this topic in the coming years.

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National Law Review, Volumess IX, Number 214

Source URL: <https://natlawreview.com/article/when-good-sites-go-bad-growing-risk-website-accessibility-litigation>