



ADA Title III Disability Access Updates:

Hot Issues and Litigation Trends

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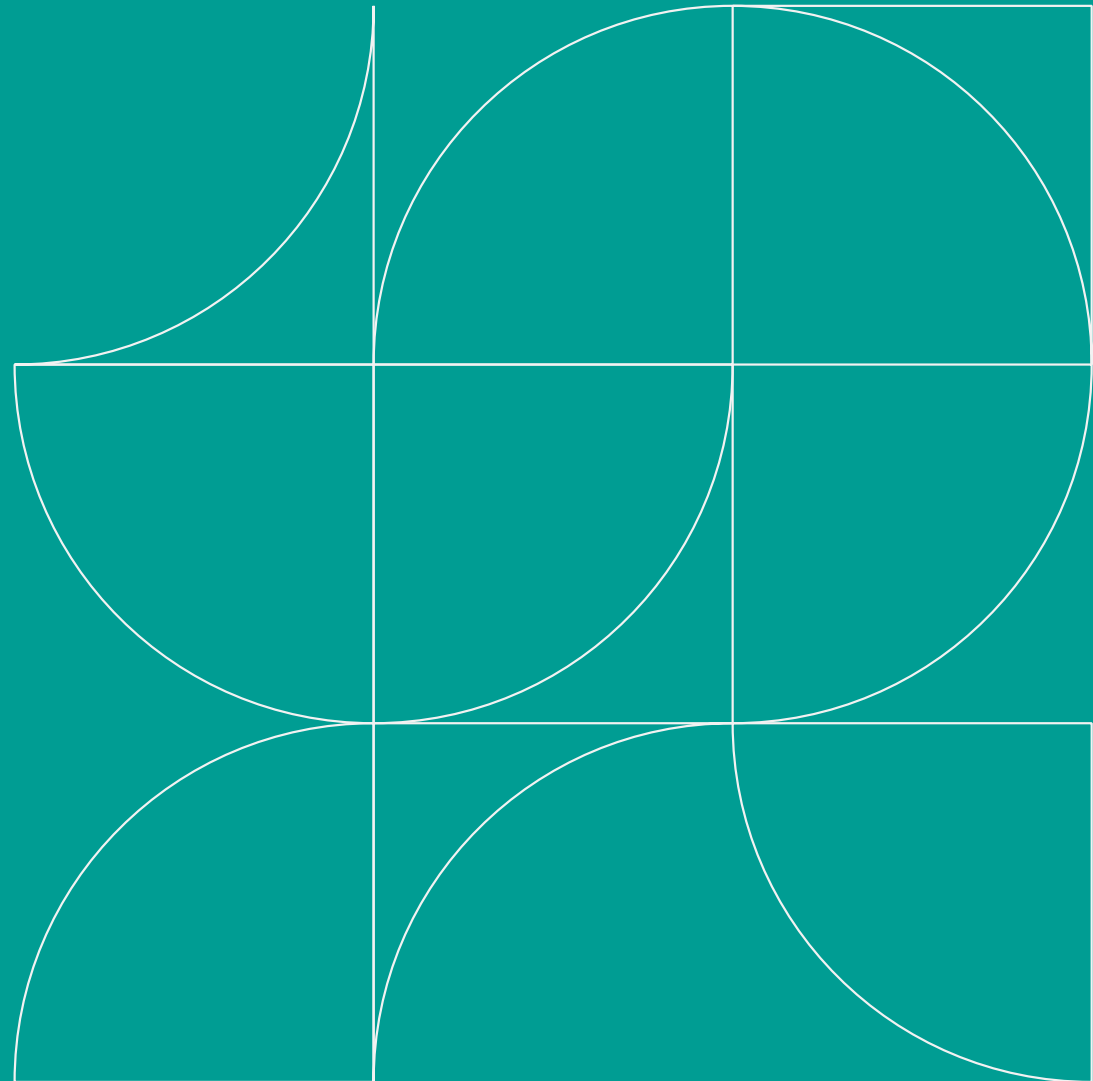
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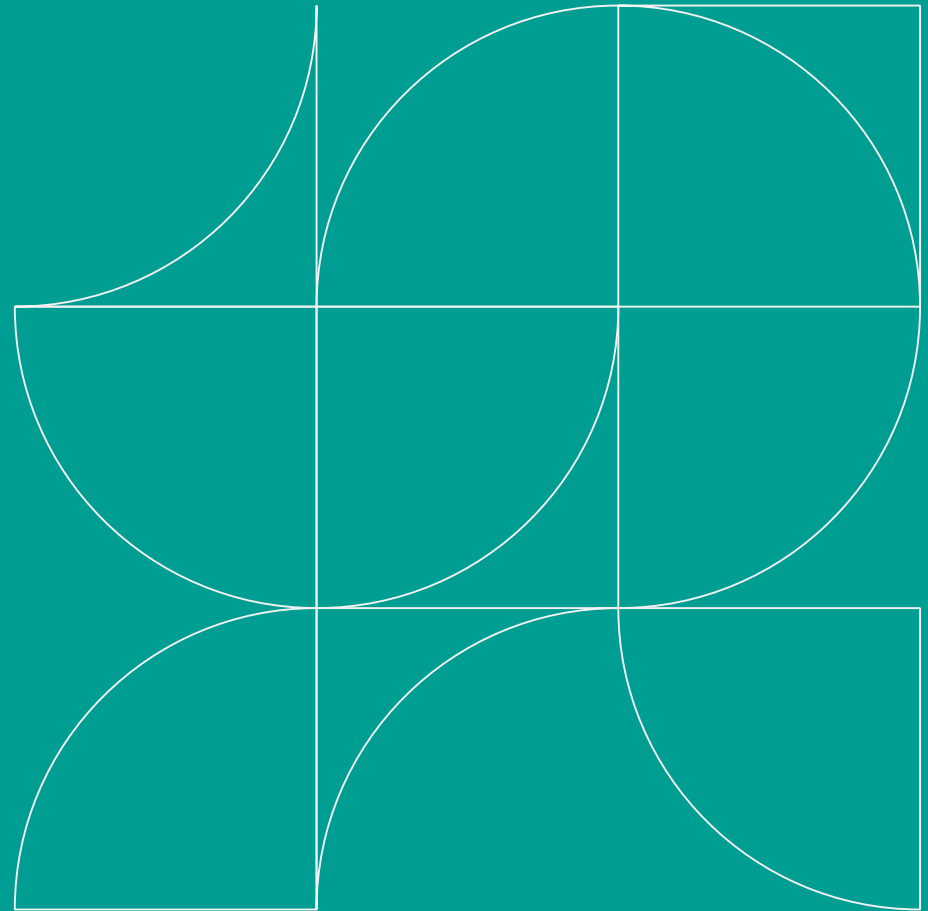


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Agenda

- 01 Overview of ADA Title III Requirements
- 02 National Lawsuit Numbers and Hotspots
- 03 The Biden Administration DOJ
- 04 Hot Litigation Topics:
 - Standing
 - Website Accessibility
 - Kiosks
 - Novel Issues
 - Service Animals
 - Hotel Reservation Websites

Overview of ADA Title III Requirements



ADA Background

- Under Title III of the ADA, public accommodations must:
 - have facilities that are accessible to individuals with disabilities (*i.e.*, members of the public) and maintain them;
 - make reasonable modifications to policies, practices, and procedures when necessary to ensure that individuals with disabilities have equal access to public accommodations' goods, services, facilities, privileges, advantages, and accommodations; and
 - ensure effective communication with individuals with disabilities by providing them auxiliary aids and services at no additional charge.
- Remedies:
 - Private party: Injunctive relief, attorneys' fees & costs (possible damages/penalties under state corollary laws)
 - DOJ Action: Penalties \$111,614.00 for a first violation and \$223,229 for a subsequent violation; injunctive relief, damages

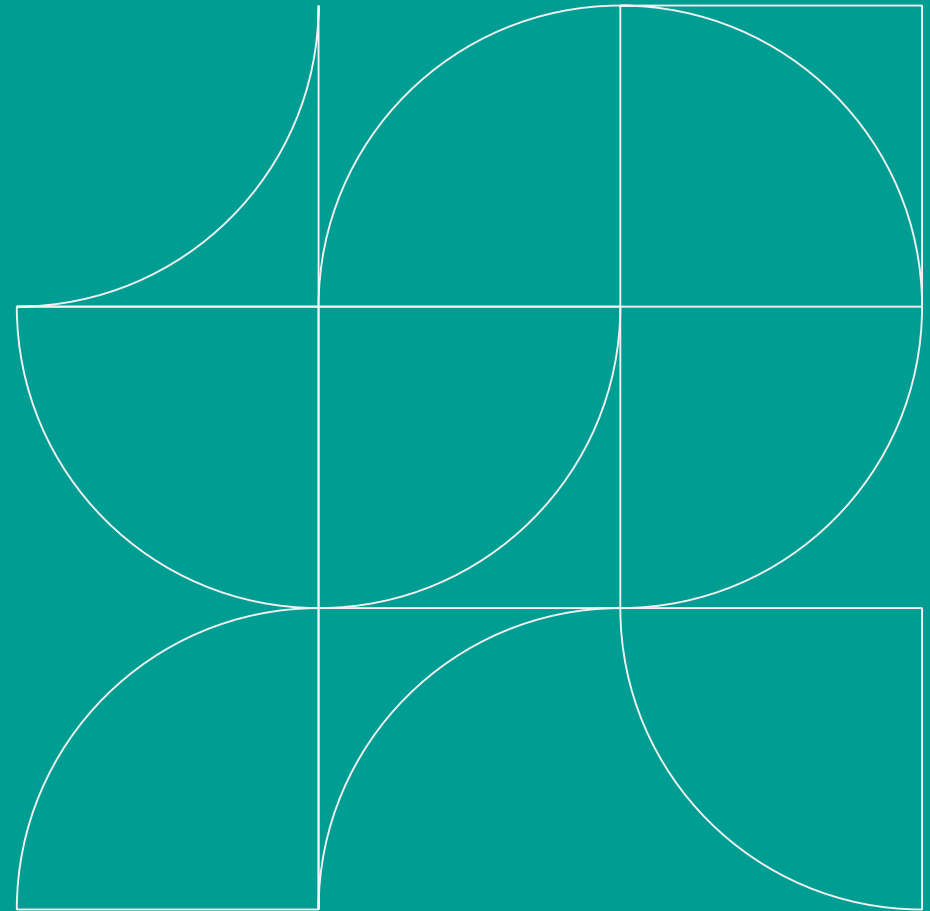


ADA Background (Cont.)

What is a public accommodation?

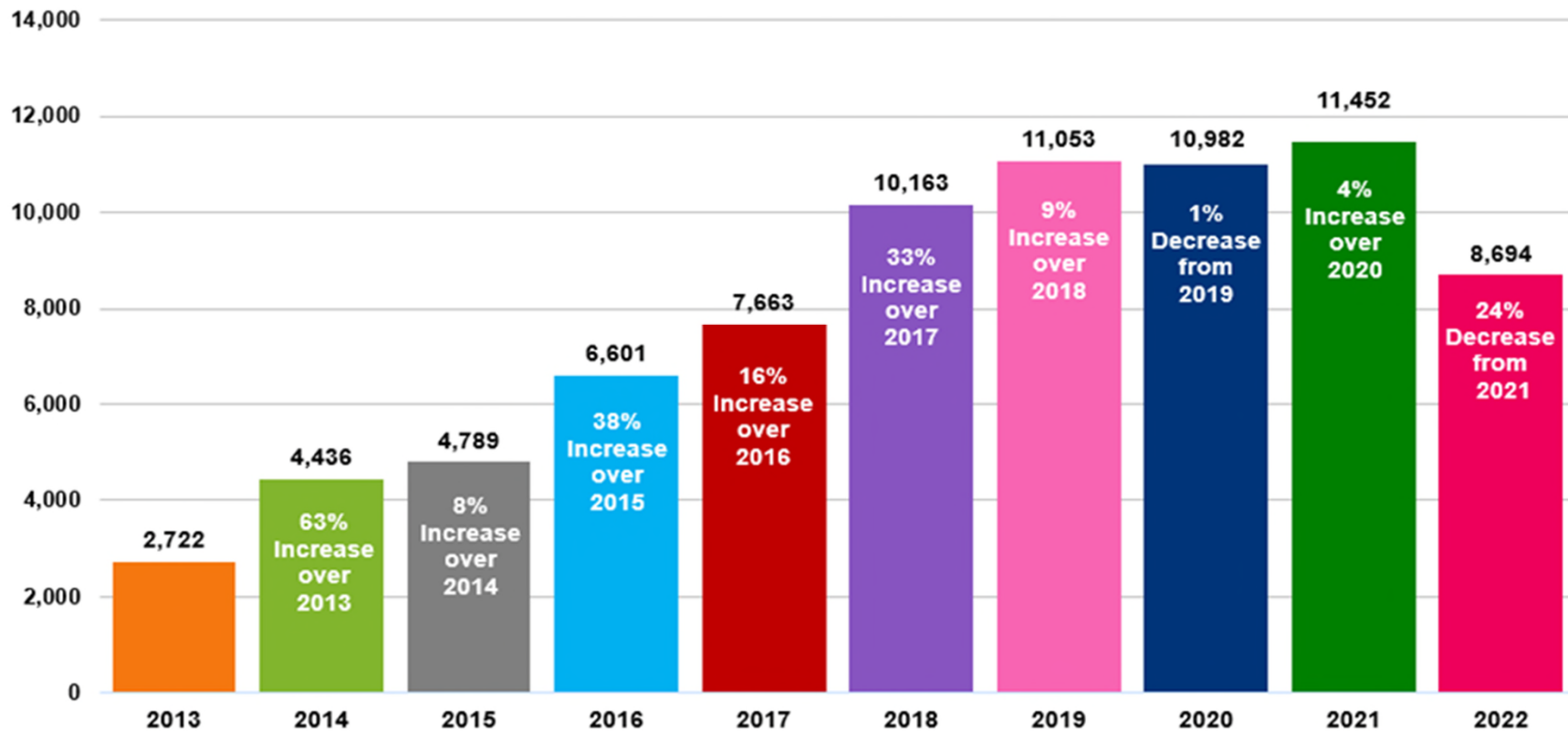
- Private business
- Affects commerce
- Falls within at least one of the following 12 categories:
 1. Places of lodging (e.g., inns, hotels, motels)
 2. Establishments serving food or drink (e.g., restaurants and bars);
 3. Places of exhibition or entertainment (e.g., motion picture houses, theaters, concert halls, stadiums);
 4. Places of public gathering (e.g., auditoriums, convention centers, lecture halls);
 5. Sales or rental establishments (e.g., bakeries, grocery stores, hardware stores, shopping centers);
 6. Service establishments (e.g., laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals);
 7. Public transportation terminals, depots, or stations (not including facilities relating to air transportation);
 8. Places of public display or collection (e.g., museums, libraries, galleries);
 9. Places of recreation (e.g., parks, zoos, amusement parks);
 10. Places of education (e.g., nursery schools, elementary, secondary, undergraduate, or postgraduate private schools);
 11. Social service center establishments (e.g., day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies); and
 12. Places of exercise or recreation (e.g., gymnasiums, health spas, bowling alleys, golf courses).

National Lawsuit Numbers and Hotspots



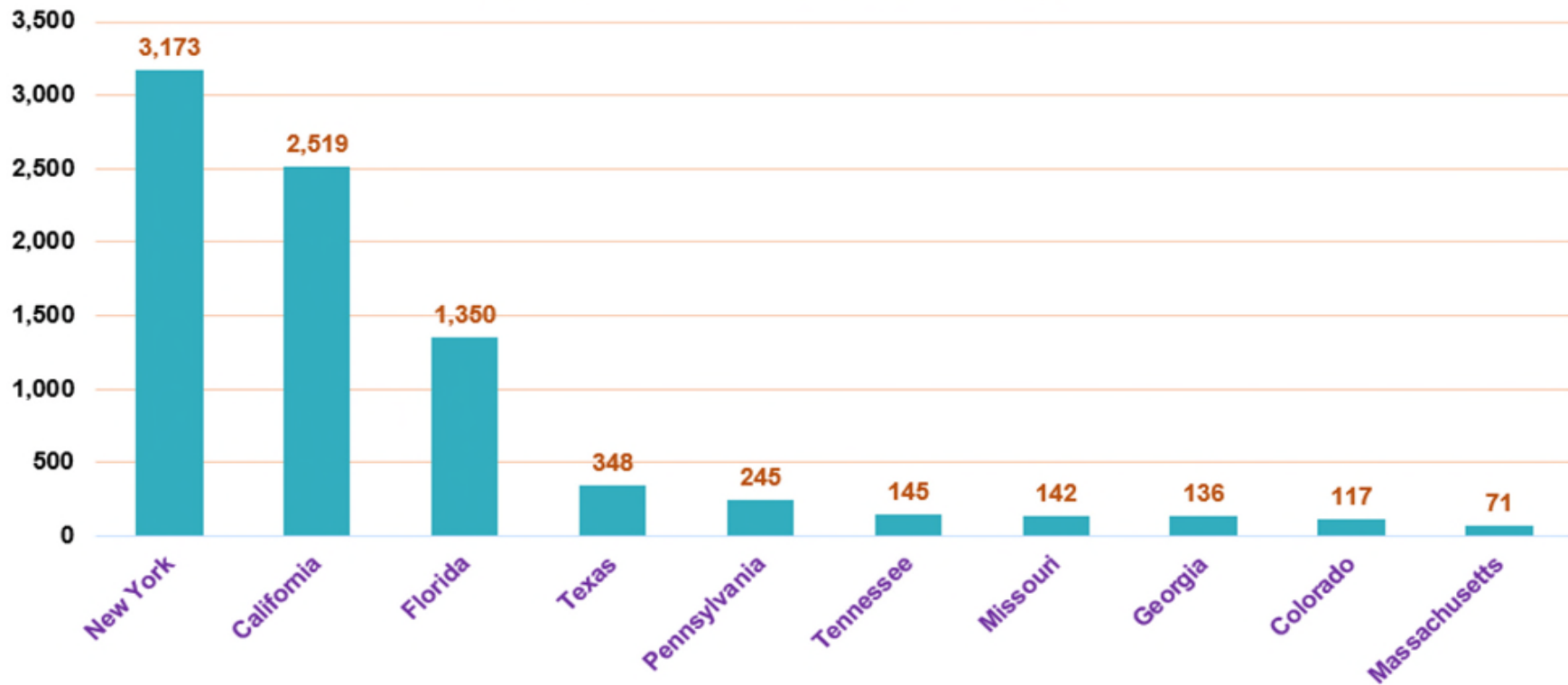
ADA Title III Accessibility Lawsuit Numbers (All Bases)

Total Number of ADA Title III Federal Lawsuits Filed Each Year
January 1, 2013 - December 31, 2022



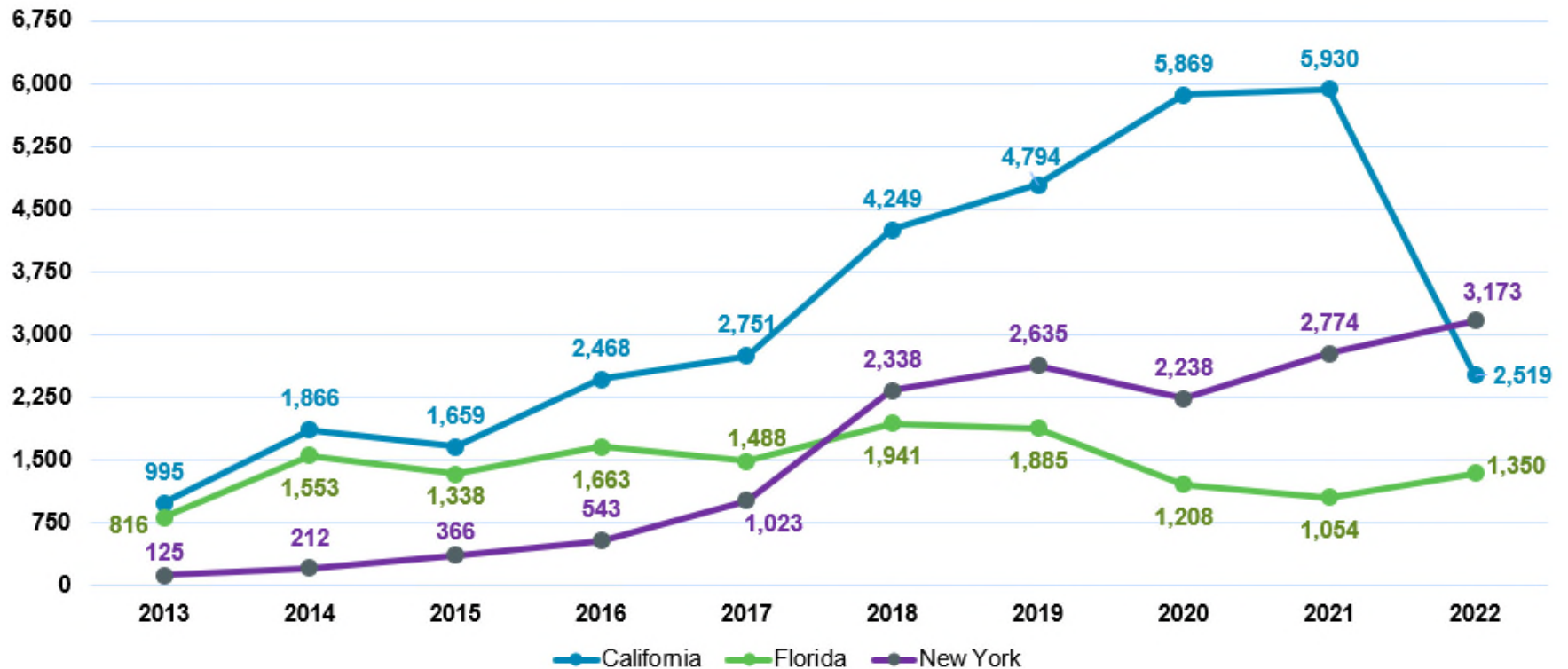
ADA Title III Lawsuit Numbers (All Bases) – Top 10 States

Top 10 States with Federal ADA Title III Lawsuits Filed
January 1, 2022 - December 31, 2022

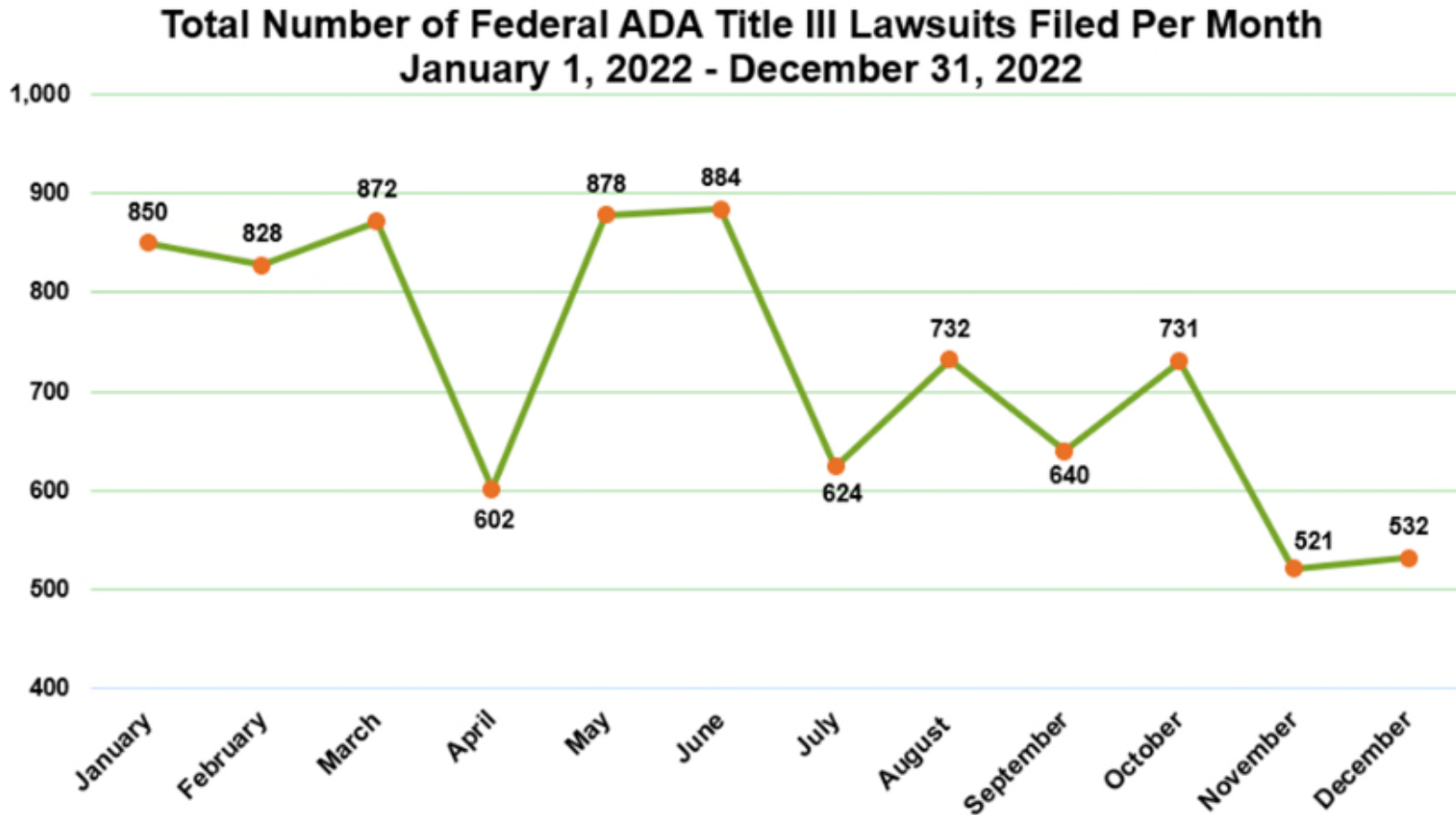


ADA Title III Lawsuit Numbers (All Bases) – The Big 3

California, New York, and Florida ADA Title III Federal Lawsuits (2013-2022)

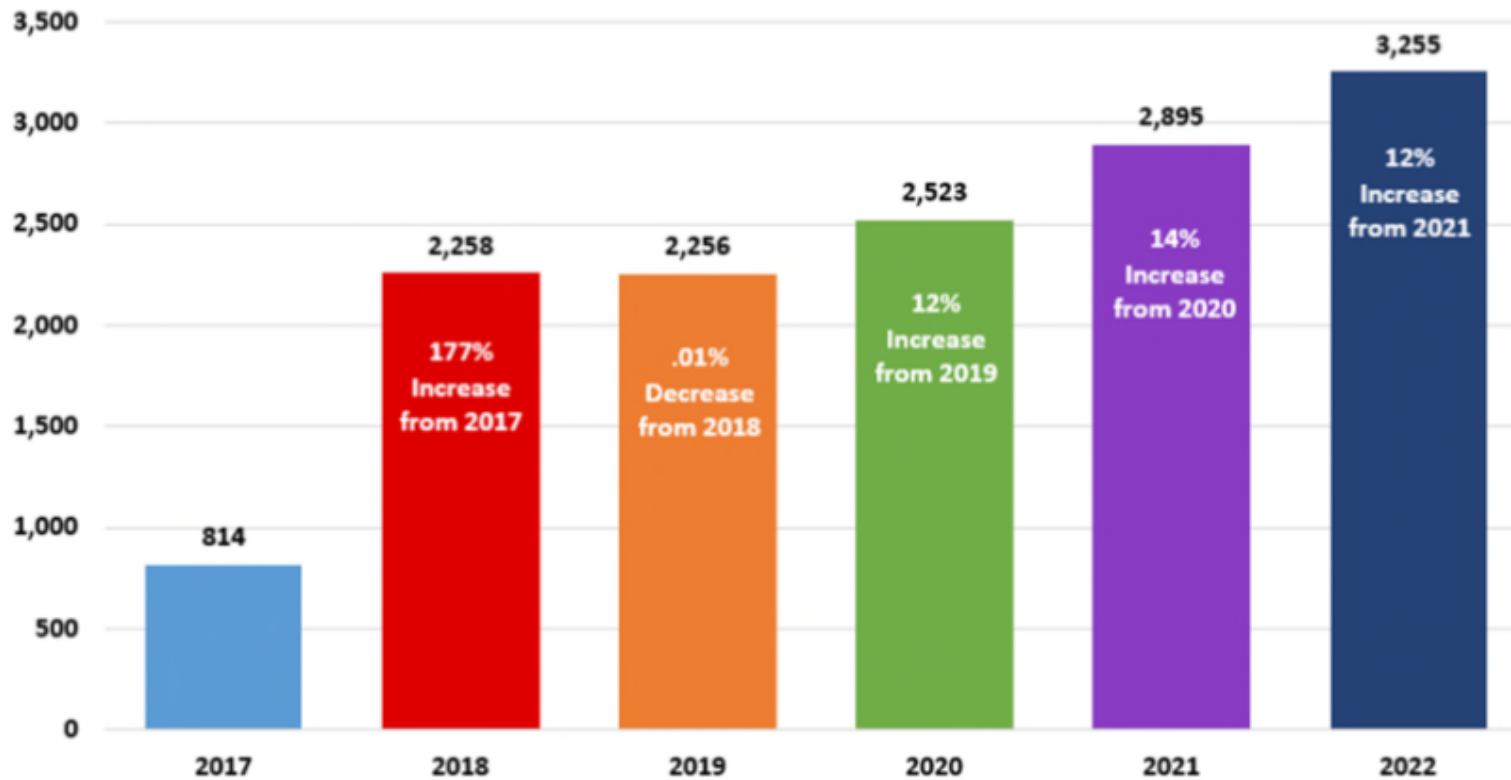


ADA Title III Lawsuit Numbers (All Bases) - Per Month

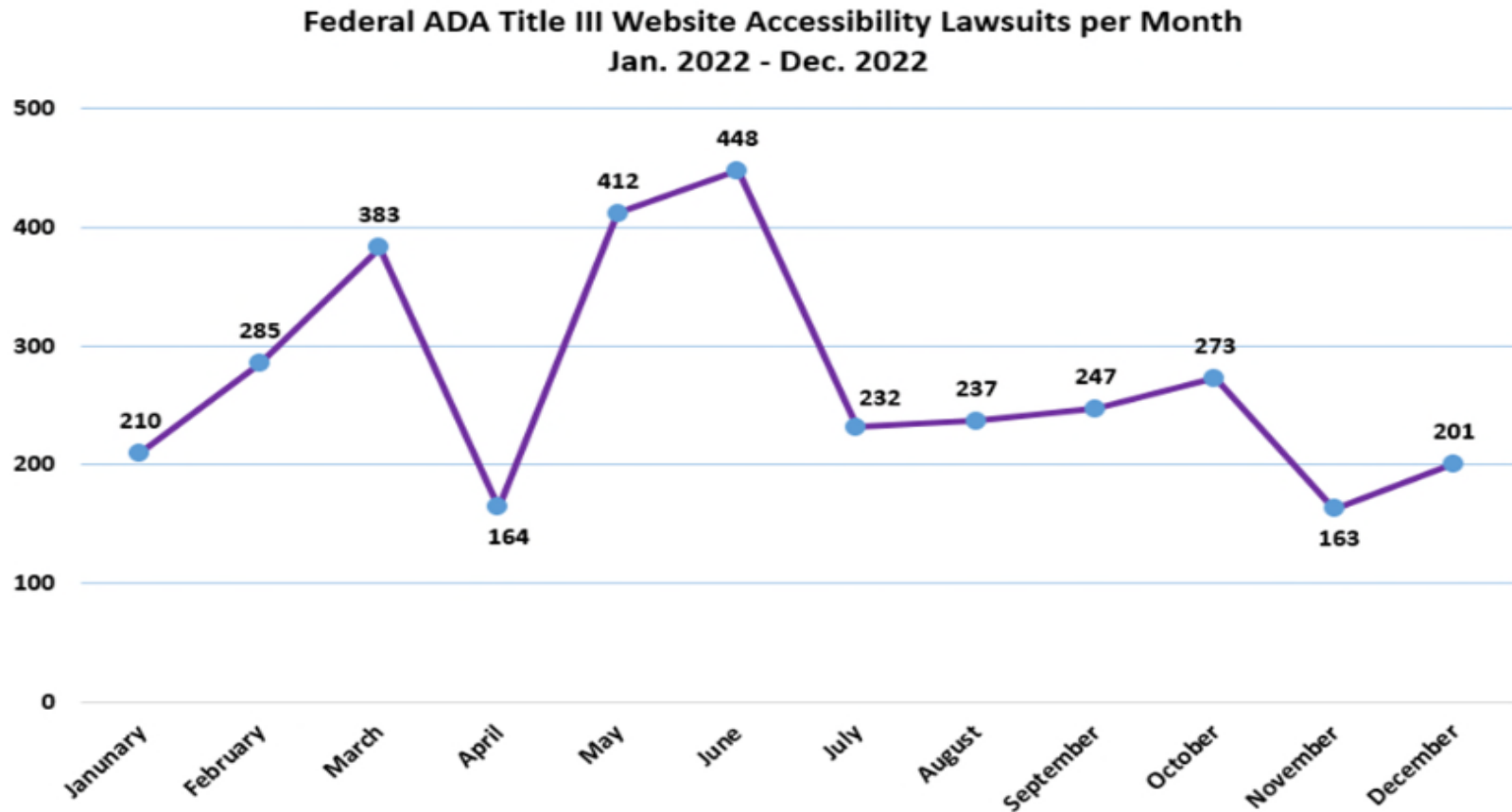


ADA Title III Website Accessibility Lawsuit Numbers

ADA Title III Website Accessibility Lawsuits in Federal Court
2017-2022

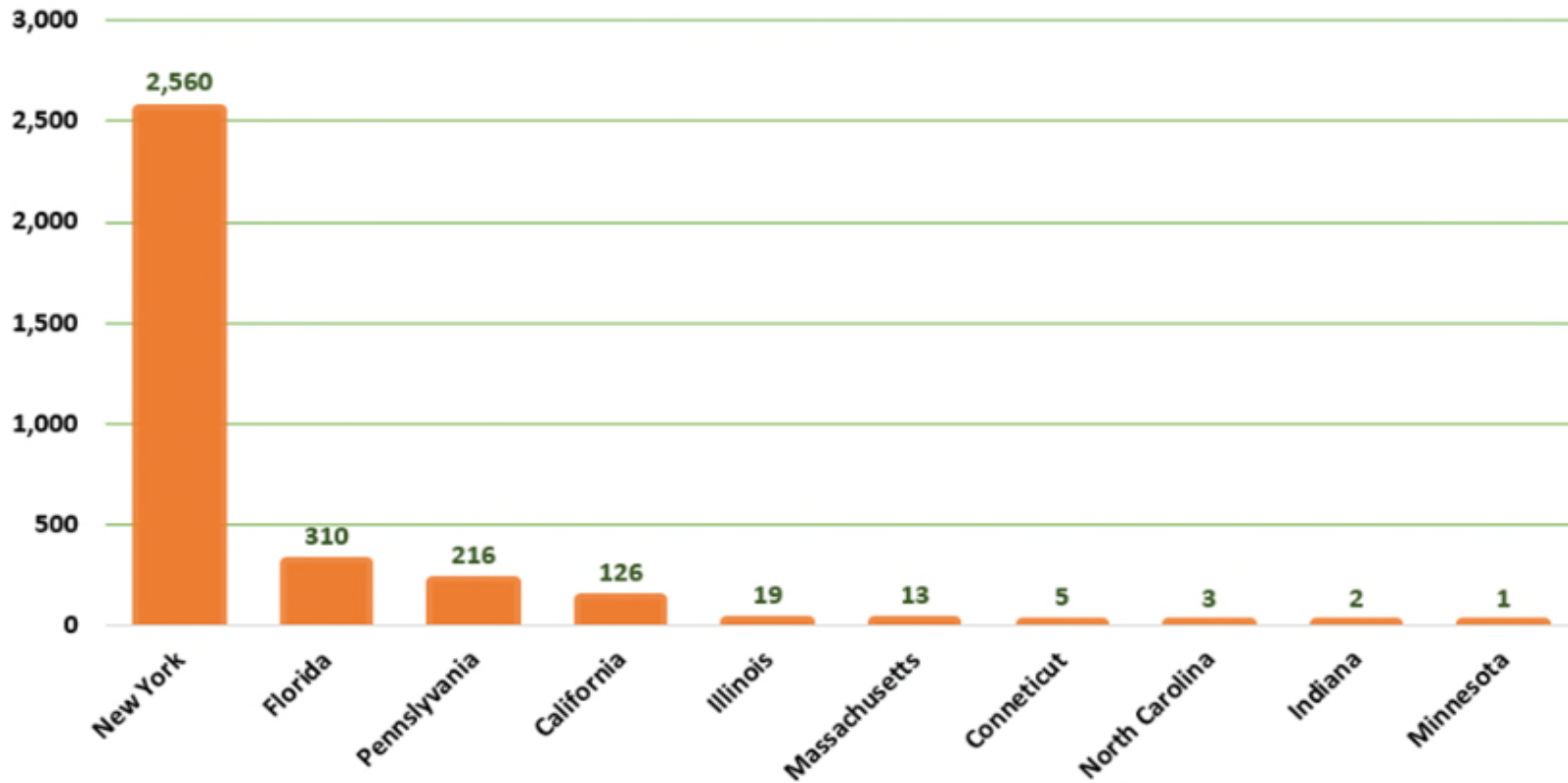


ADA Title III Website Lawsuit Numbers: By the Month

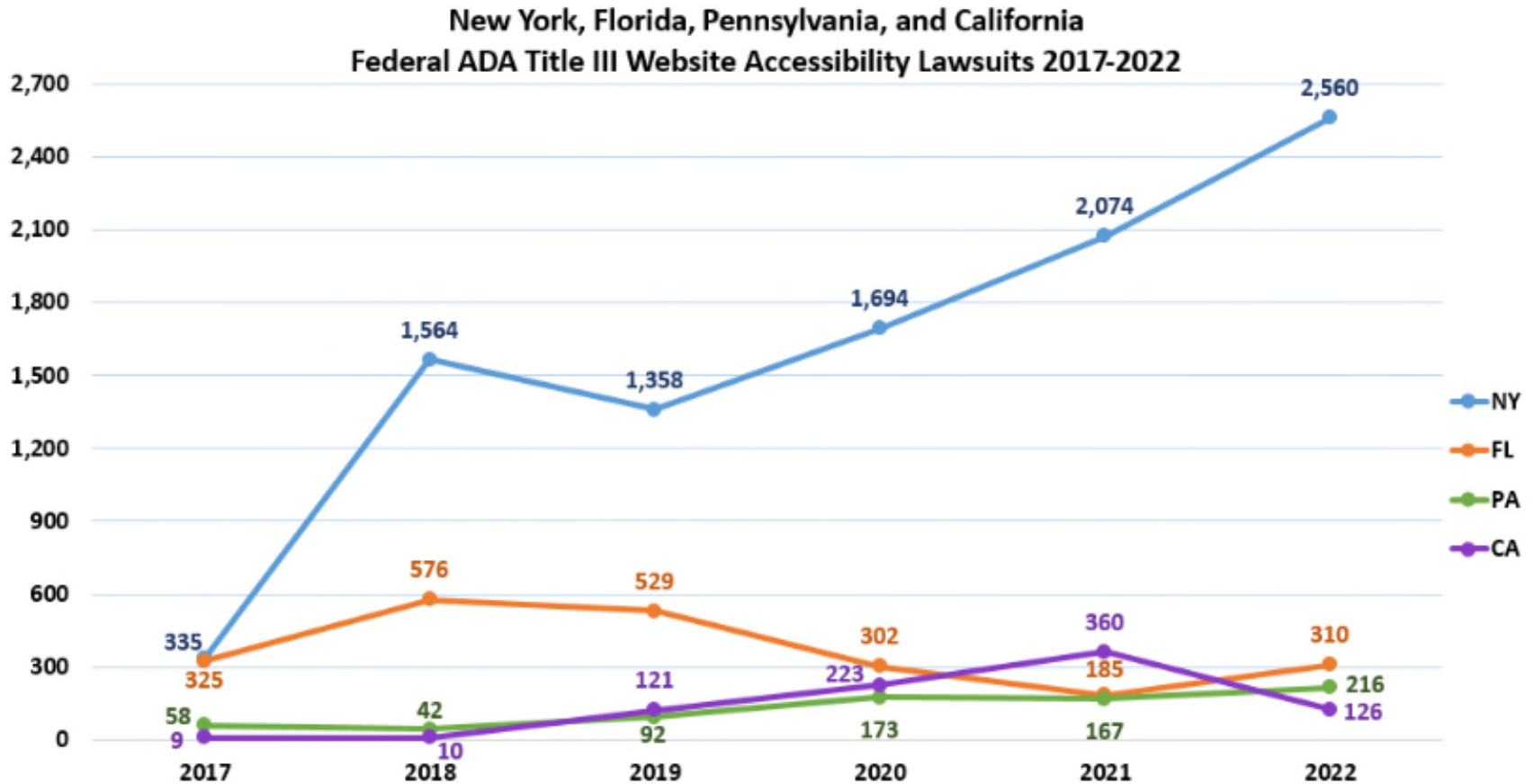


ADA Title III Web Lawsuits by State: Top 10 in 2022

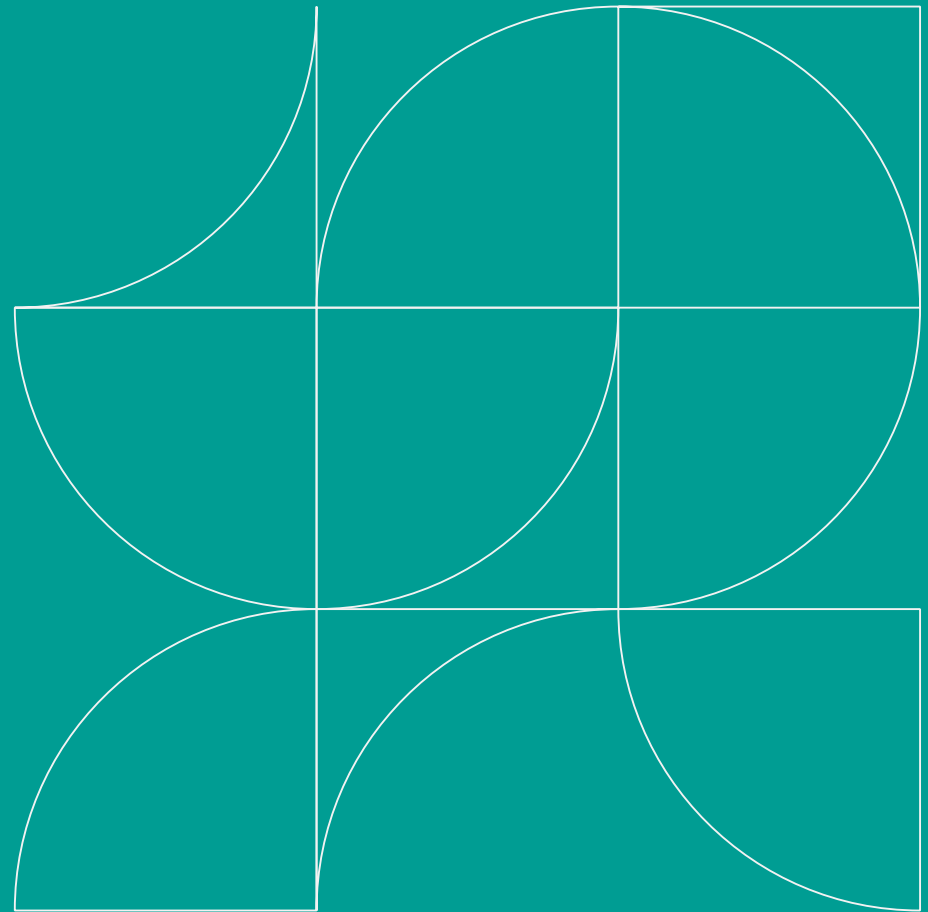
Federal ADA Title III Website Accessibility Lawsuits per State
Jan. 2022 - Dec. 2022



ADA Title III Web Lawsuits by State: Top 3 2017-2022



The Biden Administration DOJ

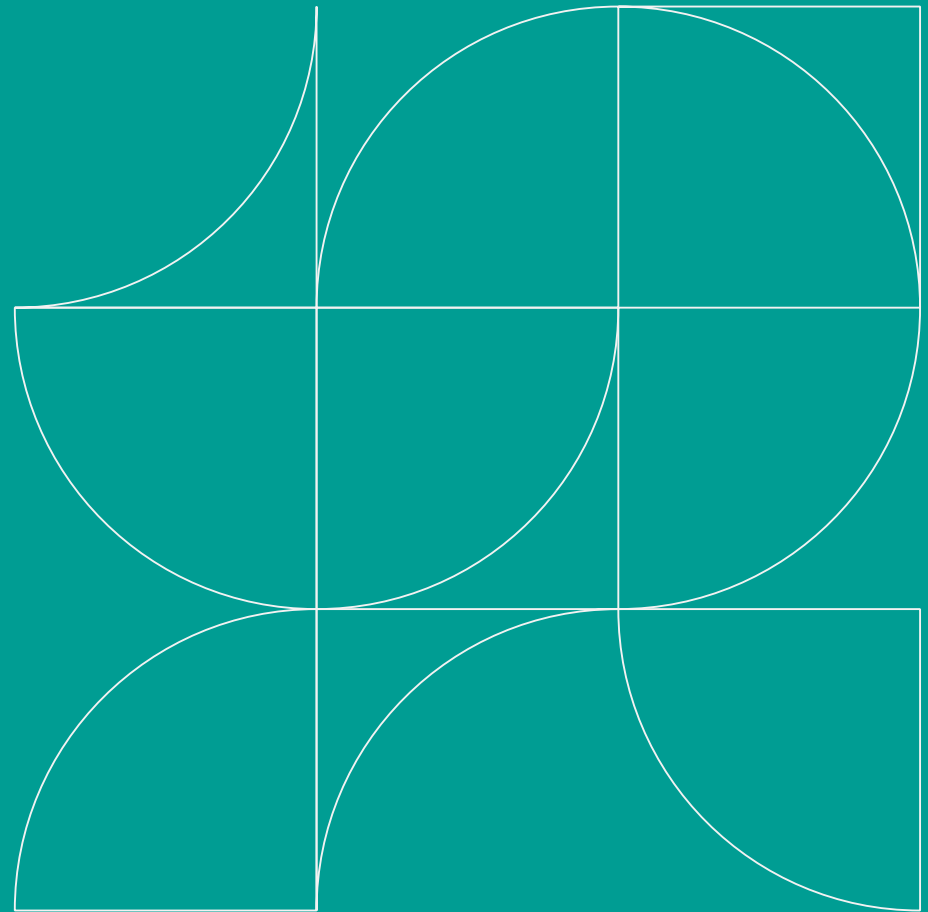


ADA Title III Enforcement in the Biden Administration



- Statements of Interest filed about bed height, kiosks, plasma donation, TX anti-mask executive order in 2021
- Consent Decrees addressing the accessibility of COVID-19 vaccination web portals using WCAG 2.1. AA (RiteAid, Hy-Vee, Kroger, CVS) and UC Berkeley website
- Settlement agreements in matters concerning sign language interpreters, physical access barriers, airport transportation services, testing accommodations, refusal to treat persons with HIV, refusal to provide health care to people with opioid addiction, inaccessible campus housing.
- Lawsuit filed against several outpatient surgery eye centers for failure to provide transfer assistance for wheelchair users for surgery (settled).
- Lawsuit filed against Wrigley Field owners for alleged non-compliance with ADA requirements in major renovation (pending).

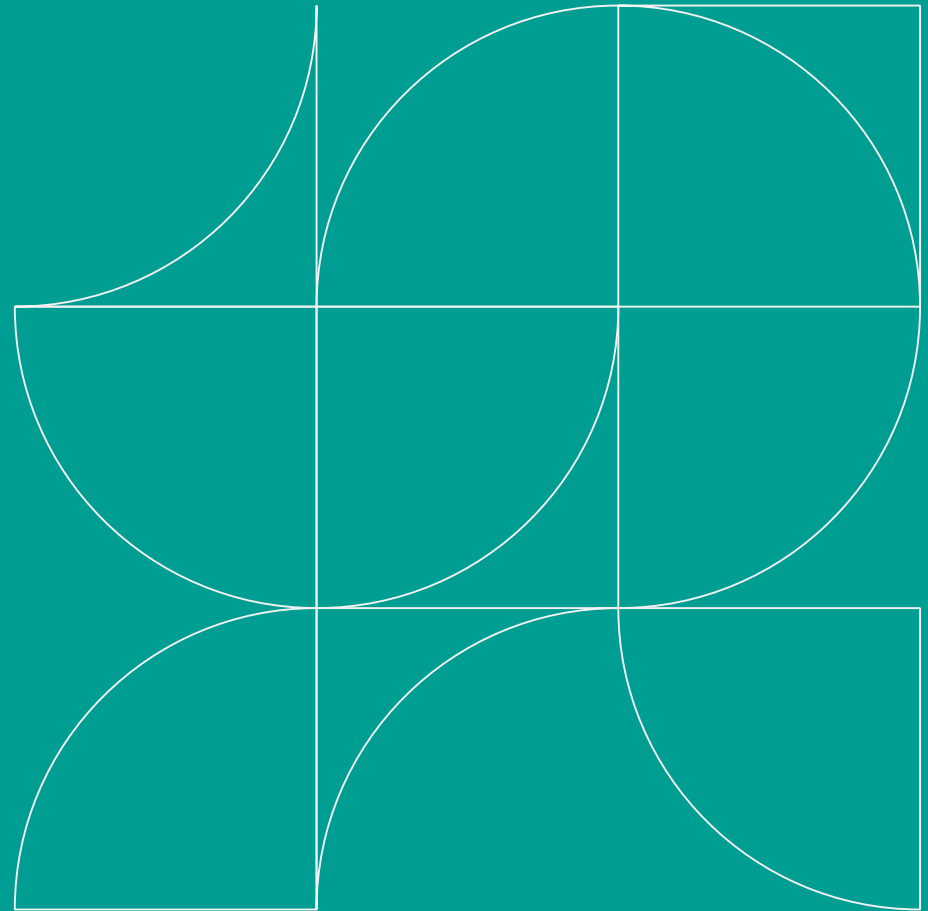
Hot Litigation Topics



Serial Plaintiff Tester Standing - Alarming Trend

- No need to have desire to patronize business to have standing to sue
 - *Laufer v. Acheson* (1st Cir, 2022) (Petition for Certiorari pending)
 - *Laufer v. Arpan* (11th Cir. 2022)
 - *Laufer v. Naranda Hotels* (4th Cir. 2023) (just decided 2/15/23)
- Encountering a barrier on a website or at a location is not enough; there must be downstream consequences
 - *Laufer v. Mann Hospitality* (5th Cir. 2021)
 - *Laufer v. Looper* (10th Cir. 2022)
 - *Harty v. West Point Realty* (2d Cir. 2022)

Websites, Mobile Apps, and Kiosks



Legal Overview: What Statutes May Require Accessible Technology

- **ADA Title II:** State & Local Governmental Entities
- **ADA Title III:** Public Accommodations
- **Section 504 Rehabilitation Act:** Recipients of Federal Assistance
- **Section 508 Rehabilitation Act:** Technology sold to federal agencies may need to be Section 508 compliant under contract.
- **State Non-discrimination Laws:** Public Accommodations
- **Air Carrier Access Act:** Requires primary websites of airline carriers to conform to WCAG 2.0 AA.
- **ACA Section 1557, Medicare Regulations:** Health Care

What is an “accessible” website?

- One that can be used by people with various types of disabilities.
- **Blind:** Screen reader compatibility
 - Alternative text for images
 - Properly labeled form fields
 - Proper use of headings
 - Keyboard-only access
 - Audio descriptions for videos
- **Low Vision:** Color contrast, text resizing
- **Deaf or Hard of Hearing:** Captions for audio content
- **Mobility:** Keyboard-only access; ability to slow down or turn off time outs
- **Epilepsy:** No flashing content
- **Color Blind:** Color not used as sole method of conveying information



Web Content Accessibility Guidelines (WCAG)

- Published by private group of experts, W3C
 - Adopted WCAG 2.1 AA in June 2018
 - Adds 17 Success Criteria to WCAG 2.0
 - Mobile Apps, Low Vision, Cognitive Impairments
- Not a legal standard under Title III of the ADA but a de facto standard

Web Accessibility Regs: DOJ Position & (In)Action Over the Years

2010-2016: 2010 ANPRM pending

2017: DOJ Withdrew ANPRM

March 2022: DOJ issued Website Accessibility Guidance

- Possible response to Feb. 28, 2022 letter by 181 advocacy groups to DOJ asking for “enforceable online accessibility standards by the end of the current Administration”
- “Longstanding” interpretation that ADA applies to internet
- States that covered entities have “flexibility” in how to apply, without elaboration
- References Consent Decrees incorporating WCAG 2.0 AA

Web Accessibility Regs: DOJ Position & (In)Action Over the Years

June 22, 2022: 12 Senators sent DOJ a letter: “critical [that DOJ] restart rulemaking”

July 2022: DOJ announced intent to begin rulemaking process to enact Title II (state and local governments) website accessibility regulations

- April 2023: NPRM to issue
- June 2023: public comment to DOJ

November 2022: DOJ – UC Berkeley Consent Decree

February 21, 2023: DOJ released 1st report on the federal government’s compliance with Section 508 of the Rehabilitation Act in 10 years, showing many agencies not complying with 508’s web accessibility mandate.

Title III Website Litigation:

Key Cases & Themes



- Federal Courts disagree on whether web-only businesses are covered public accommodations.
 - Ninth Circuit and CA Court of Appeals agree that online only businesses are not covered by Title III of the ADA
 - Most NY federal district judges say online only businesses are covered by Title III of the ADA
- Prior settlement promising to make website accessible is not a bar to subsequent suit.
- Being in the process of making your website accessible usually does not moot case, but having completed the task might.
- If the plaintiff can't ever use the services of the business whose website is inaccessible, case might be dismissed for lack of standing (but see standing discussion).
- Telephone access might be a defense but fact intensive.
- Only a handful of cases have been litigated to judgment.

Title III Website Litigation: *Domino's* Closure

***Robles v. Dominos Pizza LLC* (9th Cir. 2019)**

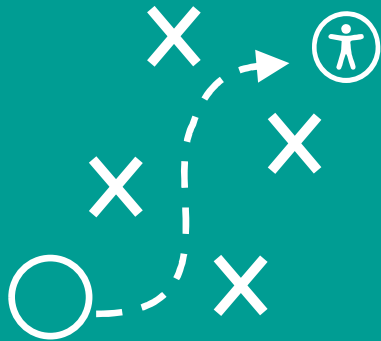
- Lawsuit alleged website and mobile app not accessible to the blind.
- Federal trial court granted early dispositive motion on due process and primary jurisdiction grounds.
- 9th Circuit reversed & remanded, finding:
 - ADA applies to websites & mobile apps that have nexus to physical place.
 - Rejected due process/primary jurisdiction arguments - Domino's had notice of the general requirements under ADA Title III.
 - Telephone service as an alternative could not be decided on a motion to dismiss.
- Domino's appealed to US Supreme Court; declined to review (October 7, 2019).
- On remand, partial summary judgment granted to Robles on the website, with judge finding that website is not fully accessible to plaintiff because future order can't be placed using a screen reader.
- Settled in June 2022.

Title III Website Litigation: *The Winn Dixie Saga Ends*

***Gil v. Winn Dixie* (SDFL 2017, 11th Cir 2022)**

- Bench trial verdict for plaintiff, Court issued 3-year injunction:
 - Accessible website by 12/1/17(WCAG 2.0 AA)
 - Annual training for employees on website accessibility
 - Require third party content to be accessible
 - Adopt web accessibility policy by 12/1/17
 - Fees/costs totaling \$105,271 awarded to plaintiff
- April 2021: 11th Circuit overturned trial court decision, finding the website barriers in question did not prevent the plaintiff from accessing the goods and services offered at the retailer's stores
- May 2021: Gil filed petition for rehearing en banc
- December 28, 2021: 11th Circuit dismissed appeal as moot because the website was made accessible, and remanded case to trial court to dismiss as moot
- January 18, 2022: Winn-Dixie filed a petition for rehearing by the en banc panel
- March 2, 2022: 11th Circuit denied petition for reconsideration of dismissal order

Strategies for Avoiding/Defending Website Litigation



- Create and maintain website/mobile apps
- Accessibility Statement
- Training
- Vendor contracts
- Third party content
- 24/7 telephone line

Kiosk Litigation

- **DOJ Statement of Interest**
 - lawsuit about inaccessible self-check-in kiosks at diagnostic labs
 - employee assistance for inaccessible kiosks does not satisfy the ADA because of lengthy wait and loss of priority in line
- ***NFB v. Walmart*, D.Md. Case. No. RDB-18-3301**
 - inaccessible self-check-out devices do not violate the ADA because Walmart employees provided assistance
 - Bottom line: Employee assistance can be a method of providing access but must be prompt and cannot involve private information (e.g. PIN, health data).

Novel Issues: Serial Plaintiffs, Drive-Thru, and Accessible Parking Obstructions

Novel and Emerging Issues in ADA Title III

- Serial plaintiffs
 - Fernando Gastelum – Assorted barriers
 - Peter Strojnik Sr. – Assorted barriers (not actually disabled)
 - Kyle Wong – Pool lifts (disability unknown)
 - Howard Cohan – assorted barriers (not actually disabled)
 - Teresa Brooke – Loading zones
 - Deborah Laufer – Accessibility information on websites
- Drive through procedures for the deaf/hard of hearing
- Drive through lane cars blocking accessible parking

Novel Issues: Transfer Assistance and Amusement Ride Eligibility

Novel and Emerging Issues in ADA Title III

- Transfer assistance at surgery centers
 - Is it required?
 - DOJ Consent Decree (24 eye surgery centers in Arizona)

- Ridership eligibility criteria for amusement parks
 - Can you follow manufacturer recommendations or is there an independent duty to investigate?
 - Some federal courts take differing approaches

Service Animals

- Service animals
 - Definition
 - Individually trained to work or perform tasks to assist person with a disability
 - Emotional support animals not protected under ADA Title III
- What questions can you ask?
- Where are service animals allowed to go?
- Tricky Issues

Hotel Reservations Websites



- 28 CFR 36.302(e) requires hotels to describe accessibility features of their hotels
- Hundreds of lawsuits filed in CA by Potter Handy firm and elsewhere (Laufer)
- Ninth Circuit settled issue of what information must be provided:
 - Room type
 - Number and type of beds
 - Mobility or Hearing Accessible (or both)
 - If mobility accessible, type of bathing fixture



Questions?

Thank you!

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