



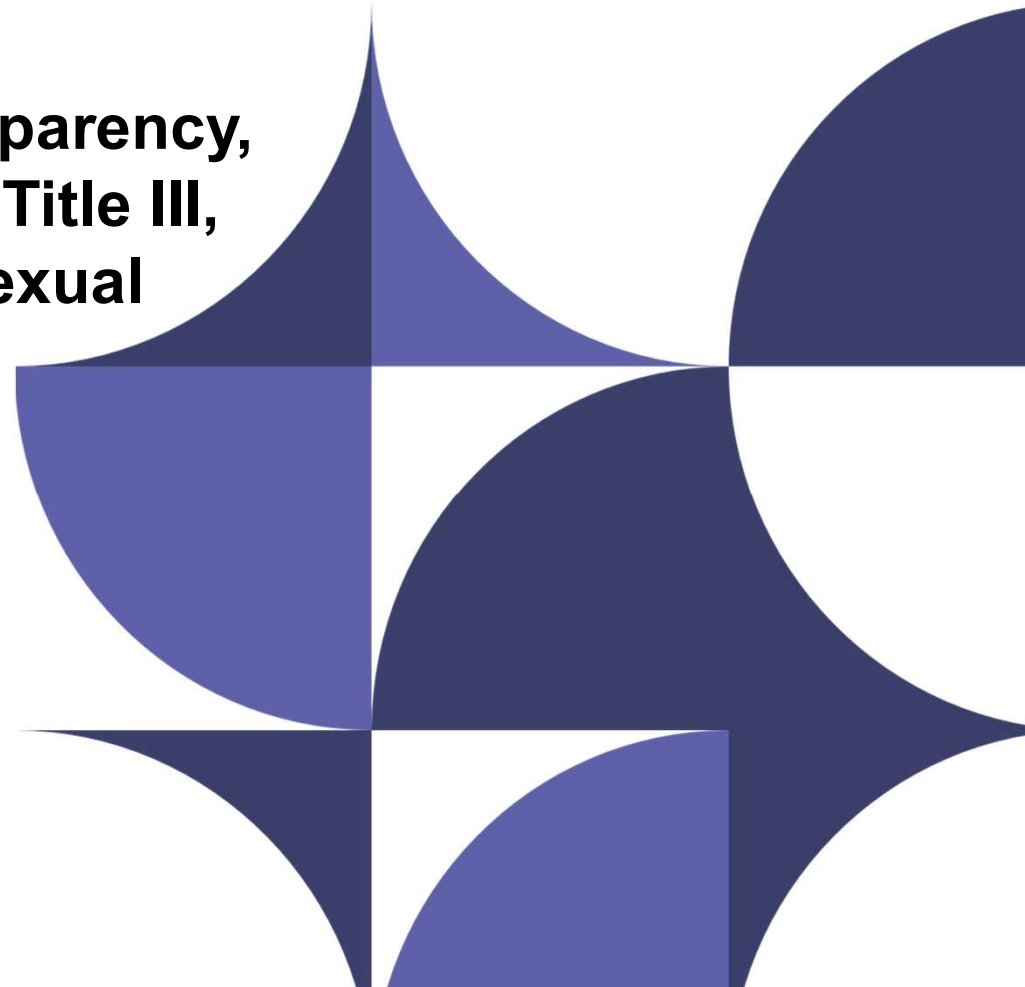
HR Forum: Updates on Pay Transparency, Website Accessibility Under ADA Title III, and Recent NY Bills Governing Sexual Harassment and Retaliation

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Seyfarth Shaw LLP

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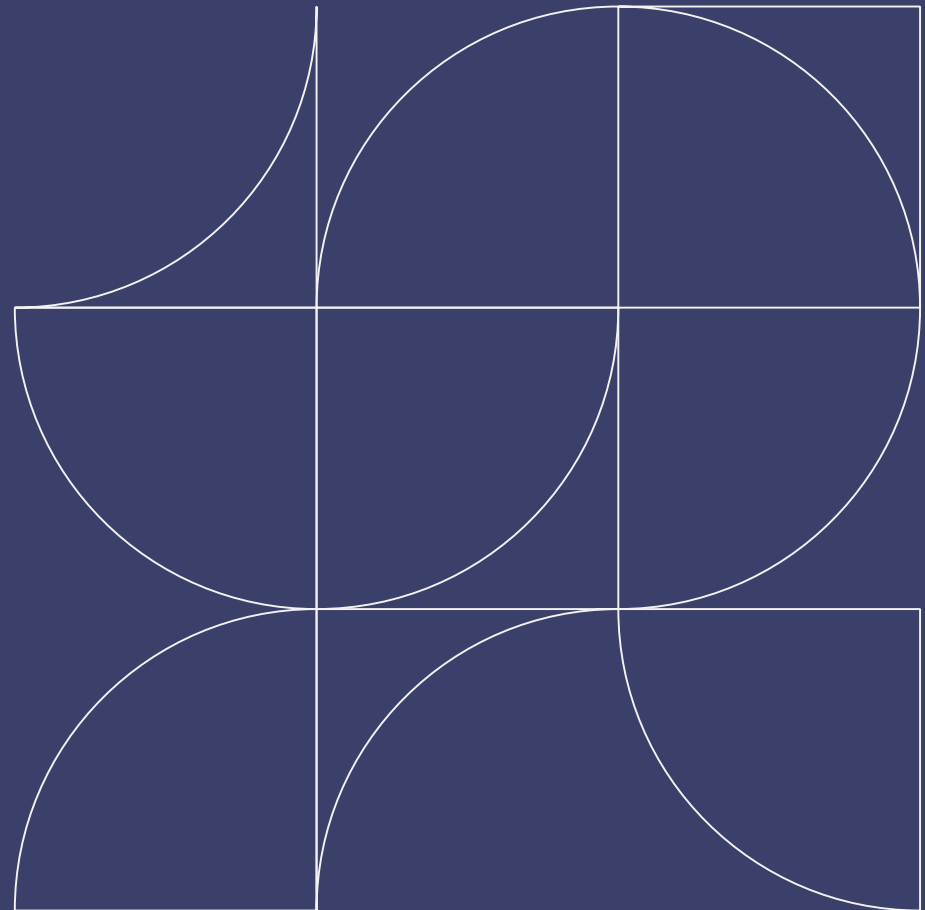


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Agenda

- 01** Welcome and Introductions
- 02** Pay Transparency
- 03** Legal Trends in Website Accessibility Under ADA Title III
- 04** Recent NY Laws and Bills Governing Sexual Harassment and Retaliation
- 05** Speaker “Office Hours”

U.S. Pay Scale Disclosure Requirements



Details on U.S. Pay Scale Disclosure Laws

Upon Request (Applicant and/or Employee)

	Timing	What Must be Provided
California*	Upon reasonable request, made after an applicant has completed an initial interview with the employer	"Pay scale," which means a salary or hourly wage range
Maryland	Upon request	Wage range (undefined)
Ohio (Cincinnati & Toledo)	Upon reasonable request, after a conditional offer of employment	Pay scale (undefined)
Washington State*	<p><u>Applicants</u>: Upon request after initial offer</p> <p><u>Employees</u>: Upon request after offer of internal transfer to a new position or promotion</p>	<p><u>Applicants</u>: Minimum wage or salary for the position for which the applicant is applying</p> <p><u>Employees</u>: Wage scale or salary range for employee's new position</p> <p>If no wage scale or salary range exists, provide the minimum wage or salary expectation set prior to posting the position, making a position transfer or making a promotion</p>

*Pending legislation will likely change requirements

Details on U.S. Pay Scale Disclosure Laws

Affirmative Disclosure Requirements

	Timing	What Must be Provided
Connecticut	<p><u>Applicants:</u> Upon earliest of (1) applicant's request; or (2) prior to or at the time of an offer of compensation</p> <p><u>Employees:</u> Upon (1) hire; (2) change in employee's position; or (3) employee's first request</p>	<p>Wage range, which means the range of wages the employer anticipates relying on when setting wages for a position and may include reference to: (1) any applicable pay scale; (2) previously determined range of wages for the position; (3) actual range of wages for those employees currently holding comparable positions; or (4) the employer's budgeted amount for the position</p>
Nevada	<p><u>Applicants:</u> Upon completion of an interview for a position</p> <p><u>Employees:</u> For promotion or transfer to a new position if the employee has (1) applied for the promotion or transfer; (2) completed an interview for the promotion or transfer or been offered the promotion or transfer; and (3) requested the wage or salary range or rate for the promotion or transfer</p>	<p>Wage or salary range or rate</p>
Rhode Island	<p><u>Applicants:</u> Upon request. Employer should provide the wage range prior to discussing compensation.</p> <p><u>Employees:</u> Upon (1) hire; (2) when employee moves into a new position; or (3) employee's request</p>	<p>Wage range, which means:</p> <p><u>Applicants:</u> The wage range the employer anticipates relying on in setting wages for the position and may include reference to any applicable pay scale, previously determined range of wages for the position, the actual range of wages for those currently holding equivalent positions, or the budgeted amount for the position, as applicable.</p> <p><u>Employees:</u> May include reference to any applicable pay scale, previously determined range of wages for the position, or the range of wages for incumbents in equivalent positions, as applicable</p>

Details on U.S. Pay Scale Disclosure Laws

On Job Posting

	Timing	What Must be Provided
Colorado	<p>On job posting.</p> <p>Notice of a promotional opportunity must be made to all employees for whom it may be a promotion, on the same calendar day; and sufficiently in advance of the hiring or promotion decision that employees receiving notice may apply. There is an exception where an employer continuously -- at least once per month -- either (1) hires for a specific position that would qualify as a promotional opportunity for any current employees, or (2) automatically promotes employees in an in-line job progression upon completing set requirements (e.g., a certification or number of service hours). Such an employer may provide a single notice of such promotional opportunities, rather than a notice for each individual promotion.</p>	<p><u>Compensation Information Posting Requirement:</u> For roles that will be CO based, and for remote roles that could be performed in CO, employers must include: (1) the hourly rate or salary compensation (or a range thereof) that the employer is offering for the position; (2) a general description of any bonuses, commissions, or other forms of compensation that are being offered for the job; and (3) a general description of all employment benefits the employer is offering for the position.</p> <p><u>Promotional Opportunity Notice Requirement:</u> Employers must post or otherwise notify CO employees of all job vacancies, whether such vacancies exist in CO or elsewhere, and whether or not any CO employee is qualified for the job. The notice must be in writing and can be made by any method(s) reaching all employees. The definition of promotion is broad, and applies to any opportunity that could be a promotion for any employee within the organization (including potentially world-wide roles), and includes in-line, career progression promotions. There are some exceptions to this requirement for confidential searches, certain automatic promotions, and temporary, acting, or interim roles.</p>
Jersey City (NJ)	<p>On any print or digital media circulating within the City that provides notice of employment opportunities</p>	<p>Minimum and maximum salary and/or hourly wage, and benefits to said posting or advertisement in the City. In stating the minimum and maximum salary and/or hourly wage for a position, the range may extend from the lowest to the highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion, or transfer opportunity.</p>
NYC	<p>On advertisement for a job, promotion, or transfer opportunity</p>	<p>Minimum and maximum salary. In stating the minimum and maximum salary for a position, the range may extend from the lowest to the highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion, or transfer opportunity.</p>



FOR HIRE

New York City
(effective May 15, 2022)

It is an unlawful discriminatory practice for an employer, employment agency or employee to advertise a job, promotion or transfer opportunity without including the minimum and maximum salary for such position in the advertisement

– **Who?**

- Applies to employers with four or more employees, at least one of whom works in NYC
- Does *not* apply to temporary help firms seeking applicants to join their pool of available workers.

– **What?**

- Lowest to highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion or transfer opportunity
 - Range cannot be open ended
- “Salary” does *not* include other forms of compensation or benefits

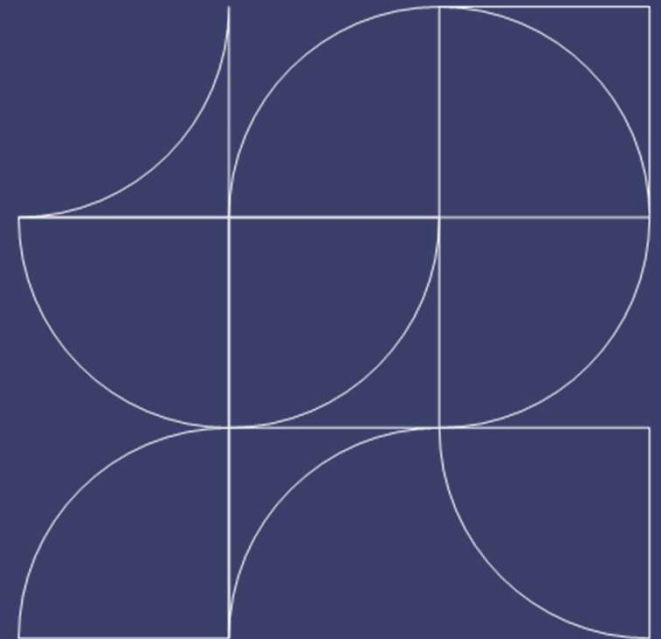
– **When?**

- Applies when advertising for positions that can or will be performed, in whole or in part, in NYC

New York City: Proposed Amendment

	Current Law	Proposed Amendment
Effective Date	May 15, 2022	November 1, 2022
Size of Employer	4 or more employees	15 or more employees
Applies to Remote Work?	"Covered employers should follow the new law when advertising for positions that can or will be performed, in whole or in part, in New York City, whether from an office, in the field, or remotely from the employee's home."	Only if position is required to be performed, at least in part, in the city of New York

Legal Trends in Website Accessibility Under ADA Title III



ADA Background

- The **Americans with Disabilities Act (ADA)** is a federal civil rights law that prohibits discrimination against individuals with disabilities.
- Covers five key areas:
 1. Employment (Title I)
 2. State and Local Government Activities (Title II)
 3. Public Transportation (Title II)
 4. **Public Accommodations (Title III)**
 5. Telecommunications (Title IV)
- **Today's focus = Title III (covers Public Accommodations)**



Public Accommodations

- 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).

ADA Enforcement

- Under Title III of the ADA, public accommodations must:
 - have and maintain facilities that are accessible to individuals with disabilities;
 - 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.
- Enforced by the Civil Rights Division of the DOJ
- **Remedies:**
 - DOJ Action: Penalties (\$96,384 for a first violation and \$192,768 for a subsequent violation) injunctive relief, damages
 - Private party: Injunctive relief, attorneys' fees & costs (possible damages/penalties under state corollary laws)

Are Websites Places of Public Accommodation?

- The ADA does not specifically identify websites as places of public accommodation.
- The DOJ has interpreted the ADA to apply to websites of public accommodations but has not issued regulations.
- Courts are split on whether the law applies only to websites with a nexus with a physical location.

–9th, 3^d Cir. say yes; 1st Cir. says no.

What is an “accessible” website?

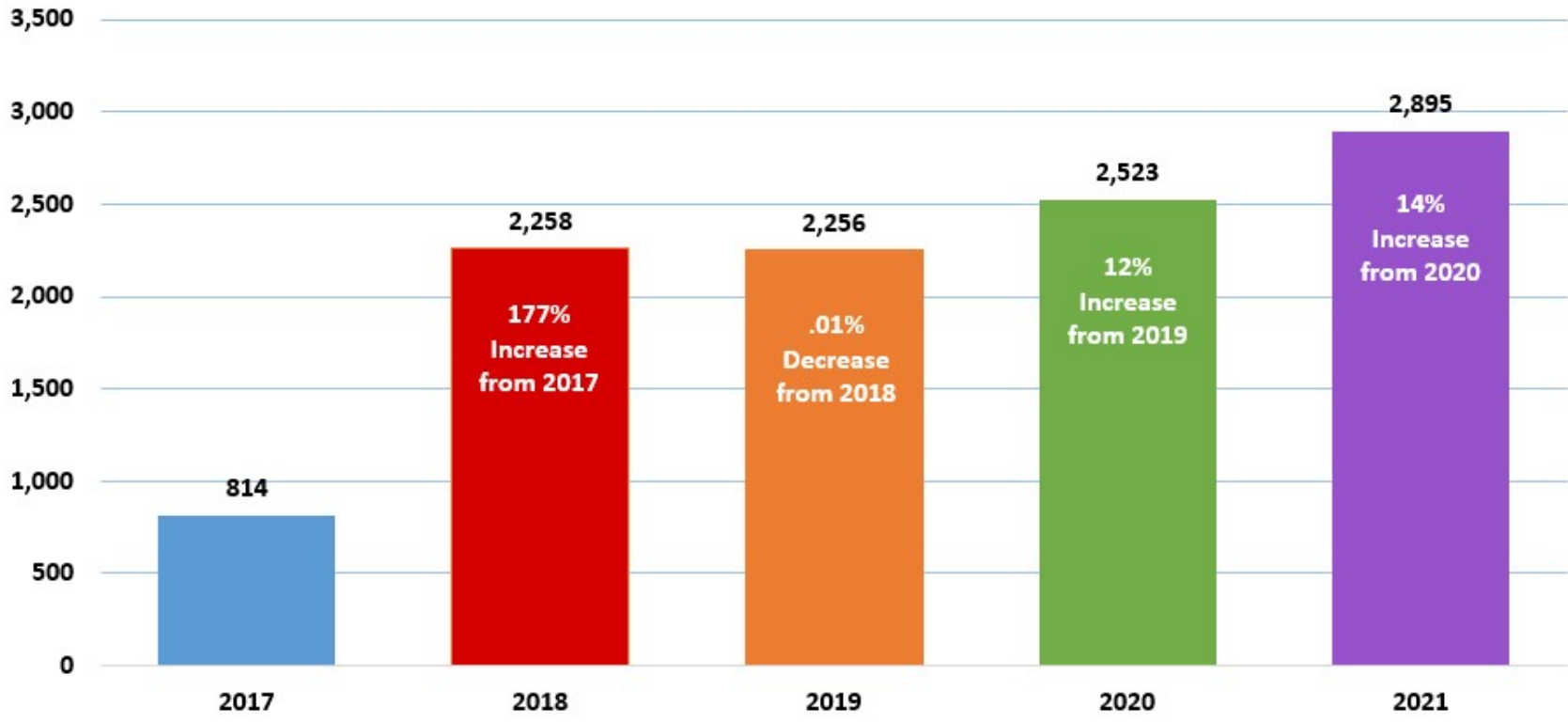
- One that can be used by people with various types of disabilities
- **Blind:** Screen reader compatibility
 - Alternative text for images
 - Properly labeled form fields
 - Proper use of headings
 - Keyboard-only access
 - Audio descriptions for videos
- **Low Vision:** Color contrast, text resizing
- **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)

- Guidelines developed by experts that define how to make Web content more accessible to people with disabilities
- Updated over past 20 years
- Not a legal standard under Title III of the ADA but have become the benchmark for accessibility

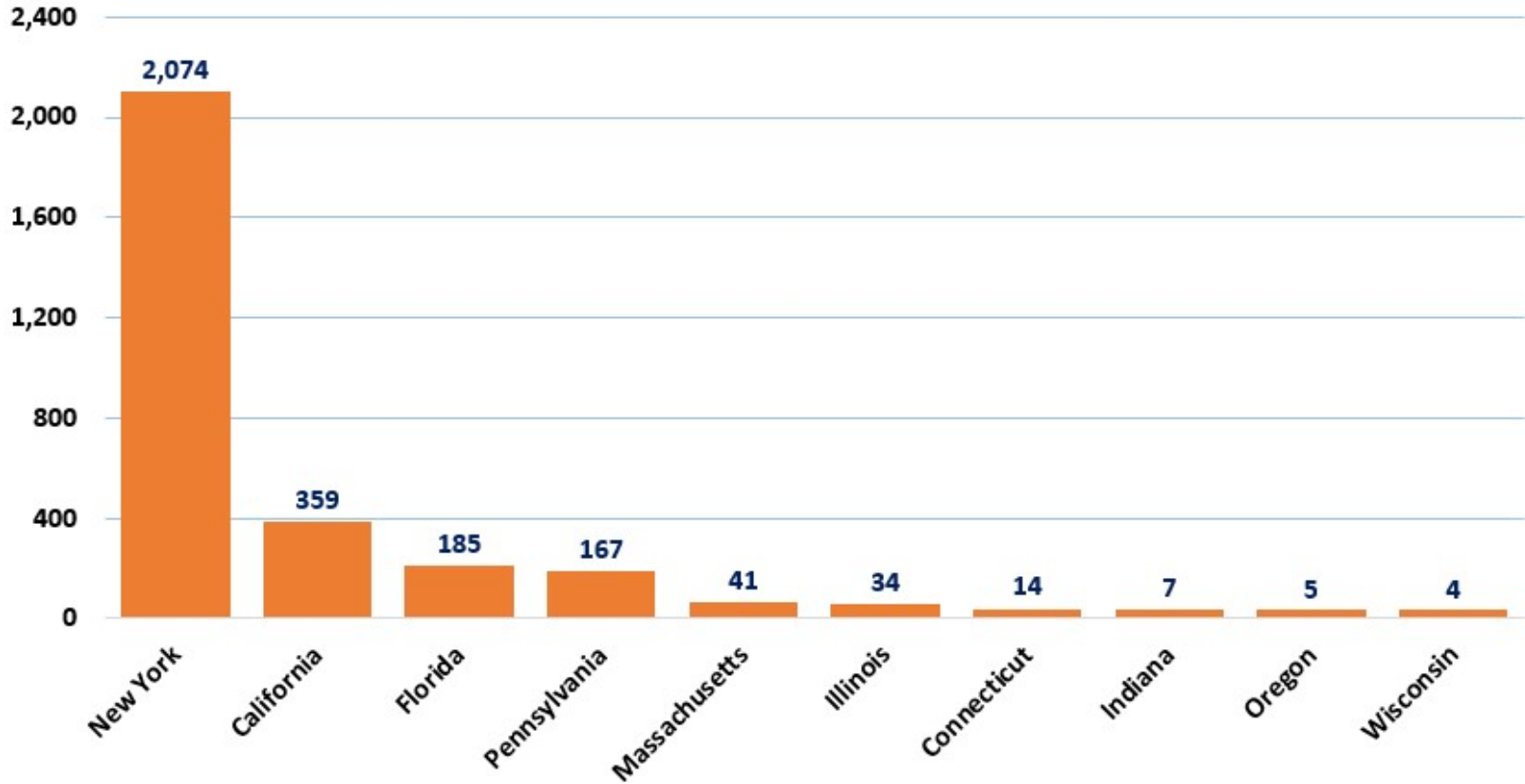
ADA Title III Website Accessibility Lawsuits Filed in Federal Court 2017-2021



ADA Title III Website Accessibility Lawsuits Filed in 2021 (Monthly)



Top 10 States with Federal ADA Title III Website Accessibility Lawsuits Filed in 2021



ADA Title III Enforcement in the Biden Administration

- Kristen Clarke heads the Civil Rights Division
- Vigorous enforcement of website accessibility
- Statements of Interest in support of ADA plaintiffs
- No new regulatory activity



ADA Title III Enforcement in the Biden Administration



- On February 28, 2022, 181 advocacy groups sent a “Joint Letter to Enforce Accessibility Standards” to Kristen Clarke.
- The groups—led by the American Council of the Blind, American Federation for the Blind, the National Disability Rights Network, and the National Federation of the Blind—asked DOJ to “adopt enforceable online accessibility standards by the end of the current Administration.”

ADA Title III Enforcement in the Biden Administration

- On March 18, 2022, the DOJ issued new “Web Accessibility Guidance” for state and local governments and public accommodations under Titles II and III of the ADA.
- Reminds covered entities that the DOJ considers website accessibility a priority and lists some settlements reached by the DOJ with state and local governments and businesses
- Acknowledges there is no regulation setting detailed standards
- No new legal insights or detailed guidance

Title III Website Litigation: Key Themes



- **Physical nexus**
 - Federal Courts disagree on whether web-only businesses are covered public accommodations.
- **Mootness**
 - Claim is moot where you have remedied the barriers and the alleged violation will not happen again
 - Websites are dynamic, winning on this basis is tricky but possible
- **Standing**
 - If the plaintiff can't ever use the services of the business whose website is inaccessible, case may be dismissed for lack of standing
- Only a handful of cases have been litigated to judgment.

Title III Website Litigation: Key Cases



Robles v. Domino's Pizza LLC (C.D. Cal. June 23, 2021)

- Lawsuit alleges website and mobile app not accessible to the blind
- June 23, 2021 – Court granted plaintiff's motion for summary judgment finding Domino's violated the ADA by having a website that is inaccessible to the blind and orders Domino's to bring its website into compliance with the WCAG 2.0 guidelines
- Decision ended five year litigation saga
 - Rejected Domino's argument that because it does not own the physical stores where the pizza would be picked up, and there is no "nexus" between the website/mobile app and the stores
 - Alleged inaccessibility of the website and app "impedes access to the goods and services of its physical pizza franchises—which are places of public accommodation"

Title III Website Litigation: Key Cases



Robles v. Domino's Pizza LLC (C.D. Cal. June 23, 2021) (Cont.)

- No expert found the website was fully accessible, including Domino's expert who said that he could not place a future order using a screen reader
- Court ordered Domino's to "bring its website into compliance with the WCAG 2.0 guidelines," but did not specify which level of compliance would be required or a time table for compliance
- Phone line to place an order did not provide equivalent access when plaintiff was placed on hold for over 45 minutes on the two occasions he tried to call
- ADA claim was not moot because the website was still not fully accessible and the accessibility of the mobile app remained disputed
- Court found that there was only a single overarching violation and did not award damages for each visit to the website.

Title III Website Litigation: Key Cases



Gil v. Winn Dixie (11th Cir. 2021)

- A legally blind individual brought a lawsuit under Title III against the Winn-Dixie grocery store chain, alleging that because the company's website was not compatible with screen reader software, he was unable to fill pharmacy prescriptions online
- In April 2021, the Eleventh Circuit found on appeal that public accommodations were limited to actual, physical places, websites were not a place of public accommodation under the statute and the website barriers in question did not prevent the plaintiff from accessing the goods and services offered at the retailer's stores
- At the end of 2021, the Court vacated its April 2021 decision and the district court's judgment

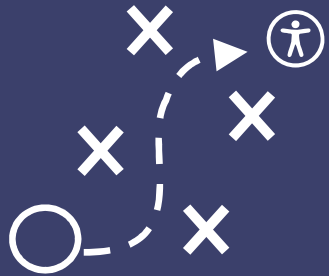
Title III Website Litigation: Recent Decisions



2021 Wins for Businesses

- ***Suris v Gannet Co. Inc., et al* (EDNY July 14, 2021):** website accessibility lawsuit against a print and online newspaper publisher dismissed because business did not fall within the definition of a “place of public accommodation” under Title III of the ADA
- ***Winegard v. Newsday LLC* (EDNY August 16, 2021):** dismissing because Title III of the ADA only covers the goods and services of a physical place of public accommodation, and the website is not a physical place
- ***Martinez v MyLife.com, Inc.* (EDNY November 1, 2021):** dismissing case, website is not a place of public accommodation
- California Court of Appeals for the Fourth Appellate District issued a decision on September 8, 2021 affirming a defense jury verdict in *Thurston v. Omni Hotels Management Corporation* finding that a plaintiff must demonstrate an intent to use a defendant’s services to have standing to bring a claim under the Unruh Act

Strategies for Avoiding/Defending Website Litigation



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



Additional Resources:

ADA Title III Blog

<https://www.adatitleiii.com/>

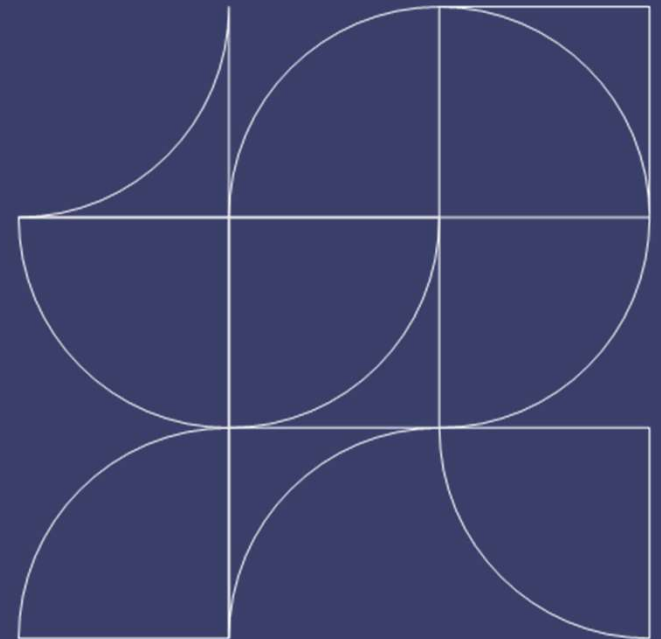
ADA Title III & Public Access Team

<https://www.seyfarth.com/services/practices/advisory/ada-title-iii-and-public-access.html>

COVID-19 Resource Center

www.seyfarth.com/returntobusiness

Recent NY Laws Governing Sexual Harassment and Retaliation



Three New Laws to Aid Victims of Sexual Harassment

All three laws were signed by Governor Hochul on March 16, 2022:

1. Creation of Workplace Sexual Harassment Hotline (effective July 14, 2022)

- Toll-free confidential hotline to be created to assist individuals with complaints of workplace sexual harassment

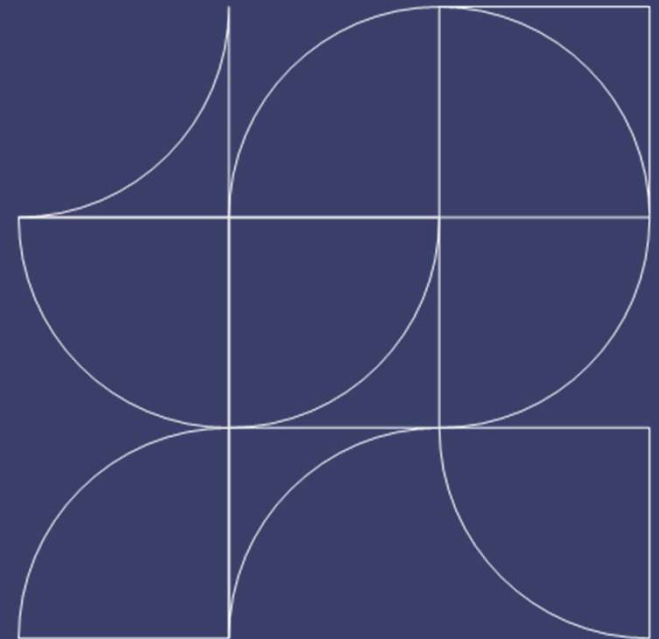
2. Protection from Unlawful Retaliation (in effect)

- Employers prohibited from releasing employee's personnel file in retaliation for the employee's complaints regarding or assistance in proceedings involving employer's unlawful discriminatory practices
- Employers may release such employee's personnel file in a legal proceeding as part of employer's commencement of or response to a complaint

3. Extension of Human Rights Law to All Public Employees (in effect)

- Human Rights Law applicable to all public employees, including elected officials' and judges' personal staff

Recent NY Bills Governing Sexual Harassment and Retaliation



Four Bills to Aid Victims of Sexual Harassment

1. Let Survivors Speak Act

- Settlement agreements involving sexual harassment or unlawful discrimination claims cannot:
 - Require employee to pay employer liquidated damages if employee breaches nondisclosure or nondisparagement clause
 - Contain or require admission from employee that they were not, in fact, subject to unlawful discrimination

2. Ban on No-Rehire Clauses in Settlement Agreements

- Agreements to release any claim unenforceable if conditioned upon employee's promise not to engage in future employment with employer

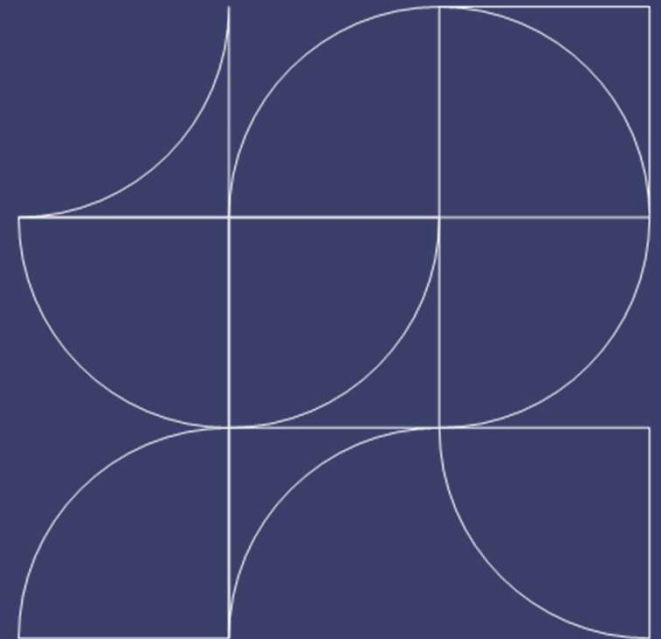
3. Extension of Limitations Period for Administrative Charges

- Statute of limitations for administrative charges alleging unlawful discriminatory practices filed with NYS Division of Human Rights extended from 1 to 3 years

4. Extension of Limitations Period for Lawsuits

- Statute of limitations for employment discrimination lawsuits under the Human Rights Law extended from 3 to 6 years

Thank You





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