



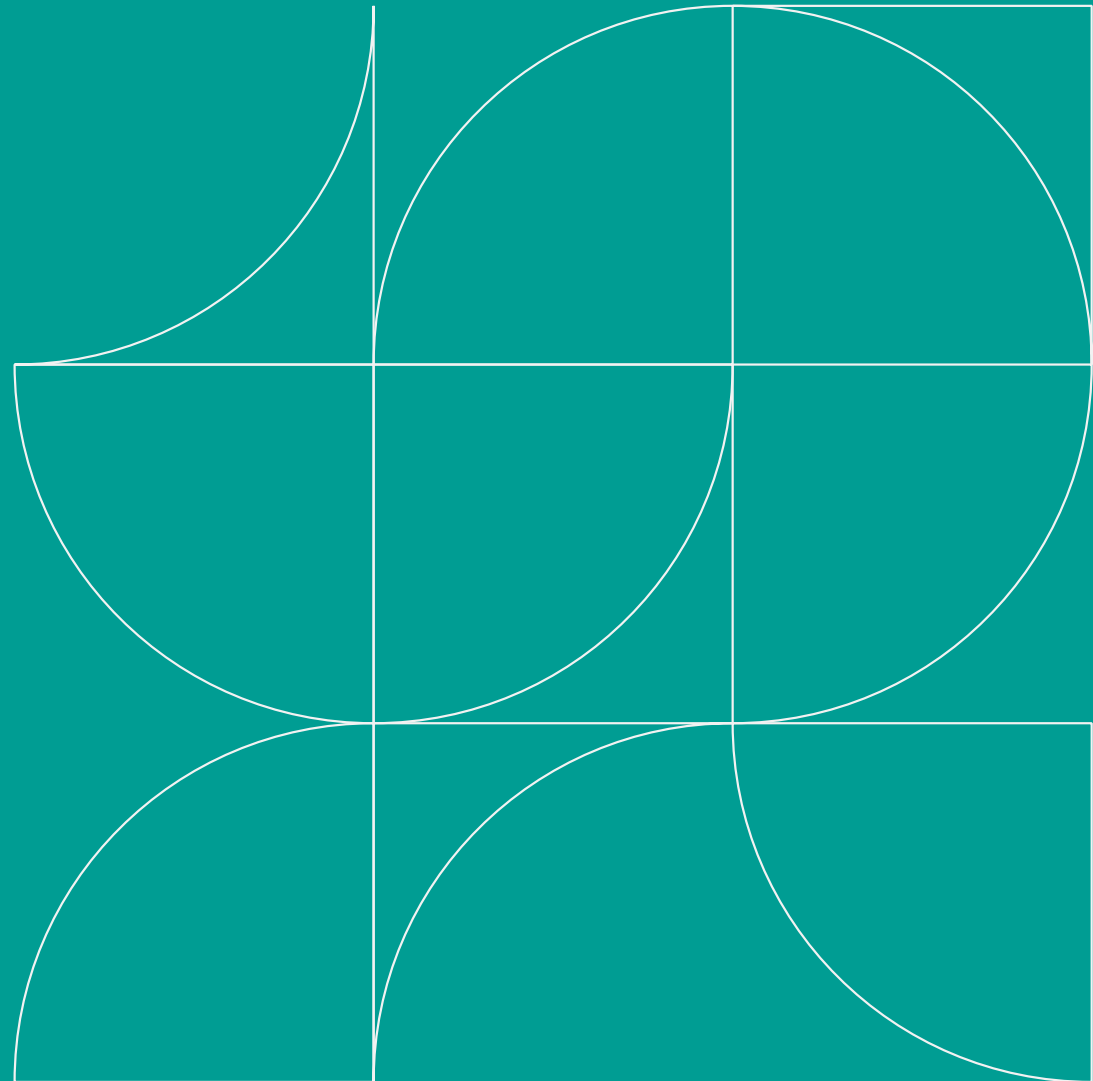
# ADA Title III Disability Access:

Hot Issues and Litigation Trends in  
the Food and Beverage Industry

August 2022

**Seyfarth Shaw LLP**

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).





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## Seyfarth Shaw LLP

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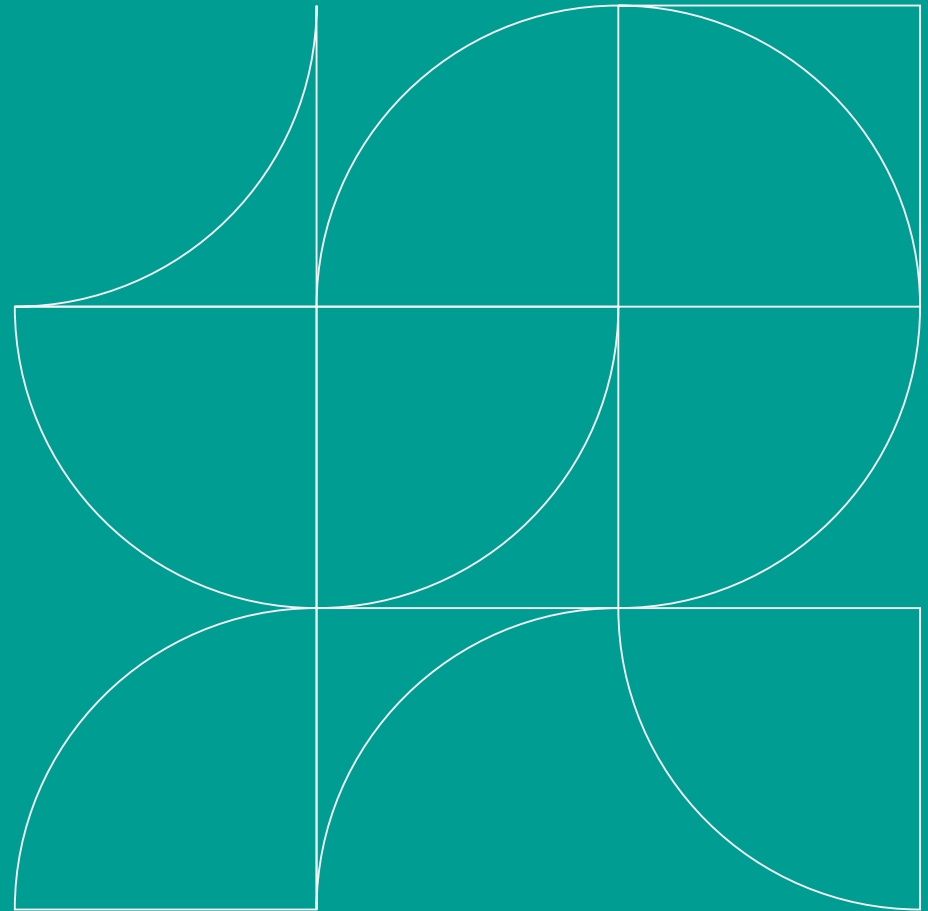
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# Agenda

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- 01** Overview of ADA Title III Requirements
- 02** National Lawsuit Numbers and Hotspots
- 03** Effective Communication
- 04** Websites, Mobile Apps, and Kiosks
- 05** Key Digital Accessibility Cases & Themes
- 06** Risk Mitigation Strategies for Digital Accessibility
- 07** Physical Accessibility Issues

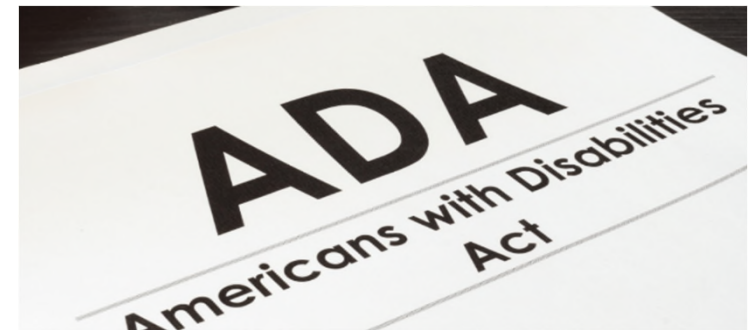
# Overview of ADA Title III Requirements



# Applicable Disability Rights Laws

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- Title III of the Americans with Disabilities Act (ADA) **prohibits discrimination against individuals with disabilities** by places of public accommodation.
- ADA Title III requires that covered facilities:
  - have **accessible facilities**;
  - make **reasonable modifications** to their policies, practices, and procedures; and
  - provide **auxiliary aids and services** at no additional charge, including those necessary to ensure effective communication with individuals with disabilities.
  - **Maintain** the accessible features of the facility
- State non-discrimination laws (e.g., California, New York)

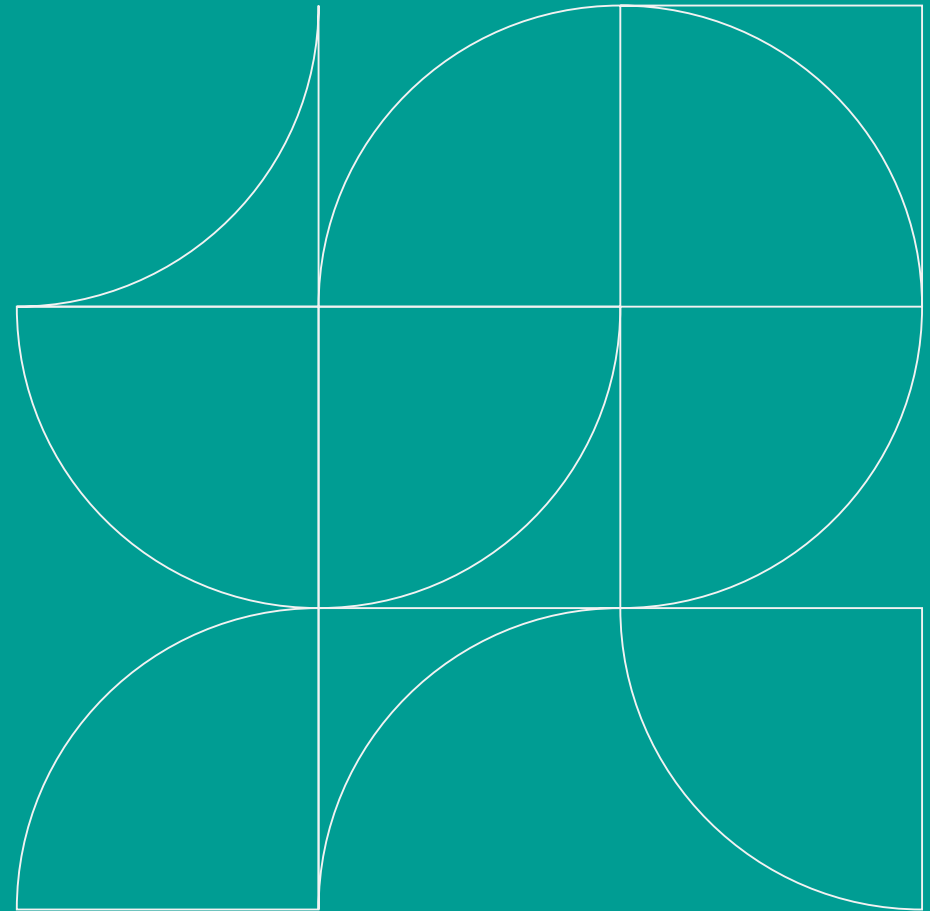


# Potential Consequences of Inaccessibility

- Remedies under ADA:
  - Private party: Injunctive relief, attorneys' fees & costs
  - DOJ Action: Penalties of \$97,523 for a first violation and \$195,047 for a subsequent violation; injunctive relief, damages
- Additional Remedies under State Non-discrimination Laws:
  - California Unruh Civil Rights Act: \$4,000 per violation
  - New York State and City Laws: \$1,500+ damages per violation, on average



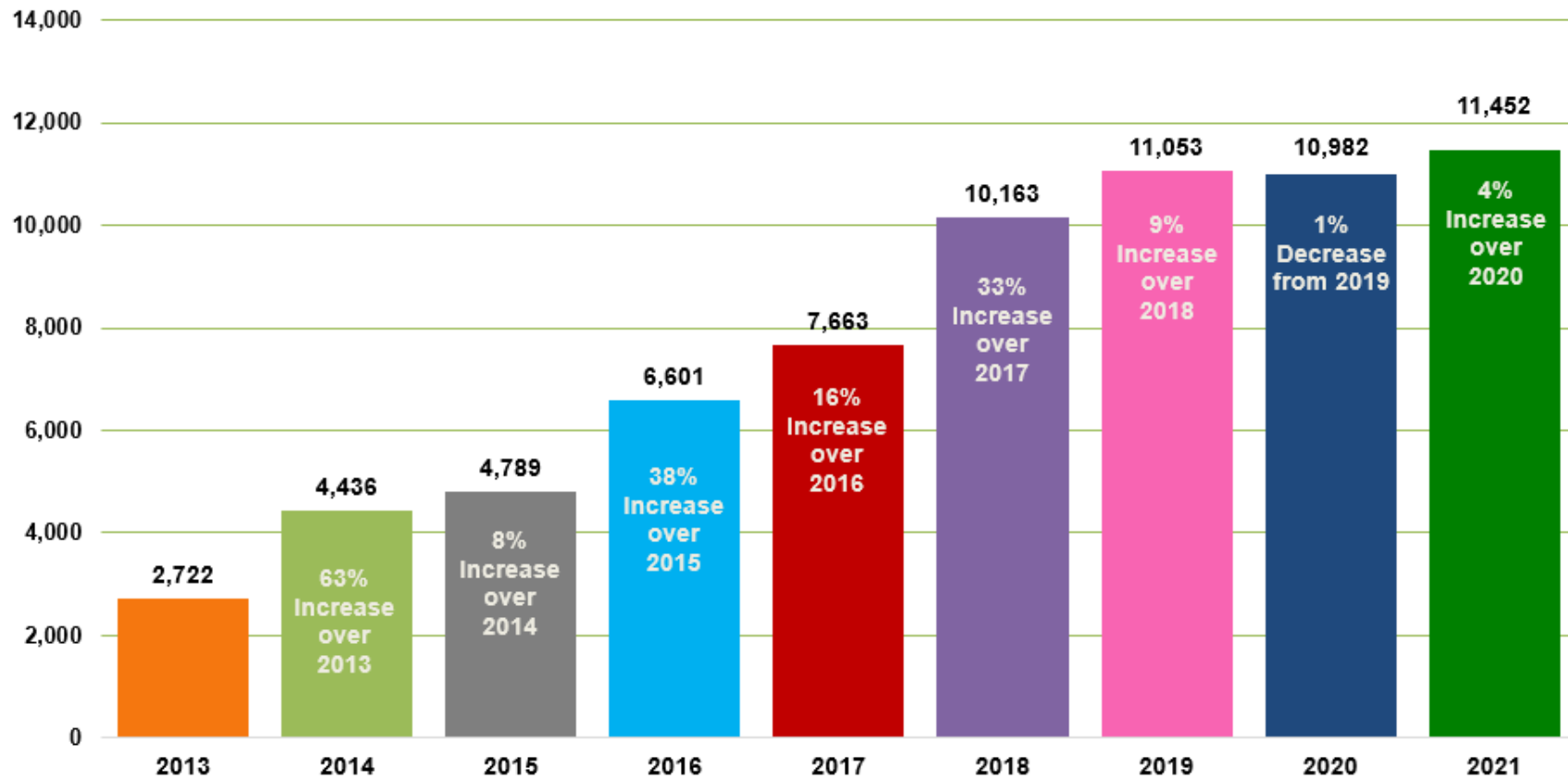
# National Lawsuit Numbers and Hotspots





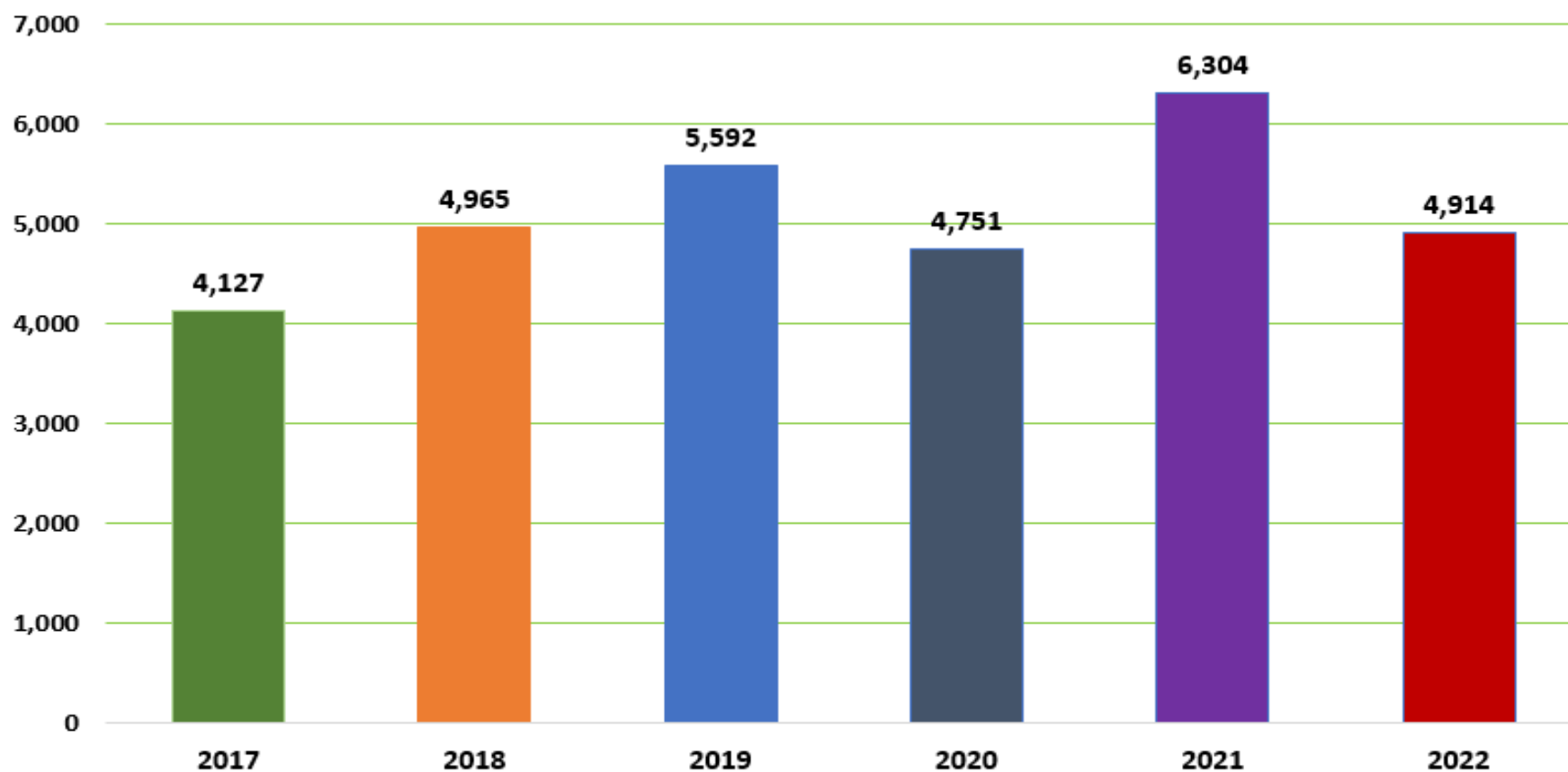
# ADA Title III Federal Lawsuits (All Bases) 2013-2021

Total Number of ADA Title III Federal Lawsuits Filed Each Year  
January 1, 2013 - December 31, 2021



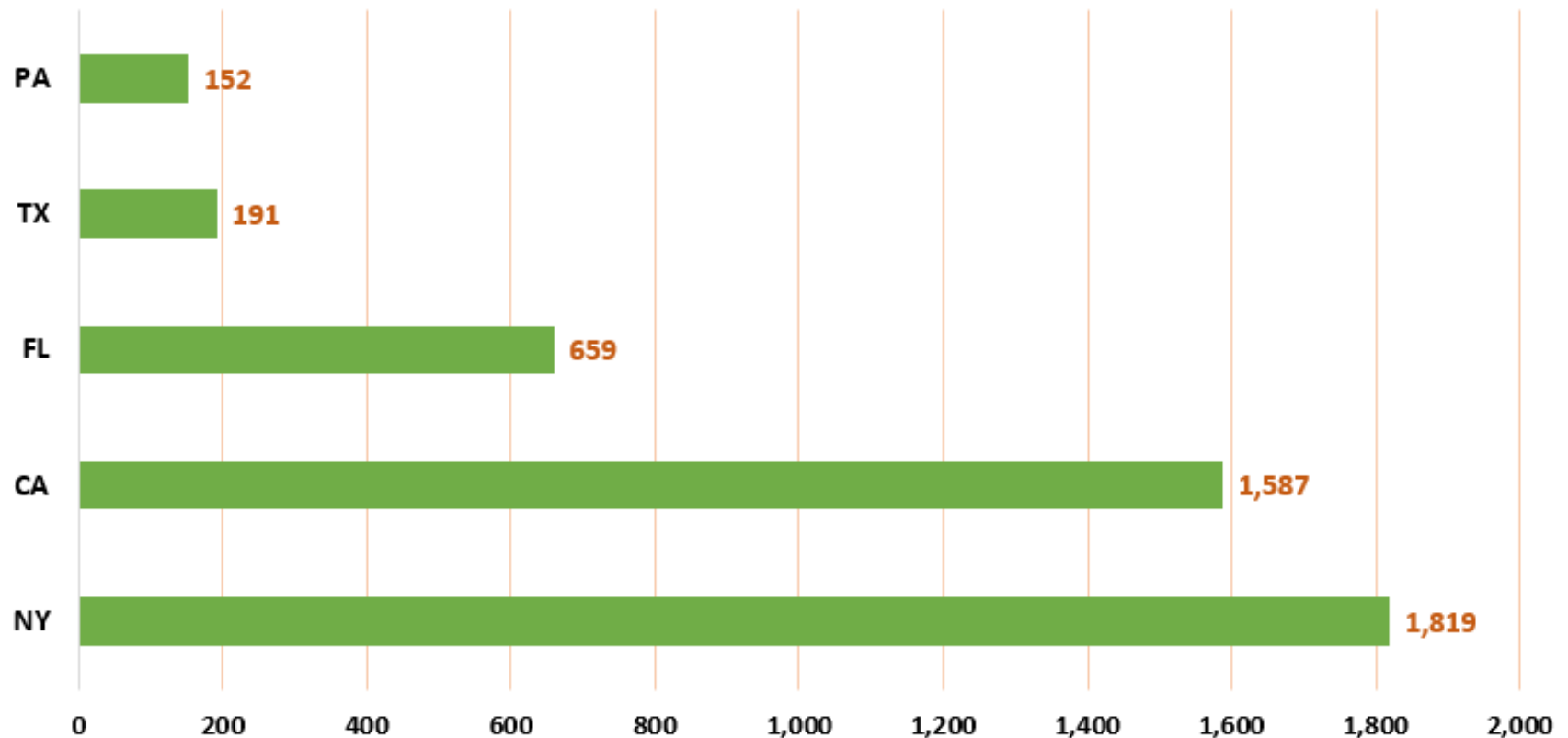
# ADA Title III Federal Lawsuits (All Bases) Mid-year Update

Mid-Year ADA Title III Federal Lawsuit Filings 2017-2022

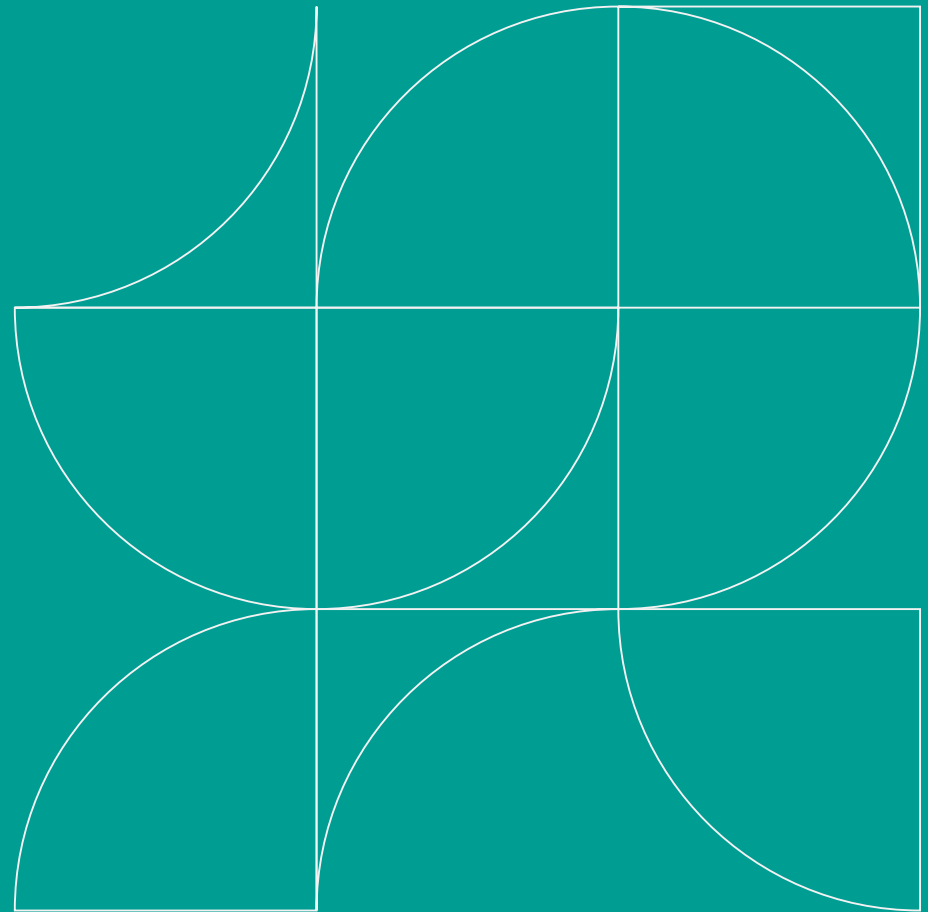


# ADA Title III Federal Lawsuits - Hot Jurisdictions Mid-Year Update

2022 Mid-Year Federal ADA Title III Filings for Top 5 States



# Effective Communication



# Effective Communication: What are Auxiliary Aids & Services?

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- Must provide auxiliary aids and services to facilitate “effective communication” with people with disabilities, unless undue burden or fundamental alteration would result.
  - A fundamental alteration is modification so significant that it alters the essential nature of the goods, services, or facilities
  - Undue burden means “significant difficulty or expense”, and depends substantially on resources of the covered entity
  - Public accommodation still has obligation to otherwise communicate effectively

# What are Auxiliary Aids & Services to Ensure Effective Communication?

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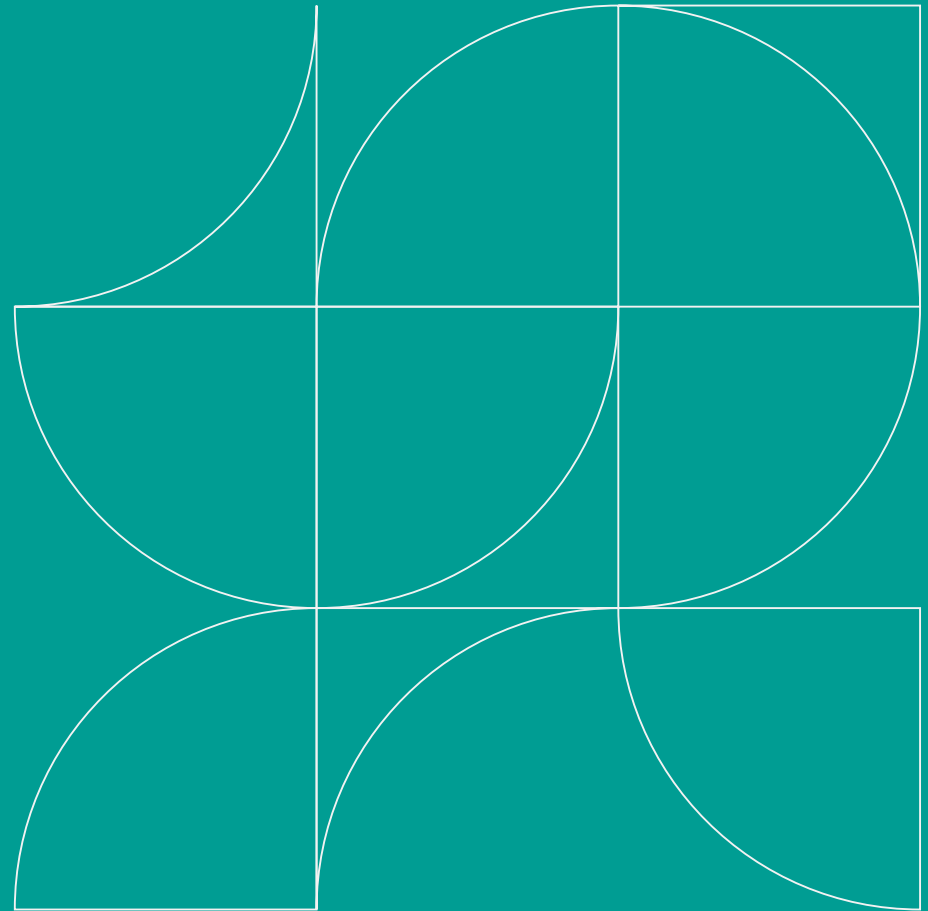
- **Examples of providing** auxiliary aids and services:
  - Exchanging notes, gesturing, using printed materials to communicate with customer with hearing disability/deaf
  - Reading menu to guest who is blind
  - Providing closed captioned video content to guest who is deaf (if televisions are provided in restaurant/bar)
  - Assisting with inaccessible self-service equipment (e.g. ordering kiosk, vending machines, QR code ordering service) by reading aloud visual information to guest who is blind and taking orders manually

# Legal Requirements for Effective Communication

## How Do You Know What Auxiliary Aids and Services to Provide?

- Auxiliary aids and services must be provided in a **timely** and provided in such a way as to **protect the privacy and independence** of the person with a disability
- Appropriate method with **vary** based on factors that include **nature, length, and complexity** of the communication
- Public accommodation **must consider individual's preferred method of communication**, but has the ultimate decision-making authority in what auxiliary aid or service to provide
- Obligation also extends to **companions** of person with disability
- Public accommodation **cannot shift the cost** of the auxiliary aid or service to the individual with a disability

# Websites, Mobile Apps, and Kiosks





# 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)

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- 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

# Will we ever see website accessibility regulations?

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**2010-2016:** 2010 ANPRM pending

**2017:** DOJ Withdrew ANPRM

**February 28, 2022:** Advocacy groups ask DOJ to issue regulation by end of Biden administration

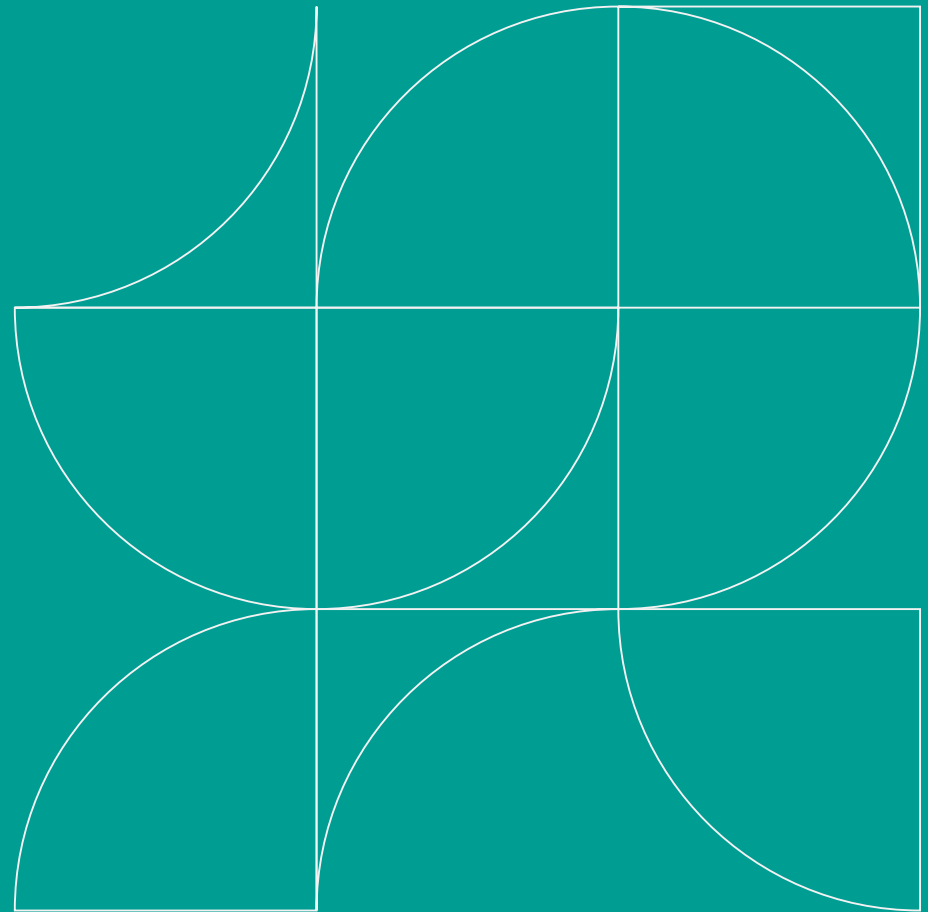
## **March 18, 2022: DOJ Issues Website Accessibility Guidance**

- 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

## **August 2022: Potential ANPRM for Fixed Self-Service Kiosks**

- In the Spring of 2022, DOJ stated that an ANPRM would be issued this month regarding self-service kiosks, which have become prevalent in restaurants and other retailers

# Key Digital Accessibility Cases & Themes



# Title III Website Litigation:

## Key Cases & Themes



- Federal Courts disagree on whether web-only businesses are covered public accommodations.
- 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 may be dismissed for lack of standing.
- Only a handful of cases have been litigated to judgment.

# Title III Website Litigation:

## Are websites covered by the ADA?



**11th Cir.:** No, but a business with a website with barriers that prevents access to place of public accommodation violates the ADA.

**9th Circuit:** No if they do not have a nexus to a physical place of public accommodation. Yes if they do.

**3d Circuit:** Has not considered a website case but has held that a public accommodation must be a physical place.

**1<sup>st</sup> Circuit:** Has not considered a website case but has held that a public accommodation does not have to be a physical place.

**2d Circuit:** Has not ruled on website case but district courts in Eastern, Southern and Northern Districts reached differing conclusions on whether internet-only businesses are covered

# Title III Website Litigation:

## Are websites covered by the ADA?



### ***Martinez v. Cot'n Wash, Inc.* (California State Court – Breaking News!)**

- On August 1, 2022, the Appeals Court affirmed a judgment of dismissal against online-only retailer on grounds that websites themselves are not places of public accommodation
- App. Ct. held:
  - Websites are not “public accommodations” under ADA Title III.
  - Creating and maintaining an inaccessible website does not constitute intentional discrimination under the Unruh Act.
- Key Takeaways:
  - This decision will certainly reduce the number of lawsuits brought in California state and federal courts by plaintiffs enticed by the Unruh Act’s \$4,000 minimum statutory damages provision.
  - This decision has little impact on claims relating to websites that do have a nexus to a physical facility where goods and services are offered to the public.

# Title III Website Litigation:

Are websites covered by the ADA?



## New York District Court Split

- **EDNY Cases Holding that Websites are not a Place of Public Accommodation**
  - *Winegard v. Newsday* (EDNY Aug. 2021) (Komitee, J.)
  - *Suris v. Gannett*, (EDNY July 14, 2021) (Cogan, J.)
- **SDNY, WDNY, and NDNY Decisions Holding Website is a Place of Public Accommodation**
  - See e.g., *Andrews v. Blick Art Materials* (SDNY Aug. 1, 2017 (Weinstein, J.) and *Del-Orden v. Bonobos, Inc.* (SDNY Dec. 20, 2017) (Engelmayer, J.)
  - *Panarra v. HTC Corporation* (WDNY April 15, 2022) (Geraci, F.)
  - *Walters v. Fischer Skis U.S., LLC* (NDNY Aug. 10, 2022) (Khan, L.)



# Title III Website Litigation:

## Key Cases, Merits & Decisions



### *Robles v. Domino's 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 and 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 motion to dismiss.
- Domino's appealed to US Supreme Court; declined to review (October 7, 2019).
- On remand, partial summary judgment granted. Judge found that website is not fully accessible to plaintiff because future order can't be placed using a screen reader.
- Case settled privately in June 2022.

# Title III Website Litigation:

## Key Cases, Merits & Decisions



### Few Courts Have Made Decisions on the Merits

#### *Gil v. Winn Dixie* (11<sup>th</sup> Cir. 2021)

- Bench trial verdict for plaintiff
  - 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
- Reversed by 11<sup>th</sup> Circuit
  - Website not a public accommodation
  - Website barriers must prevent access to a good or service at the store to be actionable
- In response to Petition for Rehearing, 11<sup>th</sup> Cir. vacates both the appeal and the judgment as moot because the injunction had expired pending appeal.

# Title III Website Litigation:

## Key Cases, Merits & Decisions



### ***Thurston v. Midvale Corp d/b/a Whisper Lounge (CA State court 2018, aff'd 9/3/2019)***

- Appeals Court affirmed summary judgment against restaurant on grounds inaccessible website discriminates against blind customer under Unruh Act.
- Ordered restaurant:
  - Conform website with the WCAG Level 2.0 AA (Ct. App. found this not overbroad or uncertain)
  - Pay \$4,000 statutory damages
- App. Ct. held:
  - Websites with physical nexus are subject to ADA Title III.
  - Third party content: “appellant offers no legal support for its theory that it cannot be liable for ADA discrimination if hires someone else to do the discrimination.”
  - Telephone and email not alternate effective communication, because they are only available during restaurant hours of operation.

# Title III Website Litigation:

## Key Cases, Merits & Decisions



### *Thurston v. Omni Hotels* (CA State court, aff'd 9/9/21)

- Blind plaintiff alleged hotel website not accessible, in violation of Unruh Act
- At trial, court instructed jury to determine if plaintiff “attempted to use [the hotel’s] website for the purpose of making a hotel reservation (or to ascertain the hotel’s prices and accommodations for the purpose of considering whether to make a reservation).”
- The jury found no intent, resulting in a verdict for the hotel.
- Appeals Court affirmed, finding that intent must be proven.

# Title III Website Litigation:

## Key Cases on Standing



### Recent Federal Appellate Decisions

- ***Calcano v. Swarovski North America Ltd.* (2<sup>nd</sup> Cir. June 2, 2022)**
  - Decision on four consolidated cases about alleged failure of businesses to provide braille gift cards
  - Court holds that plaintiffs' allegations in boilerplate complaints were insufficient to show that plaintiffs faced a "material risk of future harm" that is "sufficiently imminent and substantial" to confer standing to sue under Title III of the ADA
  - [T]he central inquiry is not whether the complaint pleads the *magic words* that a plaintiff "intends to return," and therefore faces an imminent harm, but rather whether, under the "*totality of all relevant facts*," plaintiff plausibly alleged a real and immediate threat of future injury (emphasis added).
- ***Harty v. West Point Realty* (2<sup>nd</sup> Cir. Mar. 18, 2022)**
  - Case about allegedly deficient information on website
  - Court holds that inability to obtain information from the website alone not sufficient for standing
  - Must allege "*downstream consequences from failing to receive the required information . . . . In other words, [plaintiff must show] interest in using the information . . . beyond bringing [his] lawsuit.*"
- ***Laufer v. Arpan* (11<sup>th</sup> Cir. Mar. 29, 2022)**
  - "*humiliat[ion], embarrass[ment], and frustrat[ion]*" resulting from not being able get information from website is a concrete and particularized injury sufficient to establish standing

# Title III Website Litigation:

Can you moot a website accessibility lawsuit if you've started fixing or fixed the website?



## *Diaz v. Kroger (SDNY 2019)*

- ADA claim moot based on declaration Kroger submitted stating all barriers raised in complaint were fixed, it ensured no additional barriers existed, and was committed to access going forward.

## *Langer v. BR Guest (CD Cal. 2021)*

- ADA claim moot where defendant removed videos without closed captioning and added closed captioning to remaining videos.

## *Langer v. Russell Motorsports (ED Cal. 2022)*

- ADA claim moot where Defendant captioned or removed videos, and represented that defendant had no intention to remove existing captions.

## *Rizzi v. Hilton (EDNY 2020)*

- ADA claim moot because Hilton submitted a declaration from reputable consultant, which Plaintiff did not contradict, that a blind person can use a screen reader to find a hotel and make a reservation on the website.

## Title III Website Litigation:

Can you moot a website accessibility lawsuit if you've started fixing or fixed the website?



### *Paguada v. Yieldstreet* (SDNY 2021)

- Lawsuit not moot where there were conflicting declarations submitted about whether there were still barriers on the website.

### *Walters v. Simply Skinny Ties, LLC* (NDNY 2020)

- Mootness motion to dismiss denied. Court found an ongoing factual dispute over whether:  
(1) Defendant's contention that it had "made all reasonable modifications to the website" and "remedied all the ADA violations and ensured no additional barriers to accessing the website exist" in fact did remedy the alleged violation and  
(2) whether violations are likely to recur.

### *Haynes v. Hooters* (11<sup>th</sup> Cir. 2018)

- Case dismissed by district court based on prior settlement with another plaintiff; reversed by 11th Circuit.
- Hooters was only in the process of making website accessible, so case was not moot.

### *Quezada v. U.S. Wings* (SDNY 2021)

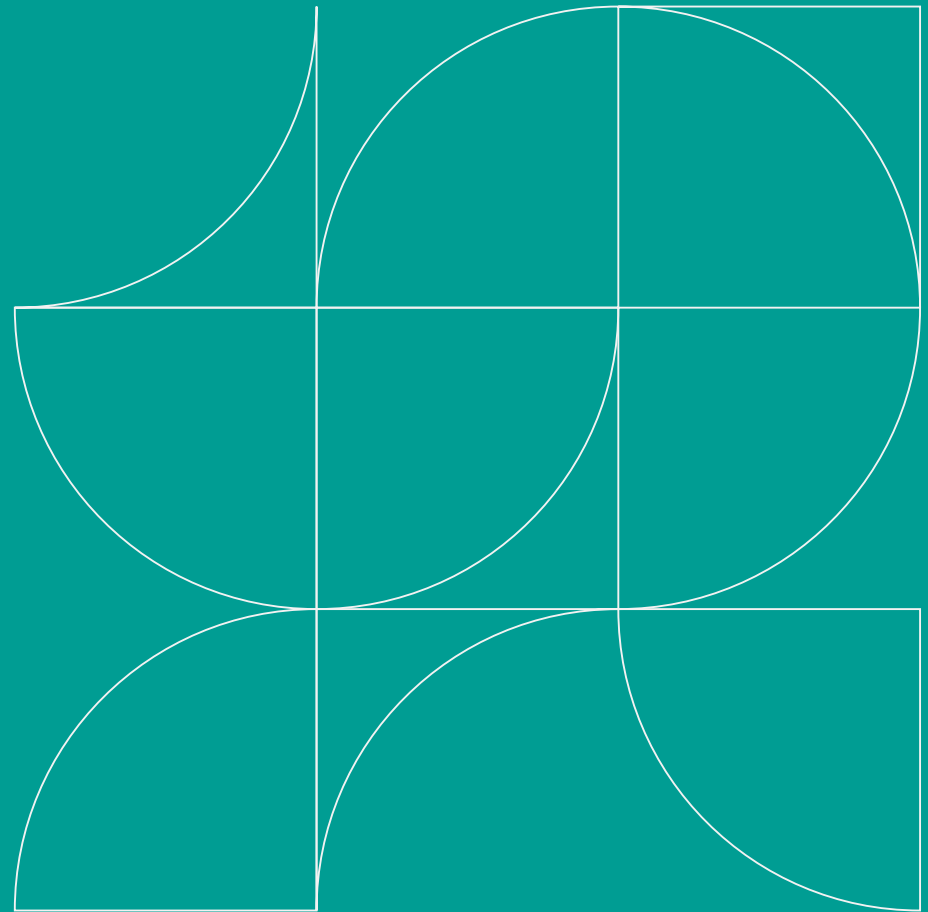
- Denying mootness motion based principally on declaration submitted by consultant that installed accessibility "widget" on defendant's website; question of fact over digital barriers requires discovery.

## Kiosk Litigation

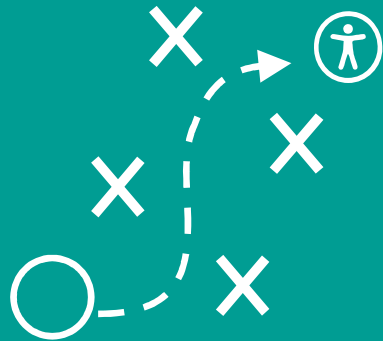
- **DOJ Statement of Interest**
  - lawsuit about inaccessible self-check-in kiosks at diagnostic labs
  - employee assistance for inaccessible kiosks does not satisfy the ADA because of lengthy wait and loss of priority in line
  - case going to trial November 2022
- ***NFB v. Walmart*, D.Md. Case. No. RDB-18-3301**
  - inaccessible self-check-out devices do not violate the ADA because Walmart employees provided assistance



# Risk Mitigation Strategies for Digital Accessibility

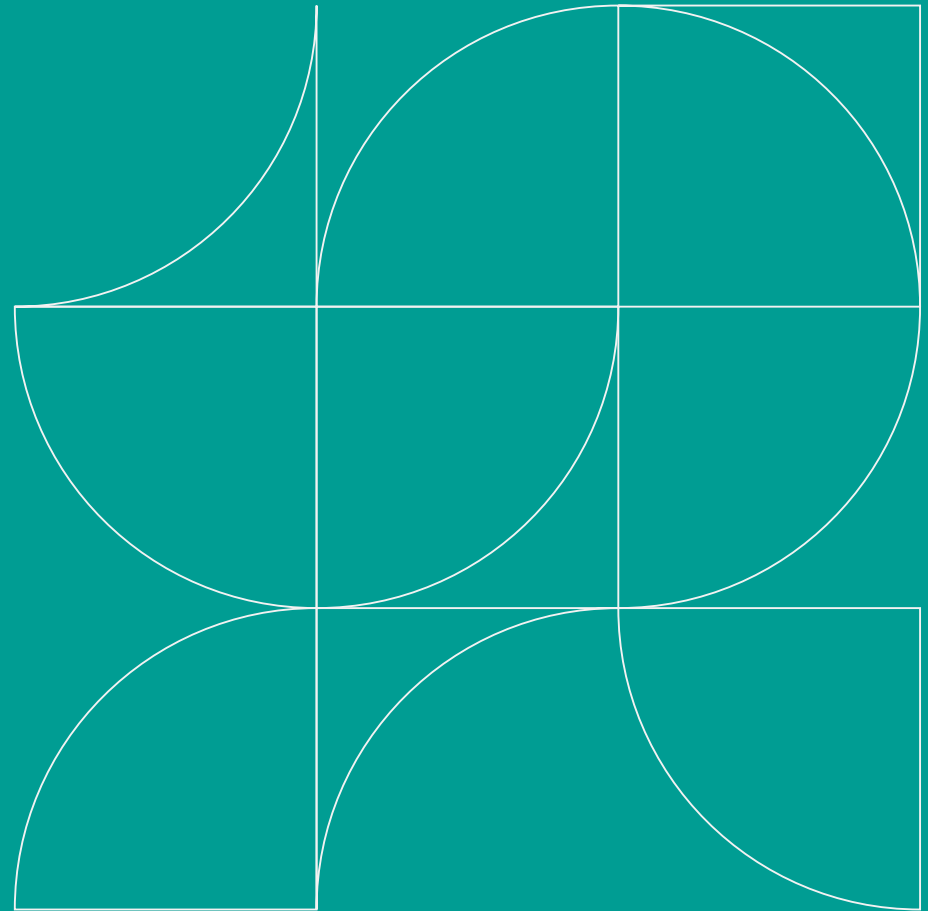


## Strategies for Avoiding/Defending Website Litigation



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

# Physical Accessibility Issues



# Physical Accessibility and Maintenance

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- New construction and alterations must comply with accessible design criteria
- **Maintenance Obligation**. A public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities.
  - What is Permitted: Isolated or temporary interruptions in service or access due to maintenance or repairs.
- Possibility for “bounce-back” based on recent website accessibility developments

# Tips on Accessible Features

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- **Accessible parking spaces and access aisles** must be free of obstructions
- **Accessible routes** must be maintained (shrubs and trees trimmed) and snow removed
- Place **self-service items** within accessible reach range
  - Place condiments, hand sanitizers, price scanners, coupon dispensers, water dispensers, etc.
    - Within reach of people with mobility disabilities (generally, between 15” and 48”), but less if reaching over counter.
- **Accessible Tables and Bar Counter**
  - 5% of seats must be provided at an accessible table. Accessible tables have a counter top that is 34” max. high to top of counter, with knee/toe clearance underneath that is 27” high by 17” deep by 30” wide minimum.
  - Bars constructed after March 15, 2012 must have a lowered section that is 36” wide and 36” high (34” high in California).



**Questions?**

**Thank you!**

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