

Navigating ADA Issues for Franchisors

Maisa Frank

Tedrick Housh

Dinah Ortiz

Brooke Robbins

November 19, 2024

© 2024 Lathrop GPM. All rights reserved. Dissemination and duplication are prohibited without express consent from the author. The content is intended for informational purposes and is not legal advice or a legal opinion of Lathrop GPM.



Presenters



Maisa Frank

Partner
Washington, D.C.
Franchise & Distribution



Tedrick Housh

Partner
Kansas City
Intellectual Property



Dinah Ortiz

Counsel
San Jose
Intellectual Property
Litigation



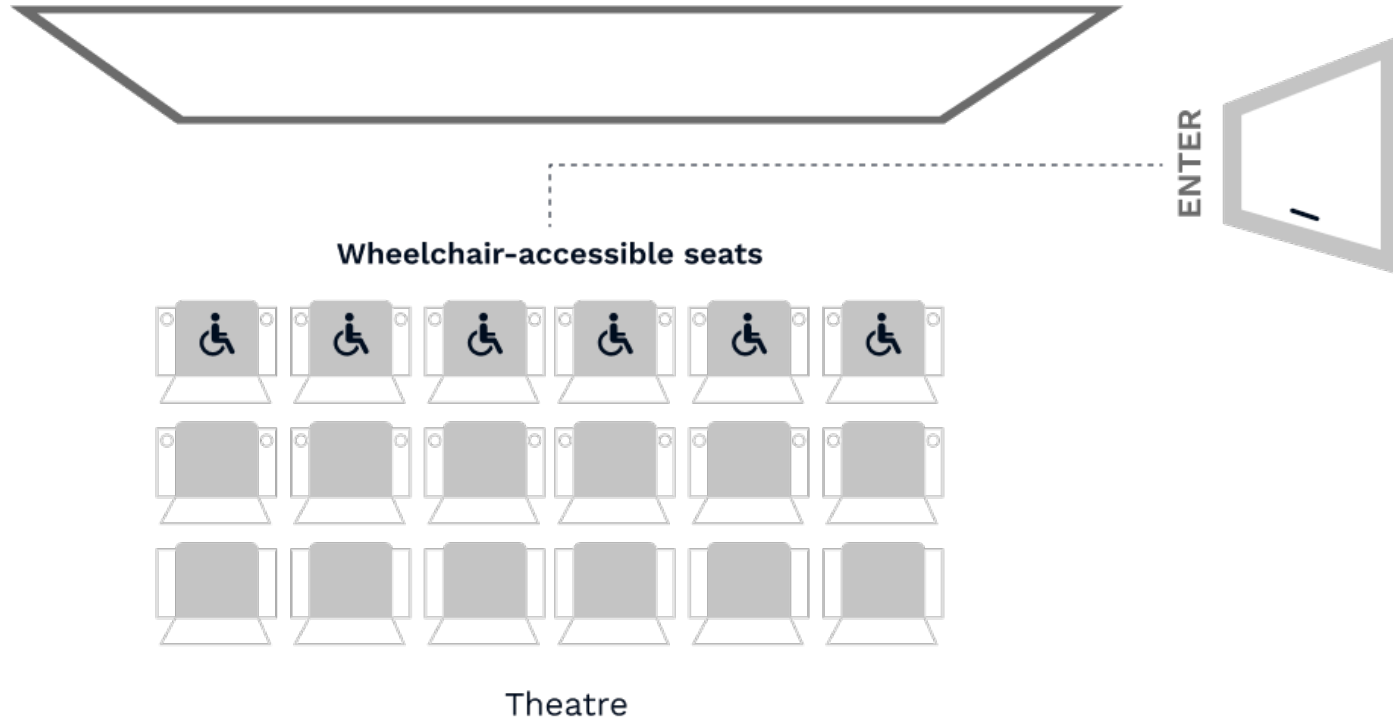
Brooke Robbins

Associate
Minneapolis
Litigation & Dispute
Resolution

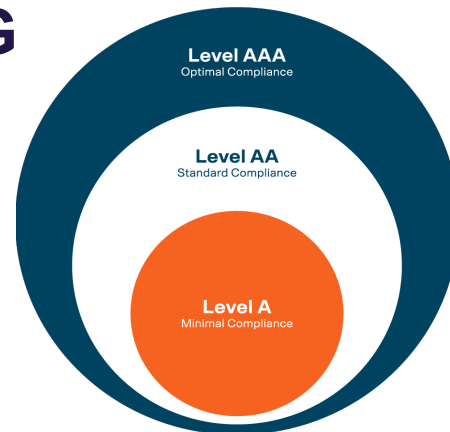
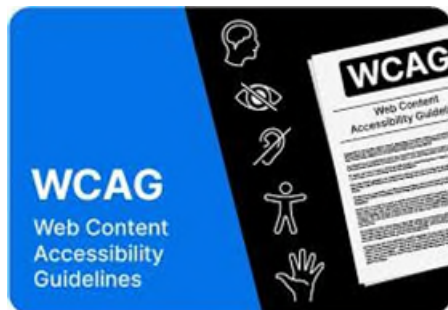
The Americans with Disabilities Act

- Signed into law on July 26, 1990 by G.H.W. Bush.
- Protects the rights of individuals with disabilities in employment, access to State and local government services, **places of public accommodation**, transportation, and other important areas of American life.
- “Public accommodations” under Title III of the ADA include businesses that are generally open to the public and fall into one of 12 categories, such as restaurants, movie theaters, schools, day care facilities and recreation facilities.
- A private party may obtain equitable relief under Title III, such as a court order requiring a business to remove a barrier or provide auxiliary aids, plus reasonable attorney’s fees. A private party may not receive financial damages.

Title III of the ADA Encompasses Many Types of Claims



What is an “Accessible” Website? WCAG

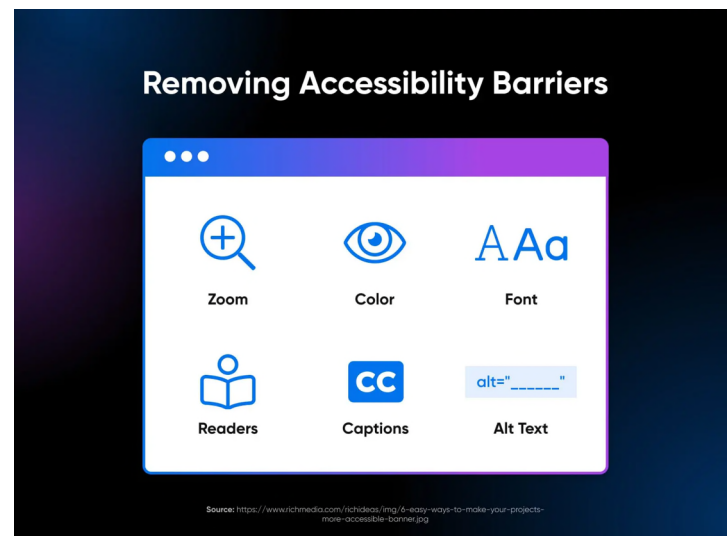


- The Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C) publishes the **Web Content Accessibility Guidelines (WCAG)**.
- WCAG 2.1 (2018). Added 17 criteria. Focus on cognitive disabilities & low vision.
- WCAG 2.2 (2023). Added 9 criteria. Not yet mandated.
- WCAG 3.0. Working draft of a new model for all kinds of devices and browsers.

Applicability of WCAG 2.1 AA to Government

Title II of the ADA requires state and local governments to make their web content and mobile apps compliant with the Level A and Level AA success criteria and conformance requirements in WCAG 2.1. Requirements include:

- Providing text alternatives for images
- Adding captions to videos
- Assistive technology, like screen readers
- Not using color alone to convey information
- Labels for screen readers on online forms



Private Businesses & Website Accessibility

Title III of the ADA does not require private businesses to comply with WCAG, but business websites have to be accessible, subject to some affirmative defenses.

Under the ADA, a successful plaintiff may obtain injunctive relief to make defendant fix its website, plus attorneys' fees, but no compensatory damages. Website accessibility lawsuits make up about 1/3 of all federal ADA claims.

Franchisor Liability. Liability of the franchisor will typically hinge on whether it is the "operator" of the public accommodation, *i.e.*, the website.

State Laws. The number of state (and local) digital accessibility laws is growing. California's Unruh Act, for example, allows plaintiffs to collect money damages of up to \$4,000 per offense.

Lots of Targets. According to the 2024 WebAIM study, 95.9% of the top million home pages still contain WCAG 2 failures.

Common Defenses to ADA Website Claims

The website is not a place of public accommodation, depending on your Circuit. *Online-only retailers* in the Third, Sixth and Ninth Circuits can seek dismissal absent a nexus between a physical location and the online service. The First, Fourth, and Seventh Circuits do not require a nexus to a brick-and-mortar location. The Eleventh Circuit appears to require online transactions in addition to a brick-and-mortar nexus. The Second, Fifth & DC Circuits have not ruled.

Plaintiff(s) failed to show actual harm. Injury-in-fact must be concrete, particularized, and actual or imminent, not hypothetical or generalized. Mere possible future injury of a “tester” while browsing is not sufficient. Plaintiff must show there was a specific product sought for purchase and the website prevented the ability to choose and buy the product.

The company has addressed the issues, so the case is moot. The court may dismiss if the defendant company shows the alleged violations have been fixed and they would not happen again.

Architectural & Other Physical Barriers to Accessibility

New construction and modifications must be accessible. **Barriers to services in existing facilities** must be removed if readily achievable.

The ADA Standards for Accessible Design include:

- Space allowance and reach ranges
- Accessible routes
- Protruding objects
- Ground and floor surfaces
- Parking and passenger loading zones
- Curb ramps
- Ramps
- Stairs
- Elevators
- Platform lifts (wheelchair lifts)



Physical Accessibility

- ADA applies to all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.
- Facility includes **both indoor and outdoor areas** where human-constructed improvements, structures, equipment, or property have been added to the natural environment.
- Perfection not required; rather, the ADA requires that a facility provide disabled patrons with an accommodation that is reasonable and permits the patron to participate equally in the good, service, or benefit offered.

Physical Accessibility Litigation

- To state a claim under Title III of the ADA, a plaintiff must show that he or she is disabled within the meaning of the ADA; that the defendant is a private entity that owns, leases, or operates a place of public accommodation; and that the plaintiff was denied public accommodation by the defendant because of his or her disability. *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 670 (9th Cir.2010).
- A plaintiff will enter your establishment, often for five minutes or less, to spot issues with accessibility.
- An inspector will subsequently visit your establishment, often for five minutes or less, to confirm that issues spotted by the plaintiff persist.
- Unless local regulations require it, first notification will be a lawsuit.
- First steps should be to find an experienced attorney and an ADA site inspector.

Litigation: Who is the correct defendant?

- The entity who owns or operates the place of public accommodation – and therefore has a “significant degree of control” over making the space accessible – is the correct defendant.
 - Courts will analyze the terms of the franchise agreement in order to determine whether the franchisee or franchisor control correction of accessibility issues.
- Franchisors only liable for ADA violations at a franchise if they maintain control over day-to-day operations or store layout.
 - *Neff v. Am. Dairy Queen Corp.*, 58 F.3d 1063, 1066 (5th Cir. 1995): veto power over structural changes to the building insufficient to show that franchisor “operates” the restaurant.
 - *Lemmons v. Ace Hardware Corp.*, 2014 WL 3107842 (N.D. Cal. July 3, 2014): summary judgment granted against franchisee but claims against franchisor dismissed. Franchise agreement required franchisee to follow federal and state laws but did not give Ace control over physical layout
 - *U.S. v. Days Inn of America*, 151 F.3d 822 (8th Cir. 1998): franchisor with control over layout liable if it has actual knowledge that franchisee’s hotel violates the ADA

Brick-and-Mortar Common Defenses

- **Lack of standing:** plaintiff did not actually visit establishment / no likelihood of return
- **Reasonable efforts to comply**
 - Ideal or preferred accommodation not required
 - Defendant need only provide a plaintiff with an accommodation that is reasonable and permits the plaintiff to participate equally in the good, service, or benefit offered.
- **Temporary impediment to access**
- **Actual compliance**
 - Investigators typically spend less than two minutes inspecting a brick and mortar location before determining whether there are any violations worth suing over
 - Do not assume that allegations in a complaint are correct!
- **Mootness:** issue has been fixed and cannot recur

Questions?

Contact Us



Maisa Frank

202.295.2209

maisa.frank@lathrogpm.com



Tedrick Housh

816.460.5642

tedrick.housh@lathrogpm.com



Dinah Ortiz

408.299.1303

dinah.ortiz@lathrogpm.com



Brooke Robbins

612.632.3472

brooke.robbsins@lathrogpm.com

Backup Slides

Specific Establishments: Hotels

- One of the regulations implementing the ADA, which has come to be known as the “Reservations Rule,” requires hotel reservation websites to share enough information online about their ADA accommodations so that people with disabilities can determine whether the hotel and its guest rooms meet their accessibility needs. See 28 CFR § 36.302(e)(1)(ii).
 - Detail about the type of room, size and number of beds, accessible bathing facilities, and communications features in the room likely enough for newer constructions
 - For older constructions, information about the hotel should include, at a minimum, information about accessible entrances to the hotel, the path of travel to guest check-in and other essential services, and the accessible route to the accessible room or rooms. The hotels should also provide information about features that the hotel does not have.
- “A hotel that is fully compliant with the current Standards need only identify which of several acceptable alternative features the room provides, such as whether it has a shower or a bathtub (both of which are permitted under the Standards).” See *Love v. Wildcats Owner LLC*, No. 20-CV-08913-DMR, 2021 WL 1253739, at *7 (N.D. Cal. Apr. 5, 2021)

Restaurants

- Typical issues to watch out for:
 - Configuration of queue lines
 - Door force
 - Accessible seating & tables
 - Accessible drink dispenser and lids
 - Accessible restrooms, including height of toilet, soap dispensers, and sink
 - Menu access for the visually disabled:
 - Braille and large print menus
 - Reading menus
 - Sign language interpretation
- Not enough for restaurant to have policies for employees to follow that would ensure ADA compliance (e.g., checking to make sure a table is accessible every morning). *Moeller v. Taco Bell Corp.*, 816 F. Supp. 2d 831, 861 (N.D. Cal. 2011).

Other common problems

- Parking: easy source of litigation for all businesses
 - one accessible parking space is required for every 25 spaces. Accessible parking spaces should be marked with signs and located as close as possible to the accessible entrance.
 - At least one of every six spaces must be van accessible
 - small businesses with four or fewer spaces must provide at least one accessible parking space but are exempt from the signage requirement.
- Entrance ramps:
 - Maximum slope of 1:12
 - Minimum width: 36 inches
 - rise greater than 6 inches or a horizontal projection greater than 72 inches
 - minimum landing size must be 60 inches long and at least as wide as the ramp
 - any change in direction should have a landing of at least 60 inches by 60 inches.

Other common problems

- Accessible doorways: at least one accessible doorway with minimum clear width of 32 inches, maximum threshold height ½ inch, maximum 8 pound door force
- Counter height: common source of litigation in stores, salons, etc.
 - Parallel Approach. A portion of the counter surface that is 36 inches (915 mm) long minimum and 36 inches (915 mm) high maximum above the finish floor shall be provided. A clear floor or ground space complying with 305 shall be positions for a parallel approach adjacent to the 36 inch (915 mm) minimum length of counter.
- Restrooms:
 - Accessible stalls: a minimum width of 60 inches and a depth of 56 inches. The door to the stall must be at least 32 inches wide and equipped with a handle that can be easily operated with one hand.
 - Accessible stalls should be equipped with toilet seats that are at a height of 17 to 19 inches from the floor. They should provide grab bars on both sides of the toilet that are mounted at a height of 33 to 36 inches above the floor and extend at least 54 inches in length.