



# The Americans with Disabilities Act (ADA)

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Jeffer Mangels Butler & Mitchell LLP

2023

# About the Presenter

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- **Stuart K. Tubis, Esq.**
- J.D. since 2011
- Labor & employment experience before JMBM
- JMBM associate in 2013
- JMBM partner since 2021
- Estimated 1,200 ADA cases defended



# Importance of Accessibility

- Why is accessibility important?
- There are currently over **58 million** people with disabilities in the United States.
- The ADA helps persons with disabilities take a **more active and independent role** in society.



# History of the ADA

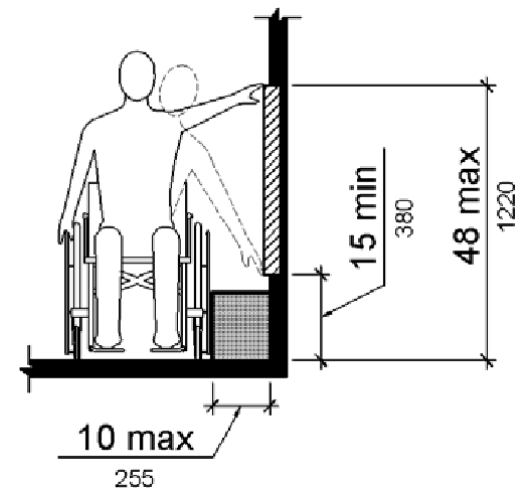
4

- **Americans with Disabilities Act (ADA)** became law in 1990.



# History of the ADA

- ❑ **Americans with Disabilities Act (ADA)** became law in 1990.
- ❑ There are **five titles** (parts) under the ADA.
  - ❑ **Title I** = Employment
  - ❑ **Title II** = Public Entities (and public transportation)
  - ❑ **Title III** = **Public Accommodations**
  - ❑ **Title IV** = Telecommunications
  - ❑ **Title V** = Miscellaneous Provisions



# Title III of the ADA

- **Title III** of the ADA requires “*places of public accommodation*” (i.e., nearly any business open to the public) to provide *full and equal access* to goods, services, privileges and facilities.
  - ▣ Parking lots, entrances, elevators, counters & tables, restrooms, policies & services, etc.





# Title III of the ADA

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- **Private right of action (enforced by lawsuits).**
  - ▣ Small government theory.



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# Accessibility Litigation

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- ❑ There are roughly **10,000** ADA lawsuits filed in US Federal Courts **per year**.
  - ❑ ADA litigation hotspots: California, New York, Florida, Pennsylvania, New Jersey and Texas.
  - ❑ Recent move to state court in California.



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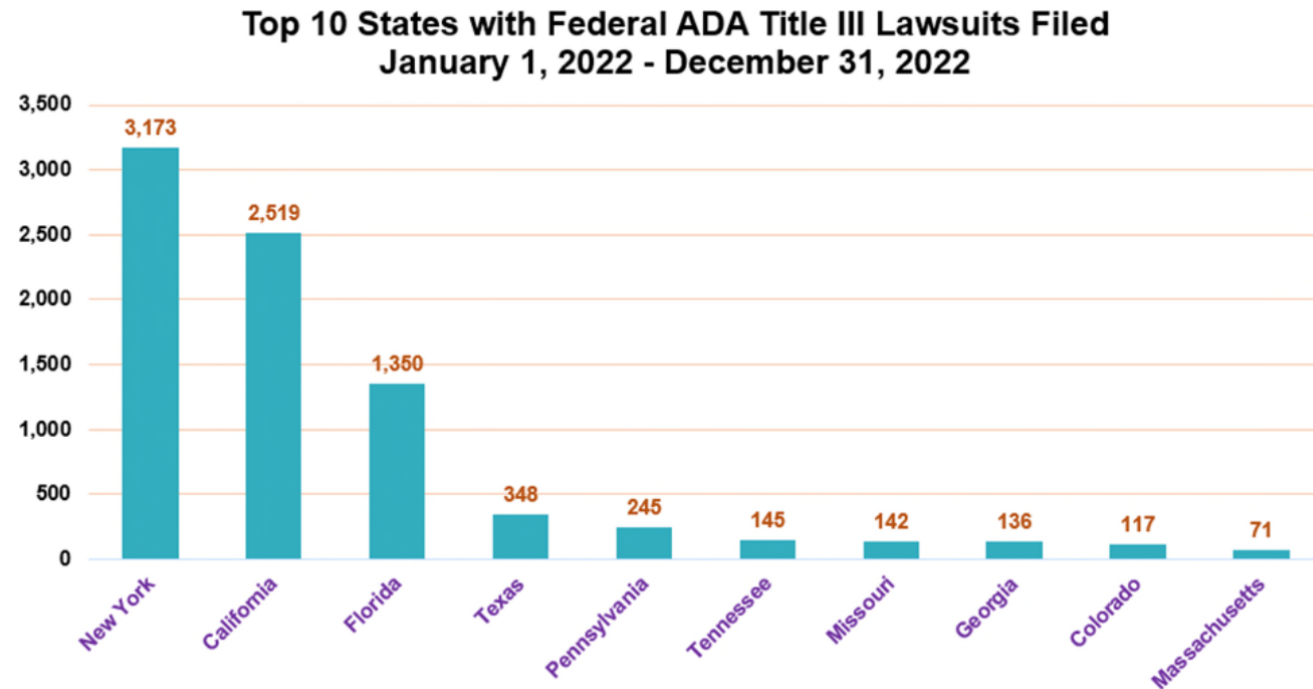
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# Accessibility Litigation

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- ADA federal lawsuits by state.



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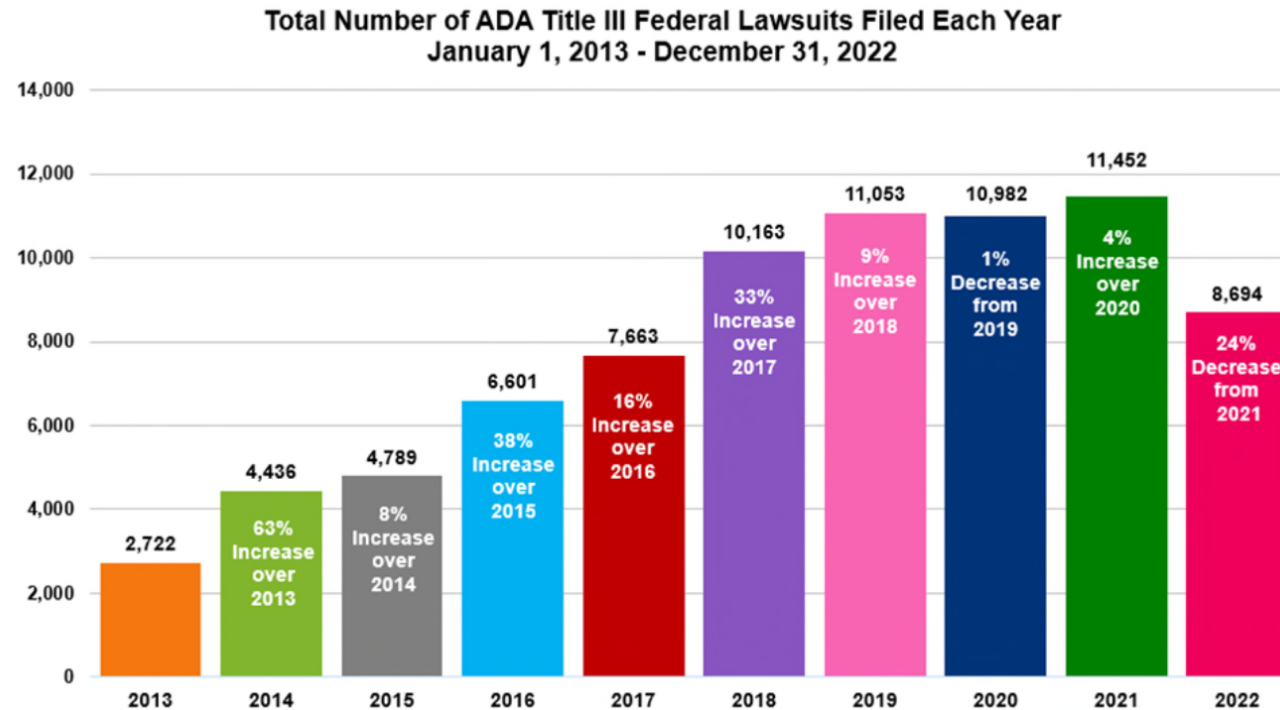
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# Accessibility Litigation

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- Increase in ADA Title III lawsuits over time.



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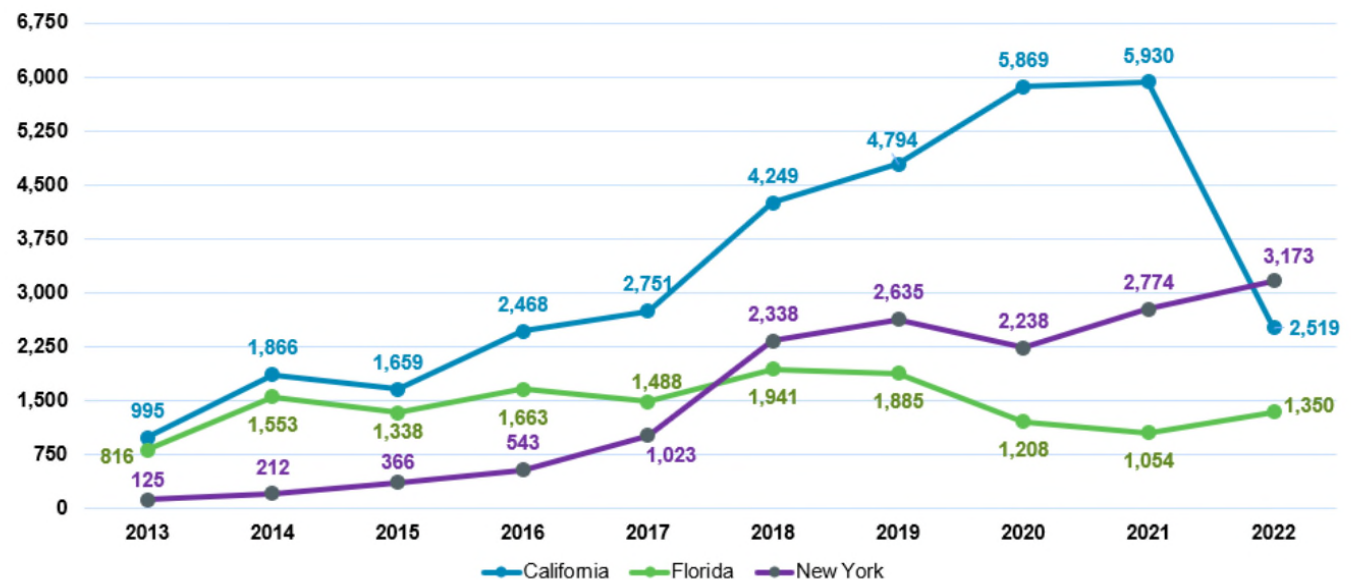
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# Accessibility Litigation

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- California lawsuits moving from federal to state court.

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



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# Accessibility Litigation

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- ❑ **Remedies for noncompliance:**
  - ▣ **Injunctive relief** (court order to remove all barriers to access);
  - ▣ **Attorneys' fees** to prevailing plaintiffs;
  
- ❑ **California Unruh Civil Rights Act**
  - ▣ **Minimum statutory damages** in CA (\$4,000 per visit).
  - ▣ **Duty to mitigate damages** limits this.



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# Title III of the ADA

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- A **prima facie case** for violation of Title III of the ADA:
  1. Plaintiff has a qualifying disability;
  2. The establishment is a **place of public accommodation**; and,
  3. Plaintiff encountered an ADA violation which **denied** him/her **full and equal treatment** at the subject property because of his/her disability.

*Wilson v. Pier 1 Imports (US), Inc. (E.D. Cal. 2006) 439 F. Supp. 2d 1054, 1067.*

# Title III of the ADA

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- ▣ A **prima facie** case for violation of Title III of the ADA:

## 1. Plaintiff has a qualifying disability.

- Has a physical or mental impairment that substantially limits one or more major life activities, or
- Has a record of such an impairment, or
- Is regarded as having such an impairment.

- ▣ Blindness? **Yes**
- ▣ Learning disorder? **Yes**
- ▣ Drug addiction? **Yes\*** (when not due to current use of illegal drugs)





# Title III of the ADA

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- A prima facie case for violation of Title III of the ADA:
  1. Plaintiff has a **qualifying disability**.
  2. The establishment is a **place of public accommodation**;
    - A facility operated by a private entity whose operations affect commerce and fall within one of 12 categories. Includes: hotels, stores, cafes, restaurants, museums, parks, theaters, gyms, etc.



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# Title III of the ADA

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- A prima facie case for violation of Title III of the ADA:
  1. Plaintiff has a qualifying **disability**.
  2. The establishment is a **place of public accommodation**;
  3. Plaintiff encountered an ADA violation which **denied** him/her **full and equal treatment** at the subject property because of his/her disability.
    - Must relate to his/her disability (standing issues).
    - CA Unruh: difficulty, discomfort, or embarrassment because of the violation.

# ADA Law Basics

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- ❑ **Who is covered by the ADA?**
- ❑ ADA imposes "**joint and several**" **liability** on owners, lessors, lessees and operators of public accommodations.
- ❑ **Landlords** are typically responsible for the exterior & structural conditions.
- ❑ **Tenants** are typically responsible for the interior conditions and operational policies.



# ADA Law Basics

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- ❑ **Does the ADA apply to buildings built before the ADA?**
- ❑ Yes. Ongoing responsibility to remove barriers to access where it is **readily achievable** to do so.
- ❑ Readily achievable means "easily accomplishable and able to do so without much difficulty or expense."
  - ▣ Case by case judgment: factors include size of the business, finances, proposed solution, cost of repairs, etc.
  - ▣ Exceptions for structurally impractical or technically infeasible situations.

# ADA Law Basics

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- ❑ **“Barrier Removal”** = Bringing non-compliant building elements into compliance.
- ❑ Common Problem Areas:
  - ❑ Parking areas
  - ❑ Accessible Paths of Travel - Ramps / Curbs / Sidewalks
  - ❑ Entrances and doorways;
  - ❑ Public Facilities (registration counters, bars, restaurants, business centers, help desks, swimming pools, etc.)
  - ❑ Restrooms
  - ❑ Emergency exits
  - ❑ Elevators
  - ❑ Private rooms and offices
  - ❑ Websites

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# ADA Urban Legends

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- ❑ My building was constructed **before the ADA**, so I'm grandfathered in, right? **No.**
- ❑ I hired a licensed **architect and general contractor** to design and build my building, so I can rely on them to get it right, can I not? **No.**
- ❑ The building department approved my plans and said my building was code compliant when it issued the **Certificate of Occupancy**, so it is compliant, right? **No.**





# ADA Urban Legends

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- ❑ I'm just the **business operator**, so I'm not responsible for ADA violations. **No.**
- ❑ I own the building, but it is **separately managed**, so I'm not responsible for ADA violations. **No.**
- ❑ I can **refuse service** to anyone, including persons with disabilities. **No.**



# Defenses to ADA Claims

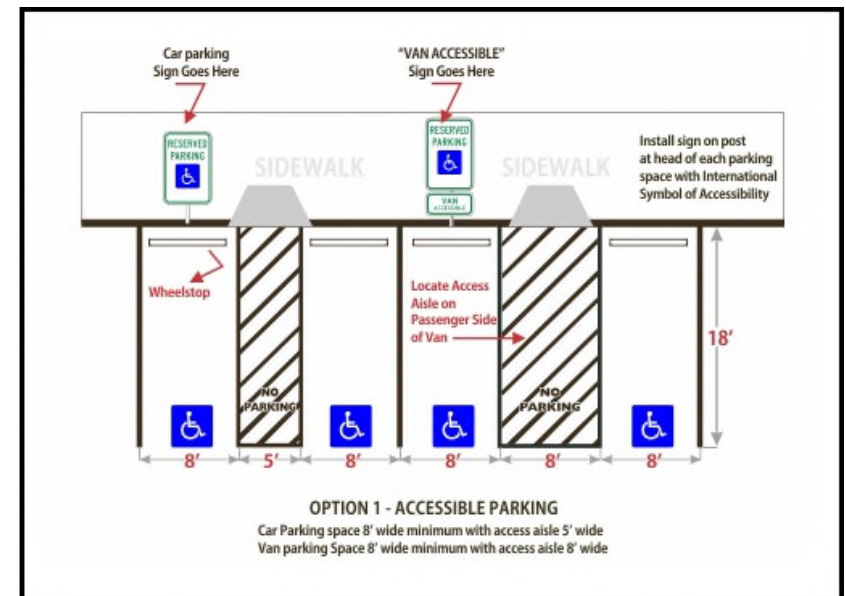
- ❑ **Compliance** with ADA standards.
- ❑ **Mitigation of damages.** Civil Code Section 55.56.
- ❑ **Bona fide interest** in the goods and services of the facility.
- ❑ **Intent to return** (tester standing) – circuit split.
  - ▣ *Acheson Hotels, LLC v. Laufer* – SCOTUS granted certiorari on March 27, 2023.



# Exterior Issues

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- **Key Idea:** Provide accessible parking (if parking is offered) and an accessible path of travel from transportation stops and the accessible parking/transportation area to the entrance and other parts within the facility.
- **A path of travel** is comprised of multiple elements: parking spaces, access aisles, signage, curb ramps, sidewalks, doors.



# Parking

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## ❑ Non-Compliant Parking Lot:



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# Parking

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## □ Compliant Parking Lot:



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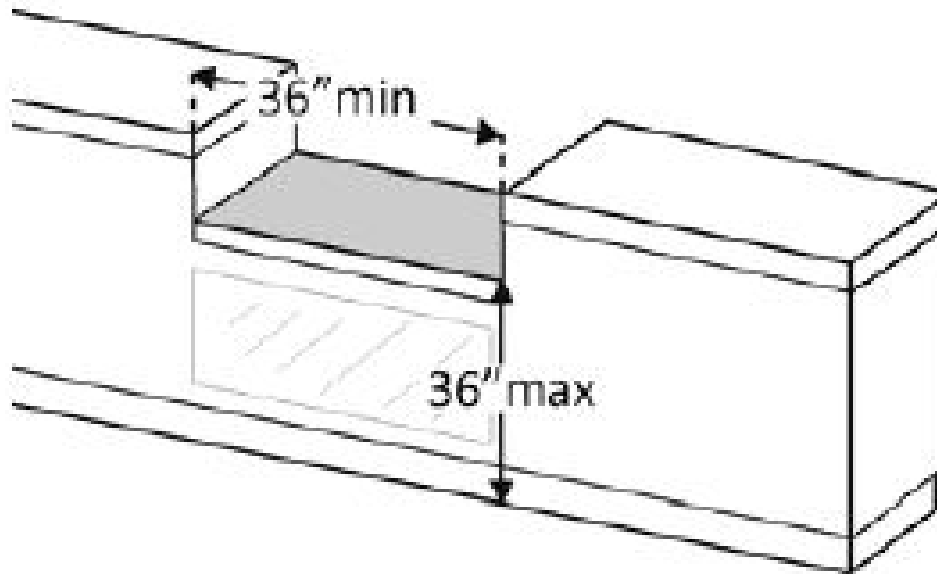
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# Counters

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- Sales and service counters shall be 36 inches (965 mm) maximum above the finish floor or ground.





# Counters

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## ❑ Non-Compliant Hotel Service Counter:



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# Counters

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## □ Compliant Hotel Service Counter:



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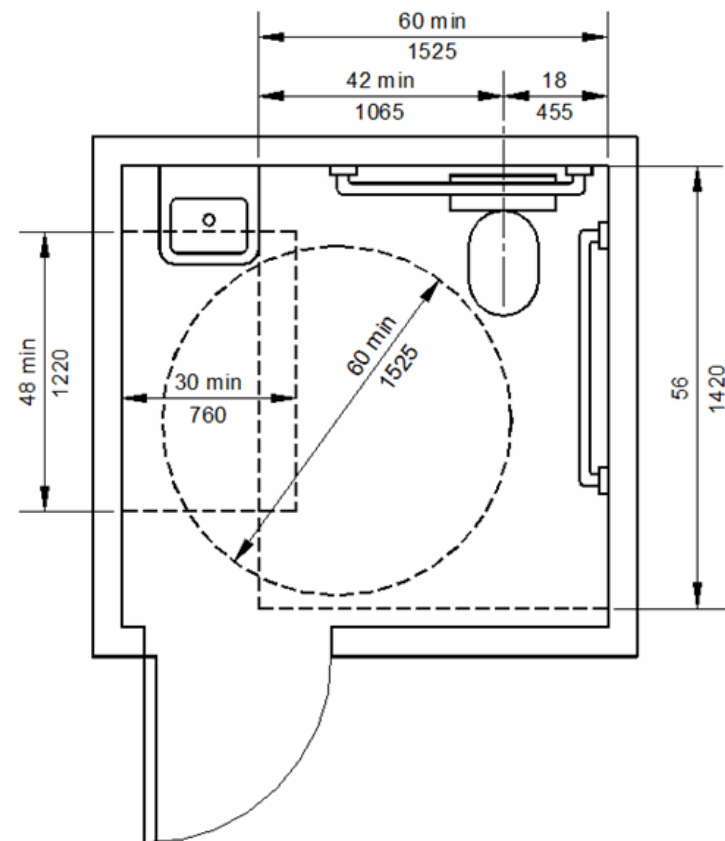
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# Restrooms

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- ❑ Proper turning radius.
- ❑ Specific dimensions for toilet height and placement, grab bars, toilet tissue dispenser, toilet seat cover, coat hooks, baby changing tables, sinks, etc.
- ❑ Under-sink pipes must be wrapped.
- ❑ Stall doors requirements.



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# Service and Emotional Support Animals

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# Service and Emotional Support Animals

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## □ Service animal

- ▣ Any dog (or miniature horse) that is individually trained to do work or perform tasks for the benefit of an individual with a disability.



## □ Emotional support or Comfort animal

- ▣ Any animal that provides comfort to a person with a psychiatric disability but is **not** individually trained to perform specific tasks to assist him/her.



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# Service and Emotional Support Animals

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- ❑ **Service animal vs. Comfort or emotional support animals.**
- ❑ Public accommodations ***must*** allow use of a service animal.
- ❑ Emotional support animals are ***not*** covered under the ADA.
  - ▣ Note: However, emotional support animals are often protected in housing as “reasonable accommodations” or “reasonable modifications” for the individual’s disability under the FHA and comparable state laws.



# Service and Emotional Support Animals

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- ❑ **Business may only ask two questions as to service animals:**
  1. Is the animal required because of a disability?
  2. What work or task has the animal been trained to perform?

28 C.F.R. §§ 36.302(c)(6), 35.136(f).



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# Service and Emotional Support Animals

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- ❑ Does a service animal need to wear a special vest or harness?
  - ▣ **No.** No special license required either.
  
- ❑ Can a service animal accompany its owner to a restaurant?  
To the salad bar?
  - ▣ **Yes.**



# Service and Emotional Support Animals

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- ❑ Can a hotel charge extra for a service animal?
  - ▣ **No**. But it can charge for actual damage caused by the animal.
- ❑ Is the business owner responsible for the care of the service animal while at the business?
  - ▣ **No**. Care of the animal is the responsibility of the owner.



# Service and Emotional Support Animals

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- ❑ **Limitations on Service Animals:**
  - ▣ The work or tasks performed by the service animal must be **directly related** to the individual's disability.
  - ▣ **Fundamental alteration** to the nature of the business.
    - (E.g., dog barking in movie theater).
  - ▣ Not protected when it would poses a **direct threat** to the health or safety of others.



# Web Accessibility

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# Web Accessibility

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- ❑ The ADA requires **reasonable modification** of policies and **effective communication** with the disabled. 42 U.S.C. § 12182(b)(2)(A)(ii-iv).
- ❑ The ADA thus, departs from other anti-discrimination statutes by requiring **affirmative steps to accommodate the disabled**. H.R.Rep. No. 101-485, pt.2, at 104 (1990); 42 U.S.C. § 12182(b)(2)(A)(ii-iv).





# Web Accessibility

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- **The Department of Justice supporting website accessibility**
  - ▣ June 25, 2015: DOJ Statements of Interest filed in 2 ADA lawsuits stating accommodations have an “obligation to provide auxiliary aids and services to individuals with disabilities to ensure **equal access to online programming.**”
  - ▣ The **two lawsuits** involved the National Association for the Deaf against MIT and Harvard University for discrimination associated with free online videos and audio files. (3:15-cv-30024-MGM; 3:15-cv-30023-MGM.)



# Web Accessibility

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## □ Web Accessibility Litigation

- ▣ Courts have interpreted the ADA as requiring web accessibility.
  - *Nat Fed of the Blind v. Target Corp.*, (ND CA 2006) 452 F. Supp. 2d 946
  - *Nat Fed of the Blind v. HRB Digital LLC, et al*, No. 1:13-cv-10799-GAO (D. Mass. filed April 8, 2013)
  
- ▣ Started with complaint letters. Turned into litigation.



# What is Website Accessibility?

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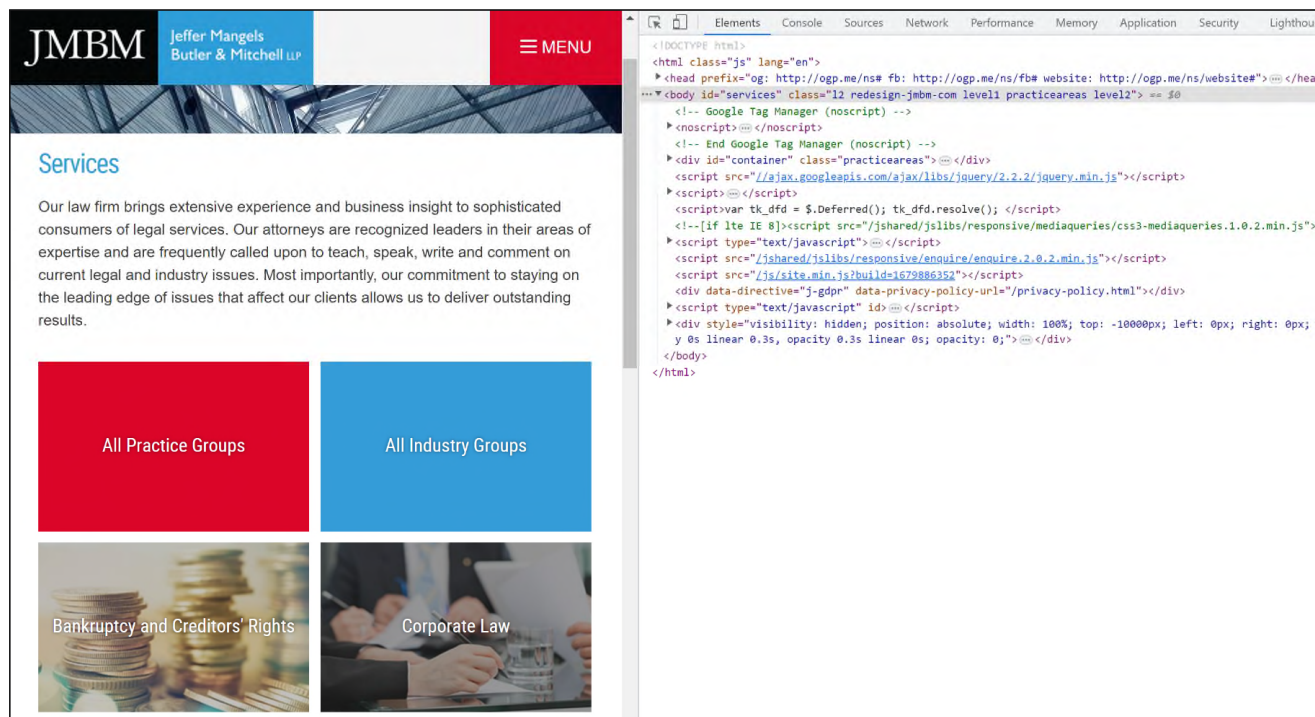
- ❑ **Screen reader software** scans the webpage code and reads it aloud to the user.



# Web Accessibility Basics

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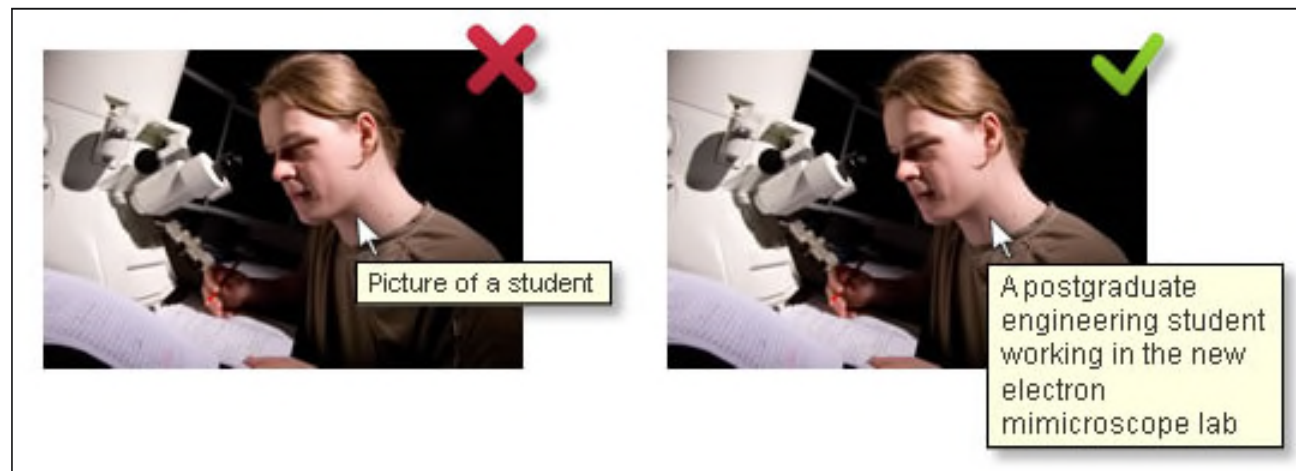
- Websites are built using HTML code.



# Web Accessibility Basics

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- **Intro to Basic Web Accessibility Elements:**
  - ▣ Provide descriptive **text alternatives** for non-text content (images, video, etc.).
  - ▣ Provide **captions** and other alternatives for multimedia.



# Web Accessibility Basics

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- **Intro to Basic Web Accessibility Elements:**
  - ▣ Create content that has **multiple presentation options** (e.g., simpler alternative layout) without losing meaning.
  - ▣ Make it easier for users to **see and hear content** (e.g., make surface content contrast sufficiently with background).



# Web Accessibility Basics

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- **Intro to Basic Web Accessibility Elements:**
  - ▣ Make all functionality **available from a keyboard** (touch screens and mice are not widely accessible).
  - ▣ Give users **enough time** to read and use content.



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# Web Accessibility

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- ❑ **Web Accessibility Standards Are Coming...**  
(eventually)
  - ▣ The DOJ has issued proposed rules for the enactment of **regulatory standards** for public accommodation website accessibility.
  - ▣ The previous target date was **2018**.
  - ▣ Industry still waits.



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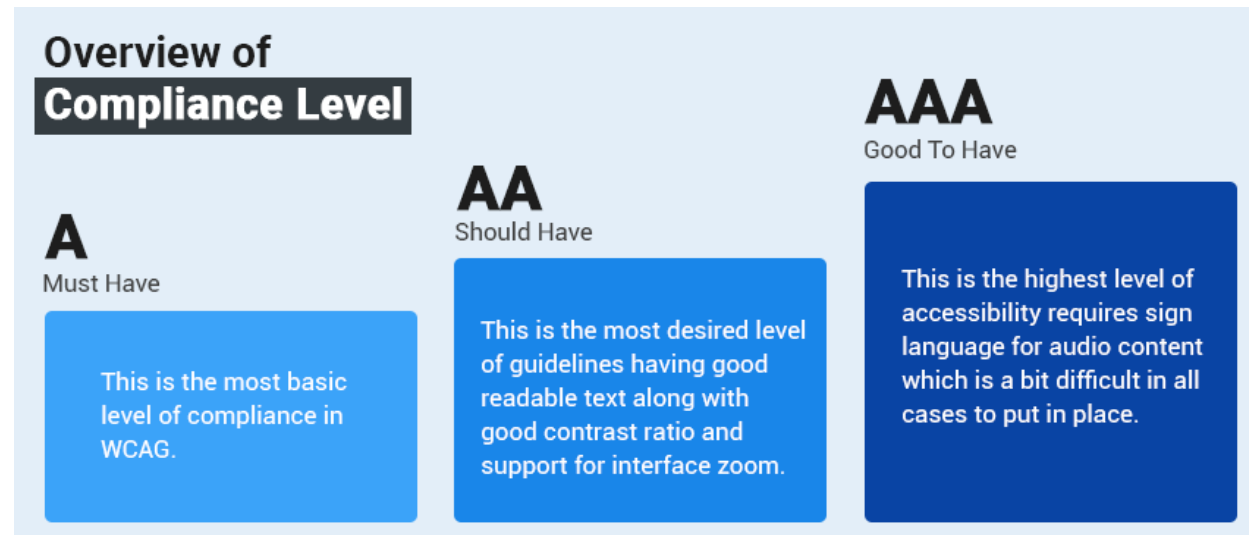
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# Web Accessibility

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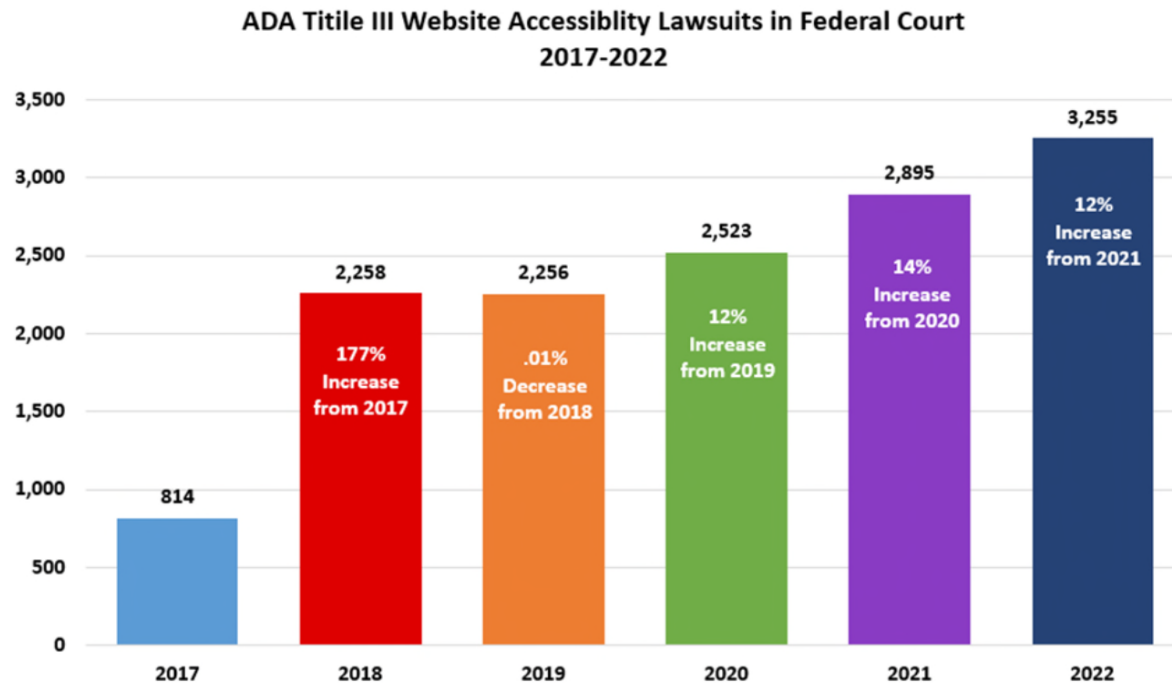
- **Web Content Accessibility Guidelines (WCAG)**
  - ▣ Published by the World Wide Web Consortium (W3C) – nongovernmental international standards organization for the internet.



# Web Accessibility

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- Website accessibility litigation is on the rise.



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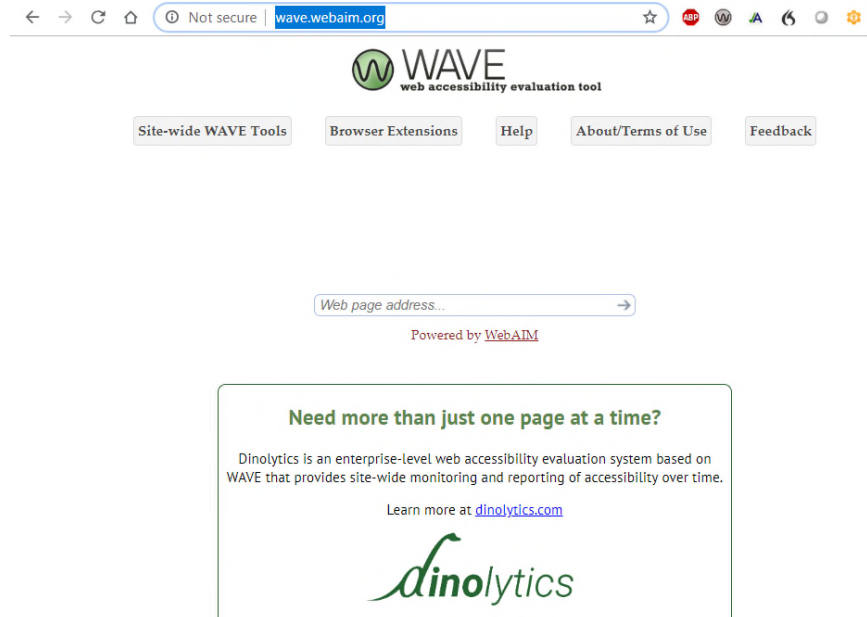
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# Web Accessibility Basics

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- ❑ **How to test for web accessibility.**
  - ▣ Software and manual testing



# Web Accessibility Basics

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## □ Testing results:

The screenshot shows the WAVE web accessibility evaluation tool interface. The browser address bar displays <https://www.petsmart.com>. The WAVE logo and "web accessibility evaluation tool" text are visible. Below the logo are tabs for "Styles", "No Styles", and "Contrast". The "Summary" section lists the following detected issues:

- 46 Errors
- 94 Alerts
- 84 Features
- 244 Structural Elements
- 339 HTML5 and ARIA
- 17 Contrast Errors

Under "Panel Options", there are links for "DETAILS", "DOCUMENTATION", and "OUTLINE". The main content area shows the PetSmart website with various accessibility icons overlaid, such as "long alt" and "alt=txt". A search bar with the text "search" is also visible.

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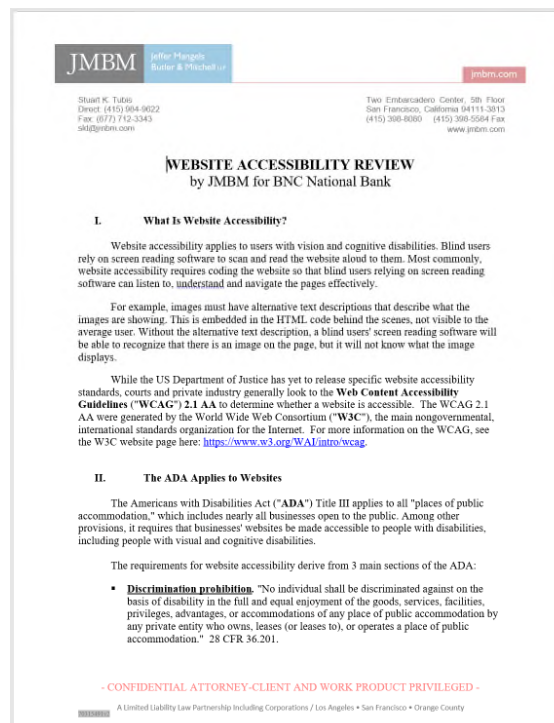
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# Web Accessibility Basics

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## □ Free JMBM web accessibility report for our clients:



# Mobile Accessibility Basics

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- ❑ **Mobile application accessibility is next.**
- ❑ Lawsuits have been filed.
- ❑ Text to speech modes and swipe commands used to navigate options on a phone.
- ❑ JMBM's work with San Jose Sharks.



# Questions?

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