

General Session

Compliant Employer Websites Under the ADA

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HR LEADERS
COMPLIANCE SUMMIT

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A spiral-bound notepad with a wooden frame is centered in the image. It is flanked by two identical potted snake plants in white ceramic pots. The background is a plain, light-colored wall.

Disclaimer:

The information in this presentation is intended for informational purposes only and should not be considered legal advice. You are strongly encouraged to consult your own legal counsel to ensure compliance with applicable law in your specific state, municipality or jurisdiction.



Agenda

Title III ADA background

Current Title III Standards for Websites

Benefits of Compliance

Avoidance of Penalties and Liability

Best Practices

Title III of the Americans with Disabilities Act

- Originally drafted in 1990 and amended in 2008
- Prohibits discrimination against individuals with disabilities in employment, public accommodations, transportation, state and local government services and telecommunications
- Places of public accommodation include 12 specified categories (e.g., places of lodging; food and drink establishments; places of recreation; sales or rental establishments, etc.)
- The categories have always centered around brick-and-mortar locations which was the status quo in 1990 because the internet as we know it was in its infancy



Title III of the Americans with Disabilities Act

- To recover under Title III, a plaintiff must prove: (1) that he/she is disabled within the meaning of the ADA; (2) that defendants own, lease, or operate a place of public accommodation; and (3) that defendants discriminated against him/her by denying him/her a full and equal opportunity to enjoy the services defendants provide.
- THE ADA DOES NOT EXPLICITLY ADDRESS WEBSITE/MOBILE APP/JOB APPLICATION INTERFACE COMPLIANCE DESPITE HAVING BEEN AMENDED IN 2008
- Numerous federal court decisions have created a general consensus that the brick-and-mortar principles of the ADA are applicable to websites (as well as mobile apps and job application interfaces)
- The arguments generally take two forms:
 - 1) Private company websites qualify as places of public accommodation; and
 - 2) Websites with access barriers (e.g. websites without compatible screen-reading software) deny plaintiffs the right of equal access

Poll question!

Has your organization created a Title III ADA compliant website?

Current Title III ADA Standards for Websites

- There is not currently a true legal standard for determining website accessibility under the ADA
- The Department of Justice advised on September 25, 2018 that it was “evaluating whether promulgating specific web accessibility standards through regulations is necessary and appropriate to ensure compliance with the ADA.”
- This approach supported the DOJ’s longstanding position that the ADA, as is, applies to public accommodations’ websites and the absence of a specific regulation doesn’t serve as a basis for noncompliance
- Very similar to how the Department of Labor has not promulgated new regulations to address the ongoing problem of addressing the inability of non-exempt employees to “unplug” due to drastic advancements in technology
- They noted that the lack of one standard allows for flexibility to comply with the ADA’s general requirements of nondiscrimination and effective communication

Web Content Accessibility Guidelines - WCAG

- Although a formal legal standard does not currently exist, the “Web Content Accessibility Guidelines (WCAG)” have been widely accepted as providing for full and equal access in accordance with the ADA
- Currently on WCAG version 2.1AA
- WCAG 2.1AA includes about 50 recommendations to improve the accessibility of an organization’s website or mobile app
- The WCAG are published by the World Wide Web Consortium’s (W3C) Web Accessibility Initiative (WAI).
- Four principles: a website must be “perceivable, operable, understandable, and robust”
- Four principles broken into twelve guidelines with “success criteria” for web developers which include tangible goals to work towards
- Various levels within the WCAG for compliance but “AA” addresses the major barriers encountered by the visually impaired

Different Levels of Conformance

Level A

The minimum level of conformance

Level AA

The level generally relied upon by the DOJ and the courts

Level AAA

The maximum level of conformance



The Four Principles

1. **Perceivable:** Content is presented in an easily perceivable manner that allows visually-impaired individuals to perceive content (e.g., alternative tags, captions, audio alternatives or assistive technology)
 2. **Operable:** Navigation is easy to operate so disabled users can easily and safely navigate the website and access content (e.g., offering keyboard accessibilities, adequate time to read and use content, and not using content that causes seizures)
 3. **Understandable:** Content is easy to understand which includes making content readable and predictable and offering input assistance if needed
 4. **Robust:** Content can be interpreted by various devices and platforms to ensure the content is compatible with user agents like assistive technologies
- Meeting these standards will improve accessibility, mainly for individuals with vision or hearing impairments, but also those with cognitive, language or learning disabilities
 - Here is a link to a good example of these principles being utilized on the [CA.gov](https://www.ca.gov) website

Common Ways to Address Accessibility Issues on a Website

- **Create alt tags for all images, videos and audio files:** Alt tags allow users with disabilities to read or hear alternative descriptions of content they might not otherwise be able to view. Alt tags describe the object itself and, generally, the purpose it serves on the site. Search engines and other robots cannot interpret images, but images can play a crucial part in how people interpret a particular web page. Alt tags solve for this by providing text which is read by the search engines thus providing accessibility.
- **Create text transcripts for video and audio content:** Text transcripts help hearing-impaired users understand content that would otherwise be inaccessible to them
- **Identify the site's language in the header code:** Making it clear what language the site should be read in helps users who utilize text readers. Text readers can identify those codes and function accordingly.
- **Offer alternatives and suggestions when users encounter input errors:** If a disabled user is encountering input errors because of their need to navigate the website differently, the site should automatically offer recommendations to properly direct the user to successfully navigate
- **Create a consistent, organized layout:** Menus, links and buttons should be organized in such a way that they are clearly delineated from one another, and easily navigated throughout the site

Benefits of Compliance - Why Should You Care?

- Increasing Your Target Audience
- Improving Your Search Engine Optimization (SEO) Efforts
- Helping Your Business Reputation
- Avoidance of Penalties and Liability

Increasing Your Target Audience

- Around 15% of the global population is classified as disabled
- Of this 15%, an estimated 190mm people experience significant disabilities¹
- Over 4.57 billion people are active internet users²
- In the U.S. alone, consumers spent an estimated \$517.36 billion online³
- In total, individuals with disabilities spent an estimated \$490 billion in the U.S.
- If the website isn't accessible, that is excluding 60 million Americans
- 69% of customers with disabilities will instantly leave the site if it does not meet their accessibility needs⁴
- Another 80% of customers with disabilities have stated that they will spend more on a website that has improved accessibility features
- The WebAIM project at the Center for Persons with Disabilities at Utah State ran accessibility tests on homepages of the top 1 million websites and 98.1% of homepages had detectable WCAG 2 failures



Improving Your SEO Efforts

- Search Engine Optimization increases your businesses' chances of being found on the internet
- Screen readers crawl website pages like search engines to find websites
- A key element of WCAG is accessibility to screen readers
- If your website meets WCAG guidelines it will appeal to users, search engines and screen readers, improving your SEO efforts
- The creation of Meta tags (snippets of text that describe a page's content; the meta tags don't appear on the page itself, but only in the page's source code), alternative image text and video transcripts will both help your SEO efforts as well as help make your website WCAG compliant

Helping Your Business Reputation

- Not only will compliance allow your website to be shopped by millions of otherwise disenfranchised customers but will also add goodwill to your brand name
- Compliance and access send a signal to those customers that they are valuable to your business and that you want to do business with them
- Competitors that are not accessible not only have legal liability to be concerned with but also will simply not be able to communicate properly with customers that cannot utilize their website due to a disability
- There are badges and other logos that you can put on your website not only to advertise your ability and willingness to make your website accessible but also to scare away potential plaintiffs that troll the internet looking for inaccessible businesses to sue



Poll question!

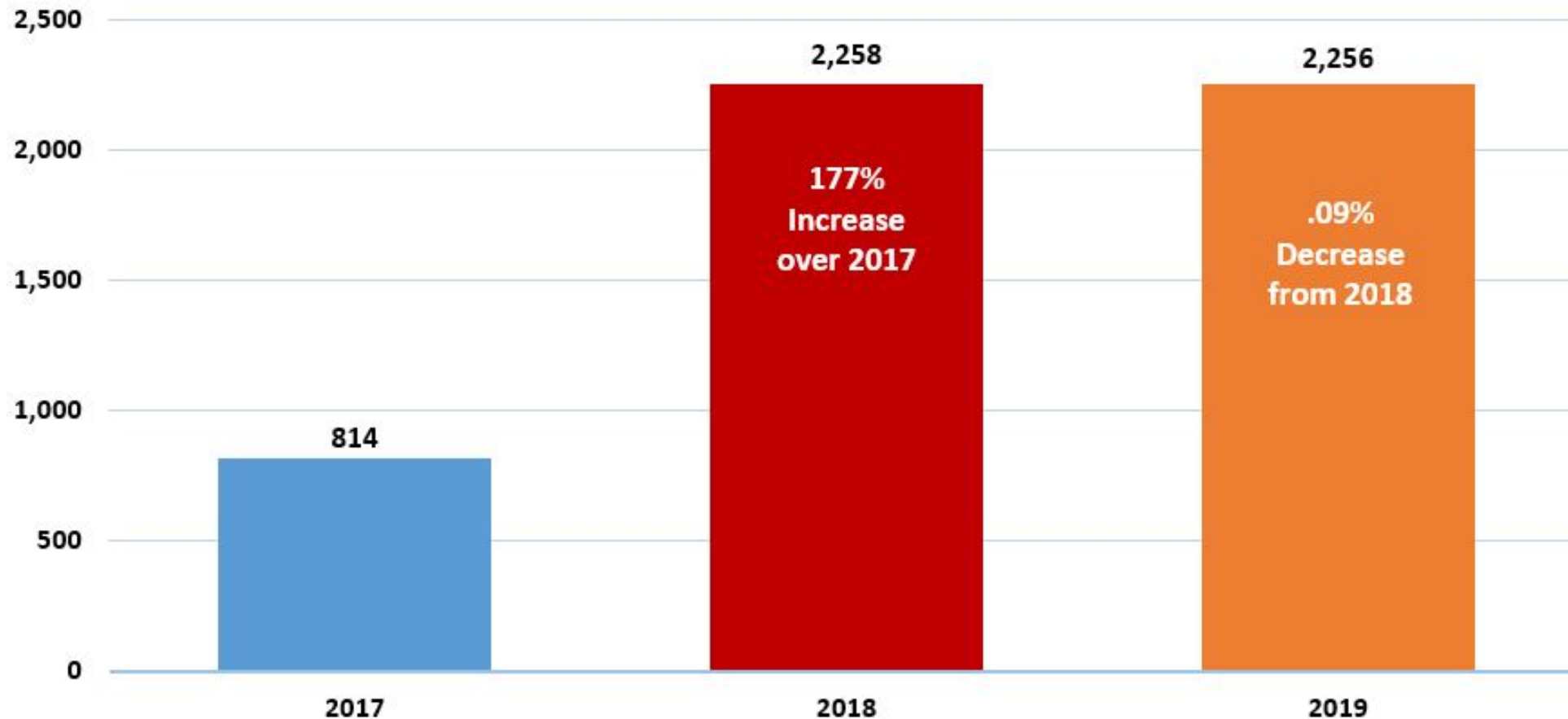
Has your organization been approached for lacking an ADA-compatible website?

Avoidance of Penalties and Liability

- The lack of clarity regarding regulations has created a “cottage industry” of lawsuits for aggrieved plaintiffs
- A single plaintiff’s attorney and sometimes the same disabled individual will file dozens or more lawsuits against many different companies alleging technical violations of Title III¹
- They will seek injunctive relief (e.g., for the company to make its website accessible) and attorneys’ fees that are authorized by statute
- They often target a specific business sector/industry (e.g., restaurants, retail stores, health care providers and e-commerce companies)
- Several lawsuits have been focused on larger businesses with deeper pockets with the likely intent of forcing smaller settlements quickly (e.g., Fordham University, Foot Locker, Brooks Brothers, Kylie Jenner)
- Many smaller businesses have opted to take a wait and see approach to potential legislation before spending the money to make their website compliant

Avoidance of Penalties and Liability

ADA Title III Website Accessibility Lawsuits in Federal Court
(2017 - 2019)



Avoidance of Penalties and Liability

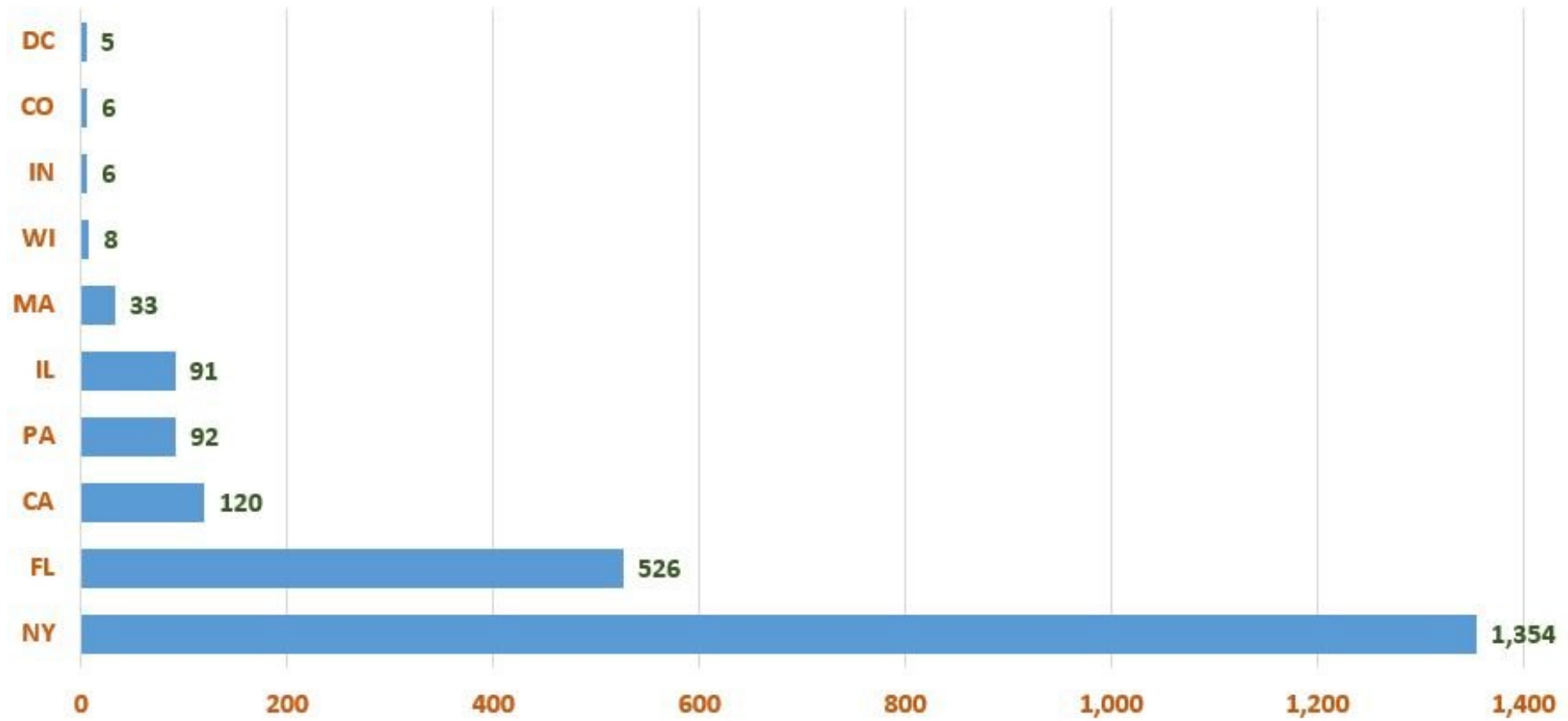
- There are two main costs associated with remediation: (1) cost to remediate and (2) litigation and attorney's fees
- Remediation takes time and should be accomplished by a reputable firm that fully understands the current WCAG standards
- Recommend to first reach out to your existing labor and employment counsel who will either be able to handle the entire project in-house or will be able to oversee the project through a relationship with a reputable remediation firm to handle the technical aspects of the project
- It is very likely that there will be true regulatory guidelines at some point that will be a roadmap to compliance so starting that process now is simply getting ahead of the curve
- It also allows a business to remove the threat of a lawsuit (and the accompanying attorney's fees) from the equation
- Attorney's fees usually range anywhere from \$5,000 to \$50,000 depending on how much the defendant chooses to fight back, the size of the defendant and the forum

Website Accessibility in the Courts – Forum Shopping

- Due to the lack of clear guidelines much of the existing law is based on the court decisions within the jurisdiction in which the lawsuit is brought
- The Plaintiff's search for a favorable jurisdiction to sue in is also called "forum shopping" and is a significant strategic component of the significant rise in litigation
- The overall uncertainty surrounding ADA cases due to a lack of clear statutory/regulatory authority has created a beneficial environment for plaintiff's counsel to take advantage of the lack of clarity regarding websites/apps and the ADA
- Once clear laws exist, it will likely provide a roadmap for employers to clearly come into compliance and will greatly diminish the benefit of lawsuits for plaintiff's counsel
- In the meantime, the courts are akin to the "wild west" as it pertains to Title III liability for defendants

Website Accessibility in the Courts – Forum Shopping

Top 10 States for Federal ADA Title III Website Accessibility Lawsuits
2019



Nexus to a Physical Place

- Some jurisdictions have ruled that to be covered by the ADA, a website or mobile app must have a nexus to a physical place of public accommodation
- In 2019, the Ninth Circuit reaffirmed in the Robles v. Domino's Pizza case that there must be a nexus to a physical place of public accommodation
- Does not mean that the nexus argument will automatically win the litigation, but it does serve to potentially frustrate plaintiff's counsel from bringing suits for web-based only employers
- New York is one of the most plaintiff-friendly forums as they do not require a nexus to a physical location in order for a defendant to be covered under the ADA
- Has led to thousands of lawsuits in NY in the past two years

Forum Shopping – Damages in Different Jurisdictions

Monetary Damages

- Under the ADA only injunctive relief is permitted, although many states have adopted statutory schemes predicated on the ADA which provide for monetary damages
- In CA, the Unruh Act provides that all persons in the jurisdiction are free and equal and regardless of disability they are entitled to full and equal accommodations, advantages, facilities, privileges or services in all business establishments
- The Ninth Circuit has held that violating the ADA is a per se violation of the Unruh Act
- Under Unruh, a plaintiff is entitled to a minimum of \$4,000 for each time he or she visits an establishment that contains barriers that deny the plaintiff full and equal enjoyment of the premises (or website)
- Even though the “nexus” requirement in the Ninth Circuit can be a deterrent, the potential for the penalties under Unruh can still provide the basis for the effort

Forum Shopping – Defenses Available in Different Jurisdictions

Existence of WCAG Guidelines

- In the Robles case, Domino's argued that its due process rights would be violated under the ADA in the absence of legal technical standards for public accommodation websites/apps and that under the primary jurisdiction doctrine, courts should not rule where enforcement agencies with special expertise (here, the DOJ) had not weighed in
- The court rejected this argument stating that the DOJ's 1996 position that all places of public accommodation must provide effective communication was sufficient and waiting for the DOJ to instate a formal regulation would just "needlessly delay" resolution of the claim
- Several jurisdictions have utilized the WCAG guidelines, even though they are technically voluntary and not applicable to private websites/apps by any law or regulation, to assess compliance
- This allows defendants to argue that they have met WCAG guidelines and thus are in compliance with Title III

Forum Shopping – Defenses Available in Different Jurisdictions

Maximum Flexibility

- The Robles case further expanded this potential defense when it stated “the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute’s requirements”
- This statement seems to provide the basis for an argument that 100% compliance with potentially applicable technical guidance is not required

Alternative Means of Access

- This could also mean that alternative means of access in some cases will be sufficient, such as being able to provide the information by phone to users who cannot obtain it online
- In the Gorecki v. Dave & Busters, Inc. case, the court recognized that providing a disability assistance telephone number may be an alternative means to comply with the ADA but that the employer needed to make sure that such notice and phone number themselves were accessible (could be read via screen-reader software)

Forum Shopping – Defenses Available in Different Jurisdictions

Intent to Return

- In the Garner v. VIST Bank case the defense argued that the plaintiff did not sufficiently establish the intent to return to the website
- Intent to return is a standard defense issue in physical ADA cases
- The court noted that there must be a reasonable inference that the discriminatory conduct will continue and based on past patronage, physical proximity to the business or personal connections to the area, that the plaintiff intends to return
- Unfortunately, it is much easier for a plaintiff visiting a website to make that argument than one that would have to return to a physical location

Case is Moot

- Some defendants have argued that the case is moot because the defendant has already taken action to remedy the alleged access barriers, leaving nothing to adjudicate (in essence, the problem has been solved already)
- This has been successfully argued in Title III physical location cases and has been applied sparingly in website cases
- This is another reason to consider preemptively fixing your website to avoid excessive litigation costs

Best Practices – What Do I Do Now?

- The most conservative approach is to conduct a 3-factor WCAG 2.1 A, AA audit and then remediate accordingly
- The 3-factor approach includes:
 1. Automated WCAG Testing – entire website crawl to capture clear deficiencies
 2. Manual WCAG Testing – Manual review of code and use-cases for unique pages
 3. Assistive Technology Testing – Using tools that people with disabilities use for use-cases on unique pages
- It isn't a guarantee that a business will avoid getting sued although it certainly minimizes the target and helps with litigation defense
- First step is to find a reputable firm that can oversee the process
- Recommend starting with labor and employment counsel to establish the attorney/client privilege; they may work with a non-lawyer firm to handle technical aspects of the review
- Be careful with only utilizing automated tools to assess your website as they appear to only detect a maximum of about 30% of WCAG issues

Best Practices – What Do I Do Now?

- Utilize a consultant that maintains expertise in the following areas:
 - The numerous combinations of use-cases for users with disabilities
 - The assistive technologies used by people with disabilities
 - The website code
 - The WCAG
 - The legal awareness of which issues have the greatest likelihood of triggering legal activity
- The goal is to receive an in-depth WCAG audit report that not only identifies what WCAG violations exist, but also how to fix them
- Once you have the audit, have your internal team(s) or an outside party break-down the tasks and implement the recommended solutions
- If the audit is well-drafted then there is potential savings by utilizing internal teams to perform the remediation rather than paying an outside party
- Once remediated, schedule periodic audits to assess compliance for new content added to the website/app
- Set up a web accessibility committee and implement mandatory training for everyone involved in development of website/app content

Best Practices – What Do I Do Now?

- Invite feedback from customers including instituting a 24-hour monitored assistance telephone number (and possibly an email address as well) to facilitate use of your website/app for individuals with disabilities
- Adopt and publish an outward-facing digital accessibility policy as plaintiff's attorneys are specifically noting an absence of a policy as a detraction from the accessibility of a website
- Don't forget about mobile applications and job-application interfaces when assessing compliance
- If you are settling a case in one jurisdiction it is recommended that you immediately remediate in other jurisdictions because "copycat" lawsuits are common