

Navigating Emerging Issues in Public Accommodations:

An Overview of ADA Title III, the NYSHRL, and the NYCHRL

Presenters:

William H. Ng, Shareholder

Matthew R. Capobianco, Associate



Littler[®]

Presented by



WILLIAM H. NG

Shareholder

Melville, NY

wng@littler.com

631.247.4707



MATTHEW R. CAPOBIANCO

Associate

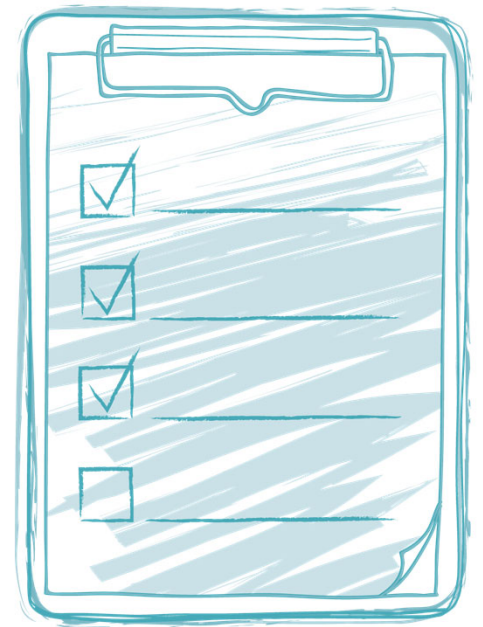
Melville, NY

mcapobianco@littler.com

631.247.4736

Agenda

- ADA: Overview
- ADA Title III: Overview
- Service Animals: Overview
- New York State Law (NYSHRL)
- New York City Law (NYCHRL)
- ADA Title III Lawsuits
- Responding to and Defending ADA Title III Lawsuits





ADA: An Overview

The Americans with Disabilities Act

- The Americans with Disabilities Act (“ADA”) prohibits discrimination on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation, and telecommunications
- Enacted in 1990 by President George H.W. Bush
- Landmark civil rights law; guarantees equal opportunity for individuals with disabilities

The Americans with Disabilities Act

- Title I – Private Employment
 - Reasonable accommodations
 - 15 or more employees
- Title II – Public Entities (such as State and Local Governments)
 - Requires that State and local governments give people with disabilities an equal opportunity to benefit from all of their programs, services, and activities (e.g. public education, employment, transportation, recreation, health care, social services, courts, voting, and town meetings)
- Title III – Public Accommodations
 - No minimum amount of employees required
 - Duty to remove barriers to access
 - “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation”
- Title IV – Telecommunications
 - Addresses telephone and television access for people with hearing and speech disabilities
- Title V – Prohibition on Retaliation

ADA Basics: Who is Covered?

The ADA protects three (3) distinct categories of individuals:

- Individuals who have a physical or mental impairment that substantially limits one or more major life activities;
- Individuals who have a record of a physical or mental impairment that substantially limited one or more of the individual's major life activities (e.g., history of mental illness); and
- Individuals who are regarded as having such an impairment, whether they have the impairment or not

ADA Basics: Major Life Activities

The ADA Defines a covered disability as a physical or mental impairment that substantially limits one or more “major life activities”

Major Life Activities include:

- Walking; Standing; Sitting; Reaching; Lifting; Bending; Working;
- Seeing; Hearing; Eating; Sleeping; Learning; Reading; Concentrating; Thinking;
- Caring for one’s self; Breathing
- Communicating; Interacting with others

ADA Basics: Mental Impairments

Mental impairments include:

- Mental or psychological disorders, such as:
 - intellectual disabilities;
 - disorders that cause injury or damage to the brain (such as Parkinson's);
 - emotional or mental illnesses; and
 - specific learning disabilities (such as retardation).

Public Accommodations

Private entities owning, leasing or operating places of public accommodation must remove architectural barriers that may deny disabled persons full and equal enjoyment of goods, services, and facilities:

- Places of lodging;
- Establishments serving food or drink;
- Places of exhibition or entertainment;
- Public gathering places;
- Sales and service establishments; and
- Exercise and recreation

Public Accommodations (continued)

- All Post-1992 construction, modifications and alterations must be fully compliant with ADA Guidelines
 - New ADA Guidelines were released in 2010;
 - “Safe harbor” provision if constructed in compliance with 1991 standards
 - Very difficult to establish
 - Area-specific inquiry (i.e. counters, bathrooms, entrance)
 - Even a minor alteration or improvement in an area can defeat the safe harbor defense (i.e. painting)

Older Buildings

- Older facilities are not “grandfathered”
- Businesses are deemed to “discriminate” against disabled persons if they fail to remove barriers
 - The duty to remove applies whenever the removal is deemed “readily achievable”
 - Defined as “easily accomplishable” and able to be carried out without much difficulty or expense
 - This often becomes a highly contested issue in litigation
 - It is VERY difficult to establish that a remediation is not readily achievable

Older Buildings (continued)

- Requires a case specific analysis
- Whether something is “readily achievable” depends on the cost of the action, and the size, type and financial state of your business
- The Department of Justice lists 21 action items that are usually going to be deemed readily achievable, e.g.:
 - Creating accessible parking spaces;
 - Installing ramps;
 - Repositioning shelves;
 - Widening doors;
 - Rearranging toilet partitions; and
 - Installing raised toilet seats

Older Buildings (continued)

- When removal is not readily achievable, public accommodations should seek to make the facility fully and equally available through alternatives readily achievable:
 - E.g. Serving beverages at a table for persons with disabilities where a bar is inaccessible, or relocating services to accessible locations
 - E.g. Meeting disabled persons at the door to conduct business if necessary

Public Accommodation Basics

The ADA requires places of public accommodation to make reasonable modifications in policies, practices, or procedures, when such modifications were necessary to afford its services to persons with disabilities. This may include removing architectural barriers.



ADA Accommodations: Interpreters or Effective Communication for Those Who Are Deaf and/or Hard of Hearing



ADA Accommodations: Legal Requirements

- Discrimination is a denial of equal enjoyment of services to individuals with a disability(s)
- Under Title III of the ADA, discrimination is described, in part, as “a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services...or otherwise treated differently than other individuals because of the absence of auxiliary aids and services”

ADA Accommodations: Legal Requirements

- Auxiliary aids include qualified interpreters or *other methods* for communicating with deaf or hard of hearing participants
- Effective communication requires auxiliary aids and services when needed
- The individual with the disability is not required to provide an interpreter
- Companions are not required to help with communication

ADA Accommodations: Legal Requirements (continued)

Auxiliary services include “qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments”



ADA Accommodations: Legal Requirements (continued)

Title III also prohibits excluding or otherwise denying equal goods, services, facilities, and accommodations to an individual because of the known disability of that individual's spouse or other related or associated individual

The Rehabilitation Act, which applies to entities that receive federal financial assistance, also provides that no “qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance”

This requirement includes “provid[ing] appropriate auxiliary aids to persons with impaired sensory . . . or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question”

ADA Accommodations: Service Animals

Service animals are individually trained to do work or perform tasks for people with disabilities



Examples:

Guiding people who are blind, alerting people who are deaf, pulling a wheelchair, alerting and protecting a person who is having a seizure, reminding a person with mental illness to take prescribed medications or to intervene to stop self-harm

Service animals must be permitted in all areas where the handler is allowed to go.

ADA Accommodations: Service Animals

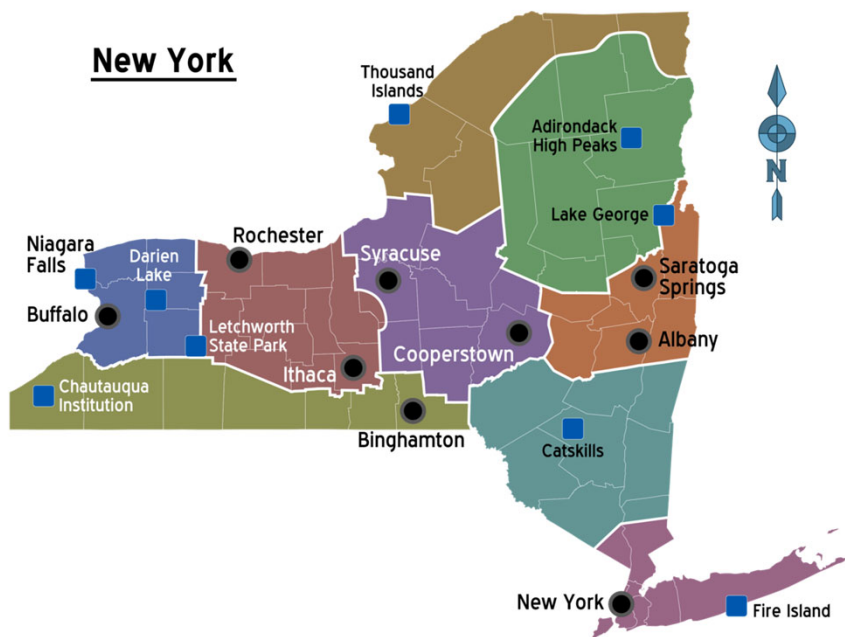
When it is not obvious what service an animal provides, only limited inquiries are allowed. Staff may ask two questions:

(1) is the animal a service animal required because of a disability? and

(2) what work or task has the animal been trained to perform?

Staff cannot ask about the person's disability, require medical documentation, require a special identification card or training documentation for the animal, or ask that the animal demonstrate its ability to perform the work or task.

- A person with a disability cannot be asked to remove his service animal from the premises unless:
- The animal is out of control and the handler does not take effective action to control it or:
- The animal is not housebroken. When there is a legitimate reason to ask that a service animal be removed, staff must offer the person with the disability the opportunity to obtain services without the animal's presence.



The New York State Human Rights Law (NYSHRL)

The NYSHRL

The New York State Human Rights Law

- Prohibits an “owner, lessee, proprietor, manager, superintendent, agent or employee” of any “place of public accommodation” to deny anyone the “accommodations, advantages, facilities or privileges thereof”

N.Y. Exec. Law § 296(2)(a)



The New York City Human Rights Law (NYCHRL)

The NYCHRL

New York City Human Rights Law

- Prohibits discrimination in the provision of “accommodations, advantages, services, facilities, or privileges of the place or provider of public accommodation.”

N.Y.C. Admin. Code § 8-107(4)



ADA Title III Lawsuits

Growth of ADA Title III Lawsuits

- The number of ADA Title III lawsuits filed in federal court has increased nearly 300% in the past 5 years
- Current trend: Demand letters to companies claiming websites and apps are places of public accommodation under Title III of the ADA and are inaccessible to individuals with disabilities
- Vision and hearing impairments and other physical issues are common claims related to inaccessibility
- Top sources of claims:
 - Physical barriers
 - Websites
 - Hotel Reservations Systems
 - Service Animals



What to Do When You Receive a Lawsuit

Take it seriously and move quickly!

- Contact your insurance carrier and or attorney;
- Be sure your counsel knows this area of the law;
- Take pictures of the entire business;
- If you rent, contact your landlord and tender a demand for defense;
- See if you can remedy the problem;
- Thoroughly inspect your property for further access issues.



ADA Lawsuit Remedies

Remedies Include:

- Injunctive Relief
- **Attorney's fees** and litigation costs (mostly driven by attorney's fees)
- Damages for government enforcement – not for private litigants



Websites & Mobile Apps



- Website accessibility
- How can a website be accessible?
- Are all websites covered?
- What are the courts doing?

Typical Website Accessibility Claim

- Plaintiff is person who is visually impaired
- Plaintiff tries to access website using screen reader technology, is unable to do so
- Plaintiff brings suit alleging violation of Title III
- Defendants argue not public accommodation
- Usually quickly resolved for monetary fee and remediations to the website or facility



The Web Content Accessibility Guidelines (WCAG) are organized under 4 principles:

PERCEIVABLE

- 1.1 Text Alternatives
- 1.2 Time-based Media
- 1.3 Adaptable
- 1.4 Distinguishable

OPERABLE

- 2.1 Keyboard Accessible
- 2.2 Enough Time
- 2.3 Seizures
- 2.4 Navigable

UNDERSTANDABLE

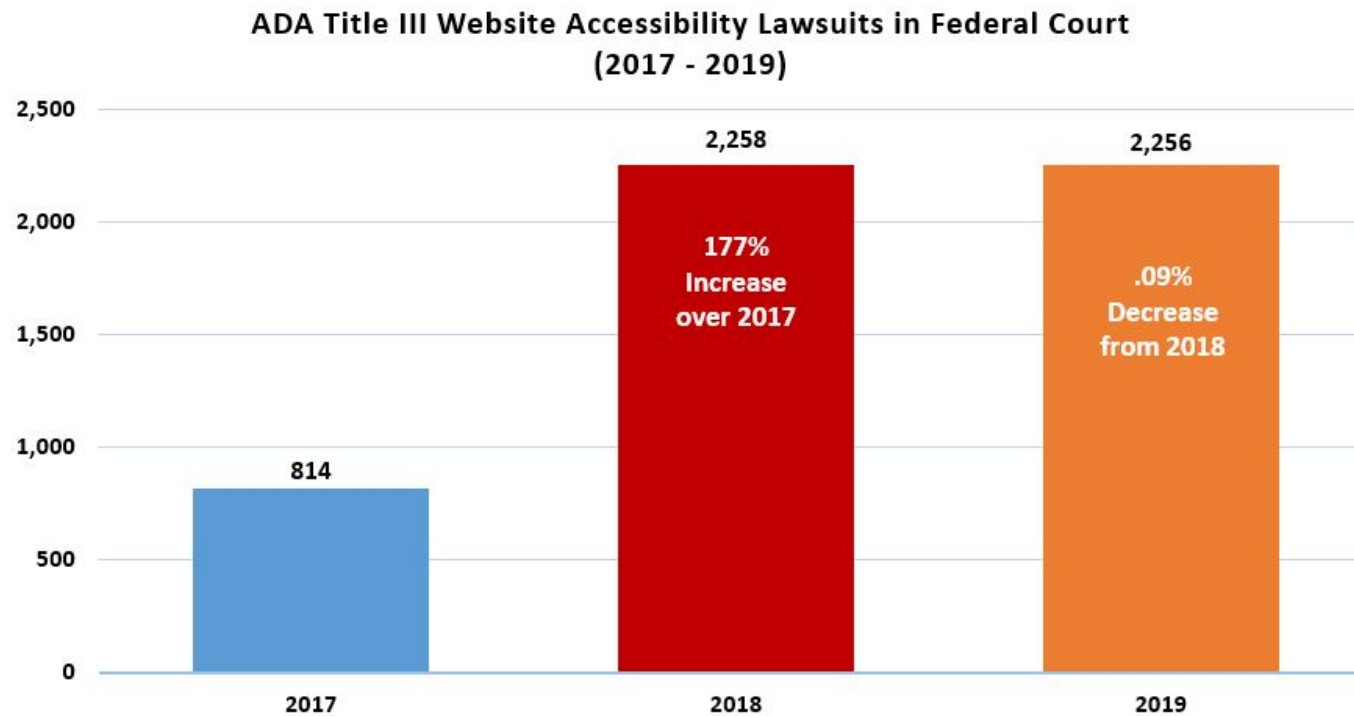
- 3.1 Readable
- 3.2 Predictable
- 3.3 Input Assistance

ROBUST

- 4.1 Compatible

Federal Website Accessibility Lawsuits:

January 1, 2017 to December 31, 2019 (2020 statistics are atypical due to COVID-19)



Avoiding Public Accommodation Lawsuits Generally

- Do Not Assume the Architect, Contractor, or Building Inspector Verified Title III Compliance
- Remove Readily Achievable Barriers
- Audit for Barriers
- Review Your Website and Mobile Apps
- Train Staff on Clearing Obstructions
- Remember, the Benefits of Accessibility

Cluttered Stores: Barrier Issue Litigation

- ADA's regulatory guidance requires:
 - Minimum width of accessible route is 36 inches
 - Accessible space of minimum height and width to check out
- Typical retail establishment
 - Narrow aisles
 - Restocking efforts
 - Merchandise displays
- What issues do these present?
- New claims, seeing more often
- Issue is not your typical barrier or access claim
- Issue is barriers *within* the store
- Typical plaintiff is an individual with limited mobility
- Trying to access store, but can't due to barriers or impediments

Common Problems Under Public Accommodation Laws

- Lack of adequate parking for disabled
 - Lack of proper signs
 - Lack of adequate loading zones
- Lack of access into the building
 - Slope too steep; lack of ramp and or grab bar
 - Lack of clearance space for wheel chairs
 - Lack of signs to accessible doors
- Doors as barriers
 - Five Pounds of pressure
 - Too much of a lip
 - Space to navigate wheel chairs



Common Problems Under Public Accommodation Laws (continued)

- Lack of access within the building
 - Surfaces too high
 - Appliances too high
 - Space to navigate wheel chairs
- Bathrooms
 - Adequate signage
 - Stall with enough space for wheelchair
 - Grab bars non-existent or out-of-compliance
 - Mirrors, sink, toilet or drier too high



Resolution of Website Accessibility Lawsuits

- Fairly new claims in the legal world, so as yet unresolved
- Often settled with a combination of a settlement agreement and a consent decree
- Consent Decree
- Standard terms
 - Defendant agrees to modify the website to conform to the Web Content Accessibility Guidelines 2.0 and/or Web Content Accessibility Guidelines 2.1 Level A and AA Success Criteria
 - Review rights of expert approved by the Plaintiff or both parties
- Injunction (rare)

IRS Incentives

- The cost of alterations may entitle a business to a tax credit, as well as the usual business-related expense deduction
 - “Tax Deduction to Remove Architectural and Transportation Barriers to People with Disabilities and Elderly Individuals” allows deduction of up to \$1,500 for any taxable year;
 - The “Disabled Access Tax Credit” is available for eligible small businesses; provides tax credit of up to 50 percent of eligible access expenditures between \$250-\$10,250
- **WARNING:** Talk to your CPA / Tax Counsel



Navigating Emerging Issues in Public Accommodations: An Overview of ADA Title III, the NYSHRL, and the NYCHRL



William H. Ng
Shareholder, Littler

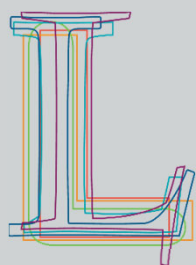
(631) 247-4707
wng@littler.com



Matthew R. Capobianco
Associate, Littler

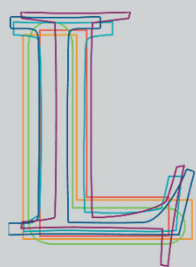
(631) 247-4736
mcapobianco@littler.com





Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



Thank You!

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.