

# Health Industry Website Accessibility

**2019 Lawsuit Trends and Practical Steps to Reduce  
Risk and Promote Compliance for Websites,  
Apps, Portals and Connected Devices**

**April 24, 2019**

**Fredrikson**  
& BYRON, P.A.

# Agenda

- Demographics and legal history
- Key statutes
- Key cases
- Trends & new developments
- Practical steps to reduce risk

# Website Accessibility

## 2008: \$6m Class Action Settlement



REVIEWS

NEWS

VIDEO

HOW TO

SMART HOME

CARS

DEALS

DOWNLOAD

### Target settles with blind patrons over site accessibility

Retail giant will pay \$6 million to plaintiffs and promises to embed Target.com with code that makes it fully usable by blind visitors, ending a class action suit.

Ad closed by Google

Internet



by **Michelle Meyers**

August 28, 2008 11:07 AM PDT

Target and an advocacy group for the blind announced Wednesday that they've settled a **class action lawsuit** regarding the accessibility of Target.com for the visually impaired.

The retail giant will establish a \$6 million fund for settlement claims and promised to make its site fully accessible to blind visitors as part of a deal ending a class action lawsuit filed two and a half years ago.

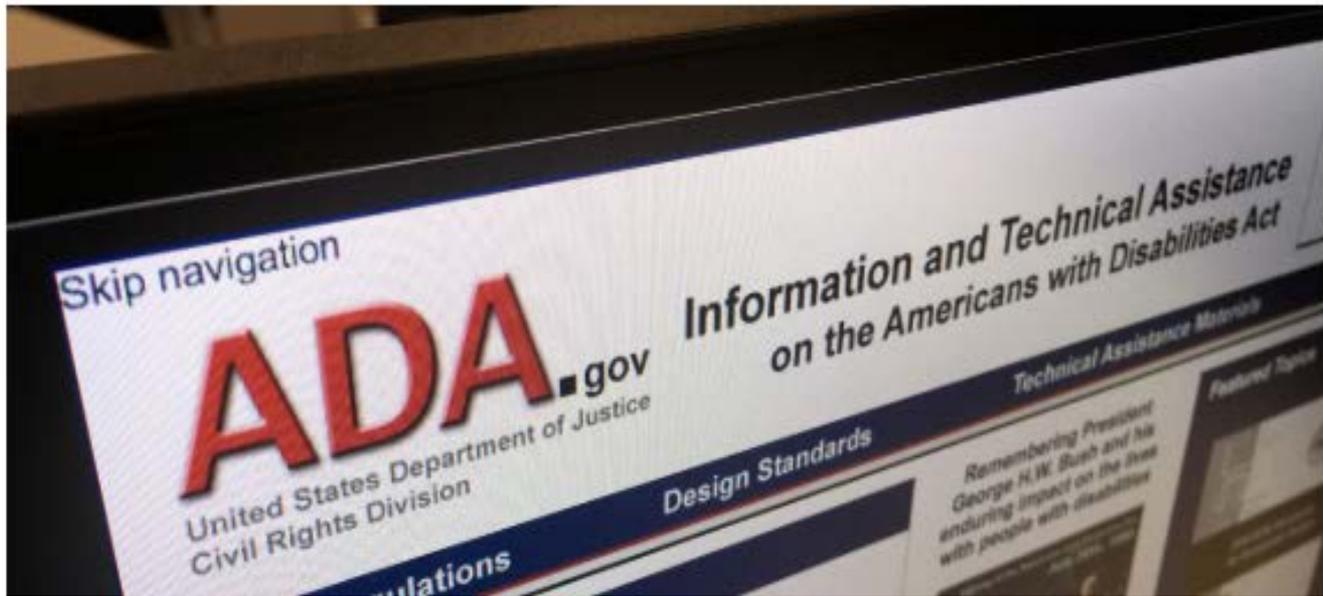


# THE WALL STREET JOURNAL.

U.S.

## Lawsuits Surge Over Websites' Access for the Blind

Complaints are new frontier in federal disability litigation, typically detailing roadblocks for 'screen reader' to



*By Sara Randazzo*

Feb. 17, 2019 10:00 a.m. ET

Businesses with websites that can't be navigated by the blind are getting pummeled with lawsuits.

# Forbes

6,749 views | Feb 22, 2018, 06:55am

## An 'Onslaught' Of Lawsuits From The Blind Is Happening;

The U.S. Department of Justice has yet to release long-promised clarifications on the Americans with Disabilities Act that would help judges handle lawsuits that claim businesses' websites are not handicap-accessible - and the blame isn't on just one of the country's last two, very different presidents.

# Thousands of Known Lawsuits and Settlements



Hospital Corporation of America  
Health care company



BECKER'S

# HEALTH IT & CIO REPORT

## Blind advocacy group sues Epic, again

Jackie Drees - Tuesday, March 5th, 2019 [Print](#) | [Email](#)



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Share 0

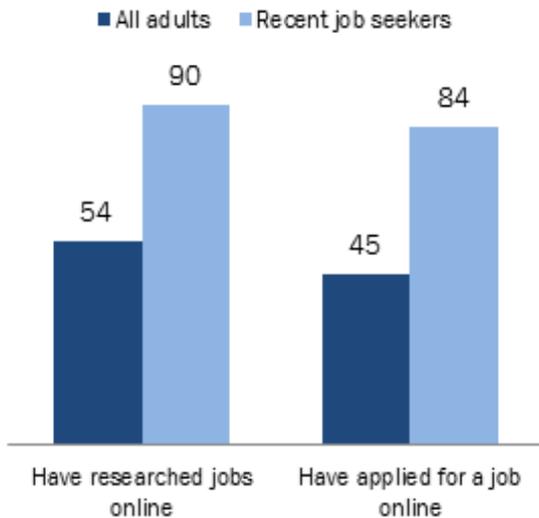
The National Federation of the Blind refiled a complaint against EHR vendor Epic. The organization previously claimed the company's software isn't suitable for blind and low-vision users, according to the *Politico Morning eHealth* newsletter.

In the NFB's new complaint, the organization claims Manuel Morse, a hospital dispatcher at Brigham and Women's Hospital in Boston, was harmed by Epic's software. Mr. Morse filed a lawsuit in 2017 after an earlier version of Epic's software failed to interoperate with the text-to-speech software. The case was ultimately settled.

# What Happened: 2008 → Now

## Researching and applying for jobs online is nearly universal among recent job seekers

% in each group who ...



Note: "Recent job seekers" are defined as those who have looked for a new job in the last two years.

Survey conducted June 10-July 12, 2015. Sample size = 2,001

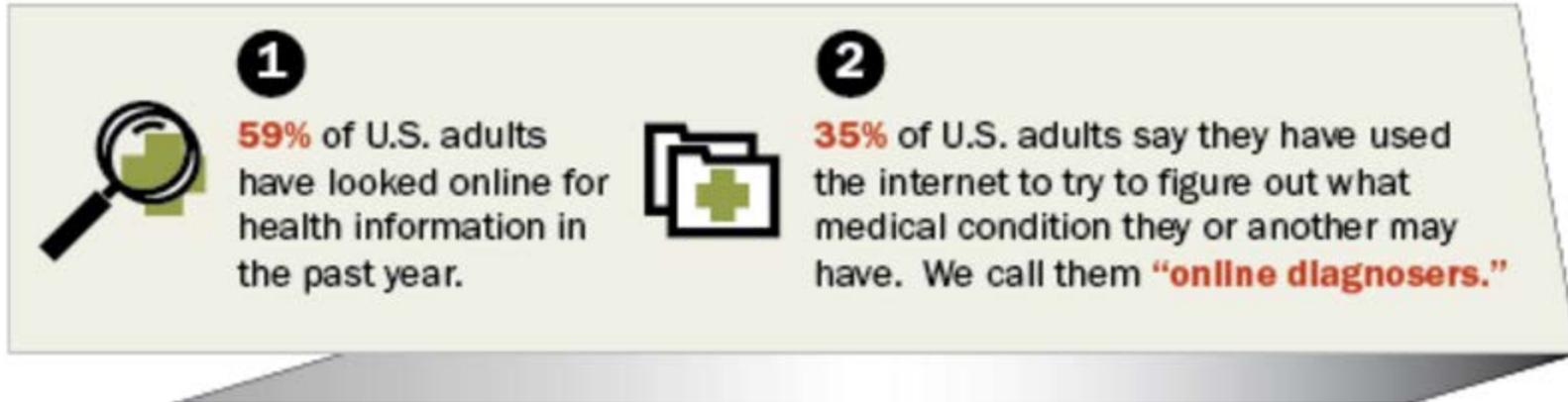
PEW RESEARCH CENTER



Source: Forrester Research Online Retail Forecast, 2012 To 2017 (US)

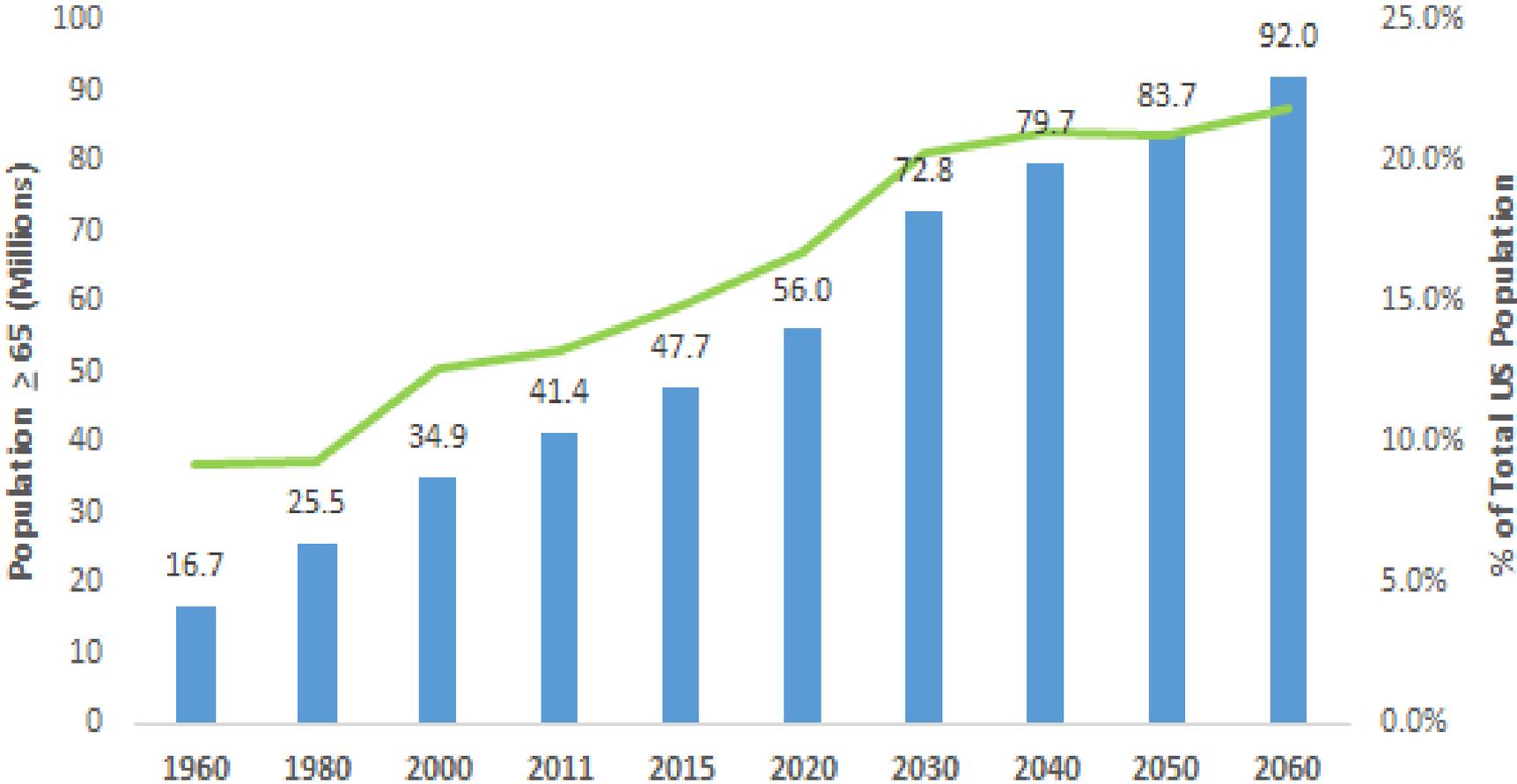
# What Happened: 2008 → Now

The internet as diagnostic tool...



- Source: Pew Internet and America Life Project, 2017

# US Population 65 Years and Older



Source: US Census Bureau

# Disabilities and Disability Status

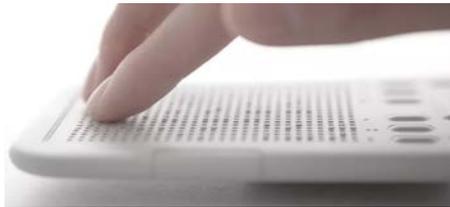
- 1 in 5 Americans...56.7 million people<sup>1</sup>
- Includes wide range of disabilities across four categories
- People move in and out of disabled status



<sup>1</sup> US Census Bureau

# Assistive Technologies

- Digital content correctly designed and coded, offers equal access to information & functionality via AT devices



**Nvaccess**  
Home of the free NVDA screen reader



# What Does the Law Require?



# Americans with Disabilities Act of 1990: Title III

- ADA Title III, Public Accommodations
- *“No individual shall be **discriminated against** on the basis of disability in the full and equal enjoyment of the 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.”* 42 U.S. Code § 12182

# What is a “Public Accommodation”?

- 50+ types of businesses:

- Hospital
- Government Offices
- Bar
- Bank
- Stadium
- Store
- Hotel
- Library
- Health Clubs
- Shopping Center
- Health Clinics
- Lawyer’s Office
- Theaters
- Bowling Alley
- Government Offices
- Senior Center
- Real Estate
- Sport Stadiums

# What is a “Public Accommodation”?

- Full list at: 42 U.S.C. § 12181

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

# ADA Title III: Public Accommodations

- **Discrimination**. Includes failure to make ***reasonable modifications*** in policies, practices or procedures to make a good, service, or item available, unless the modification would ***fundamentally alter*** the nature of the goods, services, privileges or accommodations.

42 U.S. Code § 12182

# ADA Title III: Public Accommodations

- **Discrimination**. Includes failure to take steps necessary to ensure that no individual with a disability is excluded, denied service, or otherwise treated differently because of the ***absence of auxiliary aids and services***, unless such steps would ***fundamentally alter*** the nature of the good, service, facility, privilege, advantage or accommodation being offered or would result in an ***undue burden***. 42 U.S. Code § 12182

# States. Example: California

- CIVIL CODE - CIV
- DIVISION 1. PERSONS [38 - 86] ( Heading of Division 1 amended by Stats. 1988, Ch. 160, Sec. 12. )
- PART 2. PERSONAL RIGHTS [43 - 53.7] ( Part 2 enacted 1872. )
- 51.5.
- (a) No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics

# Rehabilitation Act

- Section 504. (29 U.S. Code § 794)
- “No otherwise qualified individual with a disability...shall...be excluded from the participation in...or be subjected to discrimination under any program or activity receiving Federal financial assistance...”
- Section 508, for federal government.

# Section 1557 of the ACA

## **SEC. 1557 [42 U.S.C. 18116]. NONDISCRIMINATION.**

(a) **IN GENERAL.**—Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

(b) **CONTINUED APPLICATION OF LAWS.**—Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or the Age Discrimination Act of 1975 (42 U.S.C. 611 et seq.), or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).

(c) **REGULATIONS.**—The Secretary may promulgate regulations to implement this section.

# What is Section 1557?

- Nondiscrimination provision of the Affordable Care Act
- Prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities
- Extends or strengthens existing nondiscrimination laws

# What is Section 1557?

- Much more than website accessibility and accessibility technology
- Example: Limited English Proficiency
  - But our focus today is only on accessible technology, such as websites, from a disability perspective

# Accessibility Required by Contract

- General: *“Vendor will comply with all applicable laws and regulations in providing Services and Deliverables.”*
- Specific: Services and Deliverables will comply with ADA, 504, WCAG2.0



AUSTIN

## Sanctioned Austin ADA attorney now targeting websites

*Attorney claims healthcare websites don't meet standards for the disability community, according to court filings*

*"Since your website does not comply with Federal law, you must immediately self-report to the Department of Health and Human Services (DHHS) and forfeit any Federal funds received [from Medicaid or Medicare] until you have completed recertification."*

# Typical Complaint

Case 1:19-cv-00667-MKB-RML Document 1 Filed 02/04/19 Page 1 of 28 PageID #: 1

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
ARETHA CROSSON, Individually and as the  
representative of a class of similarly situated persons,

Case No. 19-cv-667

Plaintiff,

- against -

HEARTBEAT HEALTH, INC.,

Defendants.

-----X

**COMPLAINT – CLASS ACTION**

# Sampling of Key Cases



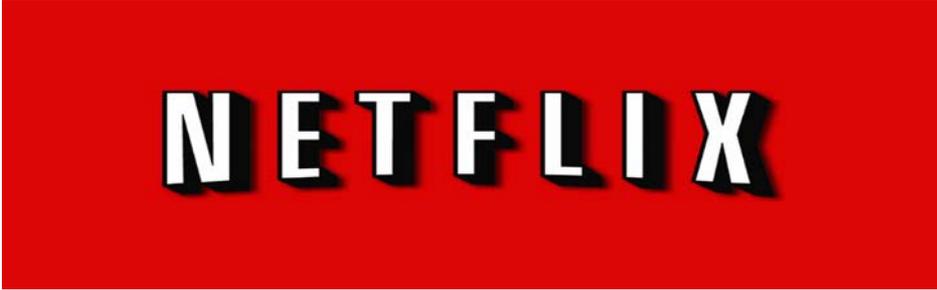
# National Federation of the Blind v. Target

- 452 F.Supp.2d 946 (N.D. Cal., 2006)
  - Complaint: target.com website is inaccessible to the blind and therefore violates the ADA and state law

# National Federation of the Blind v. Target

- 452 F.Supp.2d 946 (N.D. Cal., 2006)
  - On Target’s motion to dismiss:
    - Claims that target.com has a nexus to goods and services offered in store survive
    - Court grants dismissal of claims to the extent target.com does not impact enjoyment of goods and services offered in store
  - Case ultimately settled. Target agrees to payment and site improvements.

# Cullen v. Netflix, No. 13-15092 (9<sup>th</sup> Cir. 2015)

The Netflix logo is displayed in white, bold, sans-serif capital letters with a black drop shadow, centered on a solid red rectangular background.

U.S.C. § 12182(a). We have previously interpreted the statutory term “place of public accommodation” to require “some connection between the good or service complained of and an actual physical place.” *See Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000). Because Netflix’s services are not connected to any “actual, physical place[],” Netflix is not subject to the ADA.

Contrast: National Association of the Deaf v. Netflix, 869 F. Supp.2d 196 (D. Mass. 2012). And Access Now v. Blue Apron, New Hampshire, Case# 1:17-cv-00116-JL (Nov. 2017).¶

# Robles v. Dominos Pizza

- Case No. 17-55504, 2019 WL 190134 (9th Cir., Jan 15, 2019)

SIGN IN & EARN REWARDS ▶ Don't have a Pizza Profile? CREATE ONE ▶

**START YOUR ORDER** DELIVERY OR CARRYOUT

ORDER ONLINE MENU COUPONS LOCATIONS TRACKER PIZZA PROFILE GIFT CARDS

**CHOOSE ANY 2 OR MORE FOR \$5.99 EACH** USE COUPON

MEDIUM 2-TOPPING PIZZAS\*

OVEN BAKED SANDWICHES

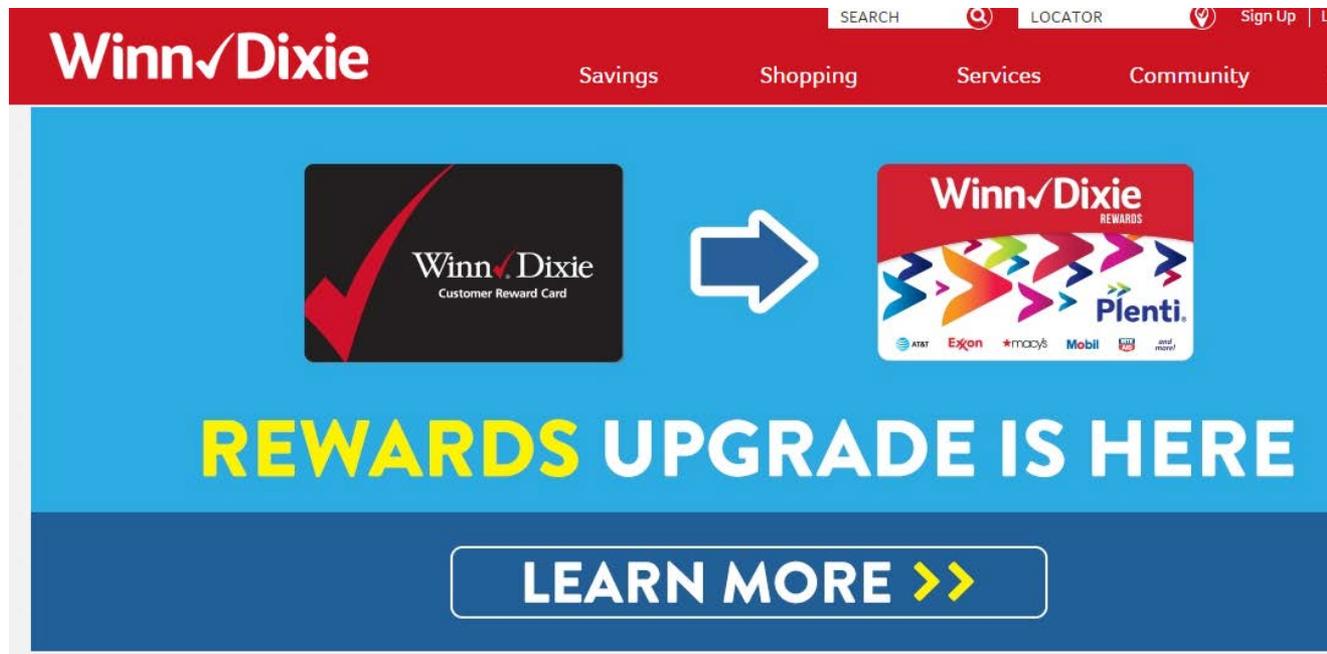
PASTAS

~ MEDIUM 2-TOPPING ~  
**HANDMADE PAN PIZZAS \$8.99 EACH**  
USE COUPON

ALL DAY. EVERY DAY.  
**CARRYOUT**

# Gil v. Winn Dixie Stores

- Case No. 16-23020-Civ (June 16, 2017, S. D. Fla.)



The image shows a screenshot of a website banner for Winn-Dixie. At the top, there is a red navigation bar with the Winn-Dixie logo on the left and links for SEARCH, LOCATOR, Sign Up, and Log Out on the right. Below the navigation bar, there are links for Savings, Shopping, Services, and Community. The main banner has a blue background. On the left, there is a black Winn-Dixie Customer Reward Card. A large white arrow points from this card to a new Winn-Dixie REWARDS card on the right. The new card features a colorful, multi-colored arrow graphic and the Plenti logo. Below the cards, the text "REWARDS UPGRADE IS HERE" is displayed in large, bold, yellow and white letters. At the bottom of the banner, there is a dark blue bar with a white button that says "LEARN MORE >>".

# Defenses

- Carroll v. New People's Bank, 1:17CV00044. (W.D. Va., April 5, 2018)
  - No standing for 300 mile distance; moot because defendant began voluntary fix
- But see, Haynes v. Hooters, 17-13170, 2018 WL 3030840 (11th Cir., June 19, 2018)
  - Reject mootness defense

# Bottom Line On Litigation

- 90%+ of cases settle in 2 days to 6 months
- Most but not all cases survive a defense motion for summary judgement
- Legal arguments continue to evolve

# Employment & Accessible Technology

BROWN GOLDSTEIN LEVY

## Blind Employee Settles Lawsuit Against Miami-Dade County Public Schools

February 26, 2019

**School System to Make Websites and Software Accessible**

Settlement payment: \$250,000¶

Agreement to improve technology to make it accessible¶

Administrative support for employee until technology improved



# Modern Healthcare

*The leader in healthcare business news, analysis, research & data*

March 06, 2019 12:25 PM

## Epic EHR software isn't accessible for blind hospital employees, suit claims



The National Federation of the Blind sued Epic Systems Corp. over its electronic health record software, alleging that blind hospital employees can't use the program.

The complaint in federal court in Massachusetts last week alleges a part-time hospital dispatcher at Boston-based Brigham and Women Hospital couldn't perform his job duties after the provider went live on an Epic EHR in 2015. The employee was ultimately placed on a paid leave of absence because of the difficulties, the lawsuit alleged.

# Internet of Things (IoT) Smart Devices



**Release Date:** Friday, October 26, 2018

**Category:** [National](#)

**FOR IMMEDIATE RELEASE**

## Walmart Sued by Blind Maryland Residents over Self-Service Checkout Kiosks

### National Federation of the Blind and Its Maryland Affiliate Also Plaintiffs

**Baltimore, Maryland (October 26, 2018):** When Cynthia Morales and her boyfriend Linwood Boyd, who are both blind, made a routine trip to a Walmart in Owings Mills in late July of 2017, they didn't expect to have to get the police involved.

# Scanning Software: U.S. Government



[Home](#) » [Automated Evaluation Tools](#)

## Automated Evaluation Tools

No automated evaluation tool can tell you if your site is accessible, or even compliant. Manual testing is always necessary.

# Scanning Tools Are Unreliable. Accessibility is a Human Test.

The screenshot shows a web browser window with the address bar displaying <https://www.nfb.org>. A WAVE accessibility scanner overlay is visible on the left side of the page. The overlay has a 'Summary' section with the following data:

Category	Count
Errors	11
Alerts	29
Features	9
Structural Elements	99
HTML5 and ARIA	213
Contrast Errors	3

Below the summary, there is a 'Panel Options' section with a 'DETAILS' link and a note: 'A listing of all the WAVE...'. The main content of the page is the National Federation of the Blind logo, which consists of a stylized figure with arms raised, surrounded by colorful lines. To the right of the logo is the text 'NATIONAL FEDERATION OF THE BLIND' and the slogan 'Live the life you want.' Below the logo, there is a green highlighted area containing the text: '\*National Federation of the Blind. Click to return to Homepage.\*' An 'alt' icon is visible above this text.

# What Should I Do to Reduce Risk?

## What is the Standard for Accessibility?

- What must a website operator do, to avoid alleged discrimination?
- U.S. Dept. of Justice: WCAG2.0AA
- Some plaintiffs: WCAG2.0AA
- Gil v. Winn-Dixie Stores, Dist. Ct. FL: WCAG2.0 (June 16, 2017)
- Issue: WCAG Version 2.1 AA

# WCAG Highlights

- <https://www.w3.org/TR/WCAG20/>
- Provide alt-text / text alternatives for images
- Captions for videos
- Keyboard navigation (not mouse)
- Consistent design
- Color contrast

# Action Items to Reduce Risk, Promote Compliance

- Audit and improve website (+ apps)  
(+ employee tools)
- Procurement / vendor selection  
process
- Assess the remediation (re-check)
- Post accessibility statement, external
- Accessibility policy and plan, internal
- HR and job portals

# Action Items to Reduce Risk, Promote Compliance

- Monitor, its not just one-time event
- Technical training
- Accessibility coordinator
- Alternate methods (telephone support)
- Don't ignore demand letter or employee request
- Insurance (cyber/website)

# Pro-Customer Warranty for Contracts with Tech Vendors

- Accessibility Warranty. Vendor represents and warrants to Client that all deliverables and all services (specifically including software-as-a-service, hosting, subscription, or similar services and offerings): (a) shall be accessible to and usable by disabled individuals using assistive technology (such as a screen-reader or captions); (b) will comply with the applicable requirements of the Americans with Disabilities Act, Rehabilitation Act, and equivalent state or local anti-discrimination law, including any related regulations; (c) shall meet or exceed the standards set forth in the Web Content Accessibility Guidelines (WCAG) version 2.1 AA, or higher, as well as any subsequent standard endorsed by the U.S. Department of Justice; and (d) for any mobile application or “app,” meet or exceed the Apple and Google developer guidelines for apps. In addition to any other remedies, Vendor shall defend, indemnify and hold harmless Client from any claim, demand, allegation, suit, or charge arising from or related to any breach or alleged breach of the foregoing representation and warranty as well as correct such deficiency at no additional charge or fee to Client.

# Questions?

**Fredrikson**  
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# Contact Information



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