

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.

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



HARVARD
UNIVERSITY



Humana



JOHNSTON & MURPHY



Blind advocacy group sues Epic, again

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



SHARE



Tweet



Share 0

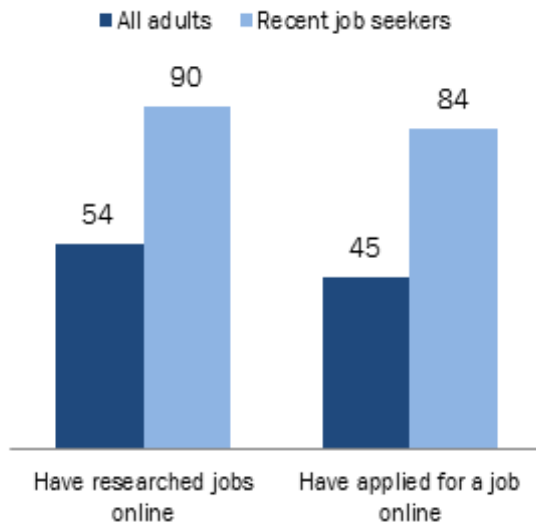
The National Federation of the Blind refiled a complaint against EHR vendor Epic. The organization previously claimed the company's software isn't suitable for blind and low-vision users, according to the *Politico* Morning eHealth newsletter.

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

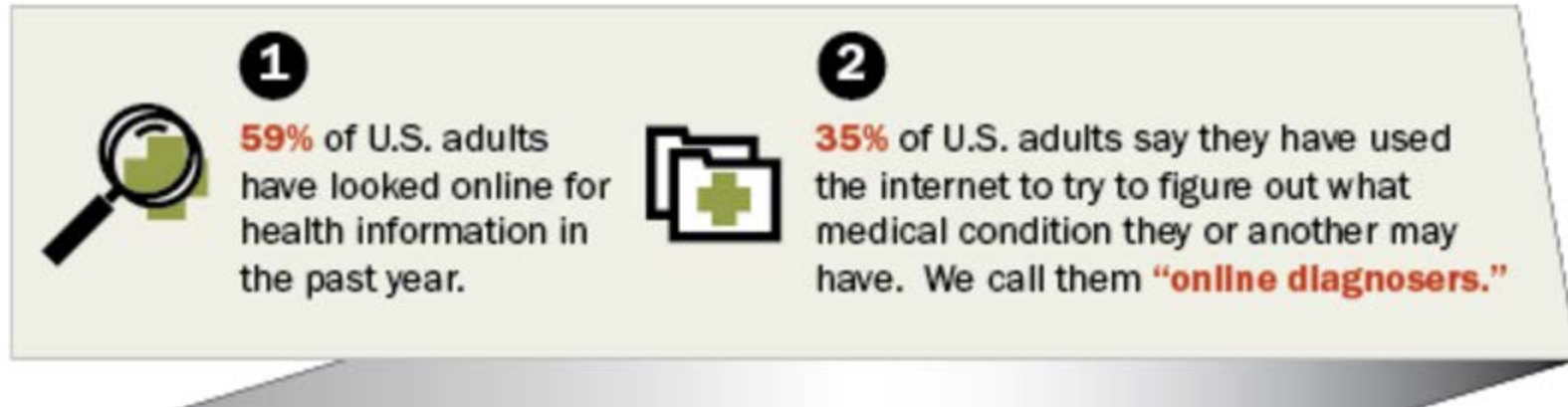
PEW RESEARCH CENTER



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

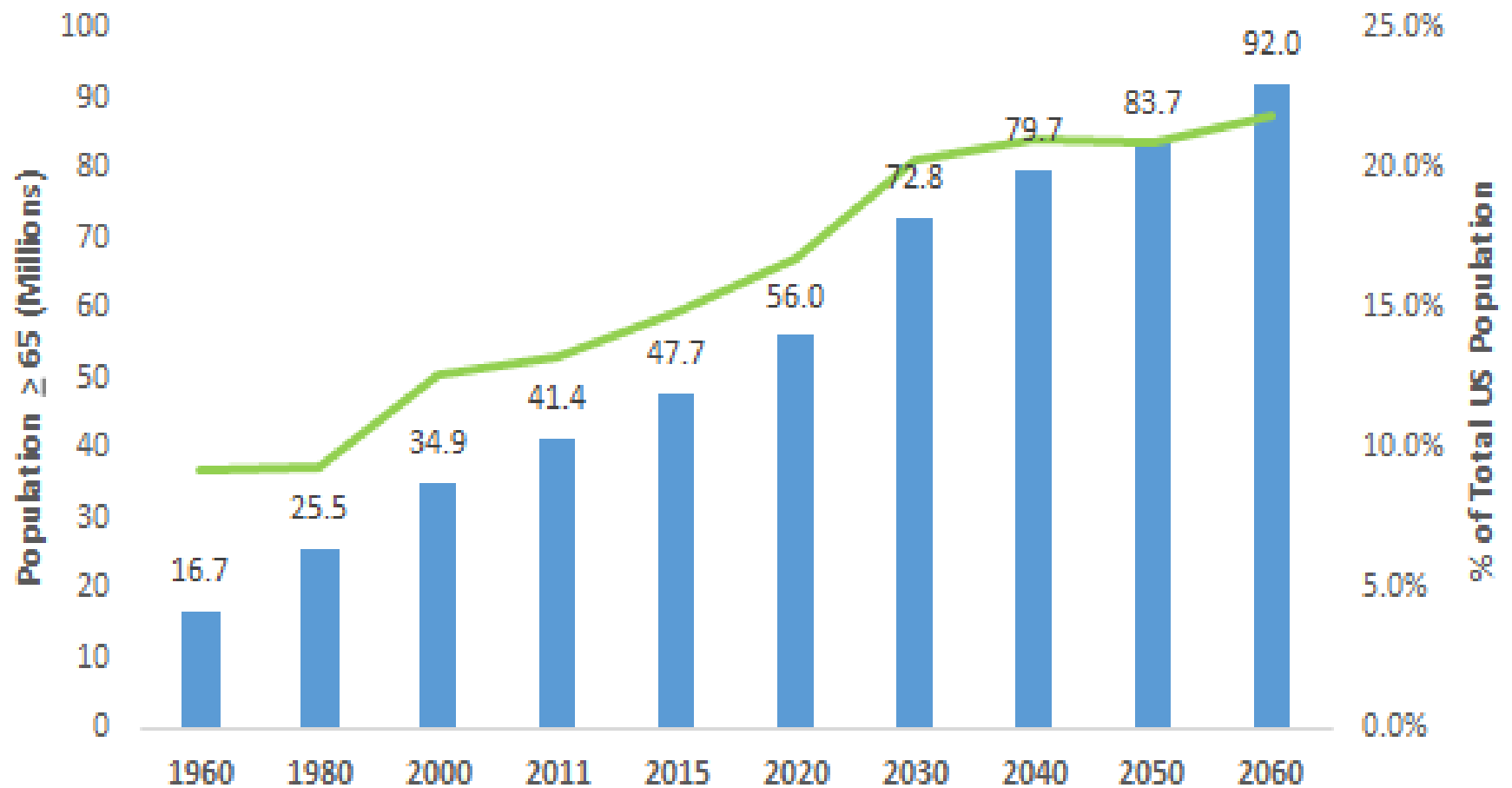
What Happened: 2008 → Now

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

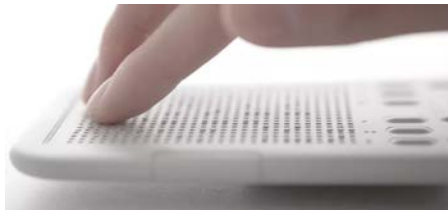
- 1 in 5 Americans...56.7 million people¹
- Includes wide range of disabilities across four categories
- People move in and out of disabled status



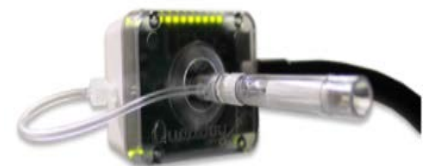
¹ US Census Bureau

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 (9th Cir. 2015)

The Netflix logo, consisting of the word "NETFLIX" 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 Promise? CREATE ONE ▶

START YOUR ORDER **DELIVERY** **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

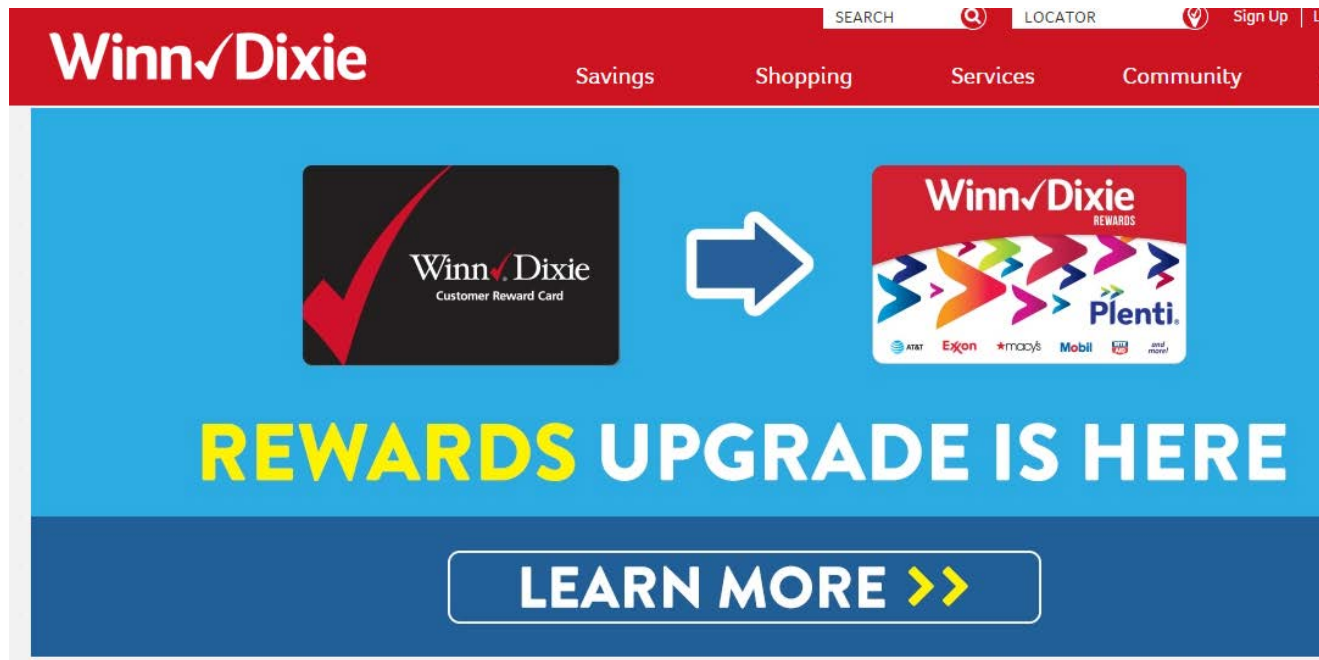
MEDIUM 2-TOPPING HANDMADE PAN PIZZAS \$8.99 EACH

USE COUPON

ALL DAY. EVERY DAY. CARRYOUT

Gil v. Winn Dixie Stores

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



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

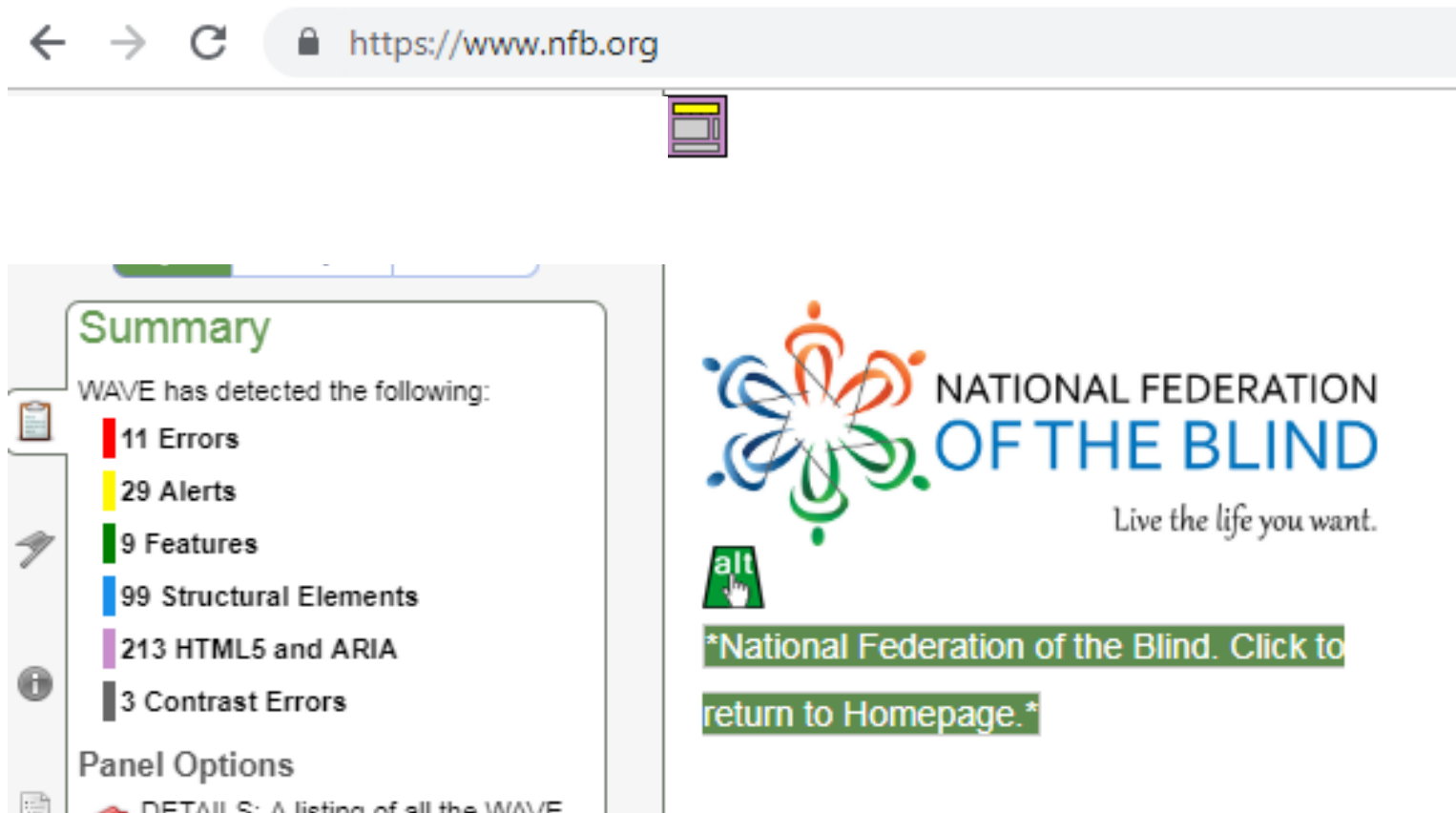


[Home](#) » [Automated Evaluation Tools](#)

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>. The page content includes the National Federation of the Blind logo, which features a stylized figure in blue, orange, and green, and the text "NATIONAL FEDERATION OF THE BLIND" and "Live the life you want." Below the logo is a green button with a white hand icon and the text "alt".

Overlaid on the left side of the browser window is the WAVE accessibility scanner interface. The "Summary" panel lists the following detected issues:

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

Below the summary, the "Panel Options" section is visible, showing a "DETAILS" link and a description: "A listing of all the WAVE".

Below the logo, the alt text for the button is displayed in a green box: `*National Federation of the Blind. Click to return to Homepage.*`

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?

Contact Information



Steven E. Helland
612.492.7113
shelland@fredlaw.com