

Trends in Digital Accessibility Lawsuits

Intro

Lori

Hey, everybody. Happy 2023 and welcome to our first event of the year at Accessibility.com. If we haven't met before, my name is Lori. I'm the Director of Conferences at Accessibility.com. We have a great lineup ahead for you in 2023, starting with today's presentations on Trends in Digital Accessibility Lawsuits. So our report just came out, our 2022 report.

If you haven't had a chance to download it yet, you can grab it from our homepage Accessibility.com. There's a big button in the, you know, on the top of the screen in the left. It's a big image. You can go ahead and download the report from there and take a look at it. And that is what our presenters today, Reeve Segal, our contributing attorney for Accessibility.com and Craig Leen who has a whole huge resumé behind him but most notably for this event, Former Director of the OFCCP.

So the two of them will be going through the report and sharing and highlighting some of the trends and comparisons from the last few years in website accessibility lawsuits. Thank you to today's sponsors. We would not be able to put this event on for free for you without their assistance. Our sponsors for today's event are Verblt, Barnes Creative Studios,

AccessibilityWorks, and the Bureau of Internet Accessibility. So from our event page at Accessibility.com/events, if you navigate to today's event, you will be able to see the sponsors logos and you can click on those and access some information about them and how they can help your organization become more accessible. Today's event is being recorded and will be available for you to watch on demand after the event.

Look out for an email from me this evening with details on how to access that. And without further ado, let's get started with today's event: Trends in Digital Accessibility Lawsuits.

Presentation

Reeve Segal

Hello everyone, and welcome to our presentation on Trends in Digital Accessibility Law. I'm Reeve Segal, and I'm a contributing attorney here at Accessibility.com, working with the legal database. And I'm honored today to be joined by attorney Craig Leen. Craig, if you just wanted to introduce yourself and maybe give some of your background.

Craig Leen

Yes, that'd be great. It's so good to be here. My name is Craig Leen I am a partner at K&L Gates in Washington, D.C. I'm in our Labor Employment and Workplace Safety Practice Group, and I'm also the co-lead of our OFCCP and affirmative action compliance area focus. Before I was at OFCCP, where I do advise on accessibility issues, DEIA issues, pay equity, creating a pay equity programs and DEIA programs. But before I was doing that, I was I was the Director of the Office

of Federal Contract Compliance Programs at the U.S. Department of Labor, which is responsible for monitoring, regulating and enforcing civil rights obligations as to federal contractors and subcontractors. There's about 25,000 federal contractors in the United States.

And when I was the OFCCP director, I would publish guidance, including a lot of guidance with the help of my career staff and political staff at OFCCP. I've published a lot of guidance on Section 503 of the Rehabilitation Act, which is a parallel statute to the Americans with Disabilities Act. So... and which has similar obligations. In fact, 503 tends to have more obligations as it also has an affirmative action component.

So I have a lot of experience with 503 and the ADA. I also just a couple of other things. I teach at George Washington University Law School. I'm a professor of government lawyering. I teach in their in their teacher government lawyering class to students in their field placement program. And I also teach, I'm a professorial lecturer in law and I teach I'm teaching local government law this semester as well.

And then finally, I'm the Vice Chair of the DC Advisory Committee to the U.S. Commission on Civil Rights. I want to be clear that I'm here in my personal capacity, and as an attorney, K&L Gates, and I'm not here in that capacity, but it does inform my knowledge of this issue. I continue to be involved in the civil rights area.

Reeve Segal

Right. Well, needless to say, we're in good hands today. So I appreciate you joining us. And let's just move on to the overview of what we're going to be looking at today. So, yeah, this is sort of the big picture of the presentation today. We're going to be looking at website accessibility lawsuits, starting with something called the Funnel Technique Process, and that's sort of how these websites are targeted.

Then once they're targeted, usually it starts with a notice or demand letter to the allegedly offending site. Then, you know, in some cases the lawsuit's filed. Well, we're then going to move on to some of our research system here for how we curate our database of Accessibility.com and go over some of the key data points for 2022, you know, broken down by the cases and the industries, the plaintiffs, the law firm and then the various states.

And then we're going to conclude with where we think the lawsuits are headed for 2023. And then hopefully have time to answer some questions. So it's sort of just the big picture nuts and bolts of what we're going to look at today. And yeah, when we start, you know, it's hard to know exactly., and Craig, you can tell me your thoughts on this, but it's hard to know exactly how the plaintiffs are doing this and kind of which websites they're choosing to target.

But big picture, we know based on some patterns, it looks like they're either going on to the plaintiffs' attorneys are maybe going on to Dun and Bradstreet or Hoover's. You know, that searches company, you know, can search a company on their search engine or possibly by the technology used and then targeting people that way. It doesn't seem like it's sort of organic,

like grandma is just trying to buy tickets on a website and the website's not compatible and it sort of just happens naturally.

We see a lot of patterns of the same industries getting hit a lot, or this week they're targeting restaurants or this week they're targeting schools. So, you know, it seems like a lot of this is based on professional sort of plaintiffs. So I don't know if that's been your experience as well.

Craig Leen

Yes. You know, I think that we've reached a tipping point here where if you're involved in commerce and you have a website that you use, you will eventually, someone will come knocking at your door. And it's not, as you mentioned, it's not necessarily going to be grassroots, someone who's one of your customers using it. But there's there's enough of these law firms that are focused on this and that are doing the searches and sending the demand letters combined with on the plaintiff's side, a lot of advocates who are also looking and if they see something might inform one of these entities, there's enough of that that it's going to happen.

Plus, as you're going to see, not only do you have these several firms that are bringing lots of suits and sending lots of demand letters every year, you also now have the US Department of Justice that's issued guidelines indicating that they're going to be focused on this as an enforcement priority. They're more likely, I would say, probably to focus on larger companies, whereas a lot of the lawsuits have been brought against middle-sized companies, as you'll see.

So regardless, I think that at this point, if you're a general counsel at a company or you're or like I am, I'm outside counsel to a lot of companies, a management-side attorney, I would be advising to take website accessibility very seriously and make that a top priority.

Reeve Segal

Definitely, definitely. And as you said, you know, looking at the next step of the notice, demand letters. So once, you know, a plaintiff's firm has honed in on particular, you know, defendants or companies that they want to go after, they usually start with a notice or demand letter. And typically these are sort of very standard pro forma letters.

They mention the name of the firm and the, you know, disabled consumer that they're representing, the website that's at issue... Then the type of violation, either, you know, Americans with Disabilities Act or here in California, the Unruh Act, and then the time frame for them to for the website to fix it or a suit will be filed.

And you can tell me your experience. But I think, you know, if it gets to this stage, I feel like a vast majority of these matters are settled at this stage rather than suit. Or how would you recommend your to your potential clients? I think if they don't have the guidance of you, they might think, oh, let's just go pay this and get it done with.

But maybe you could you give your clients different advice to maybe realize the changes they can make beforehand? Or you know what? What do you generally do if you get a client in this situation?

Craig Leen

So so I'm here in D.C. and I tend to take a national look at these issues. And so, you know, where I see now OFCCP has said, and even when I was director I said, that you know, website accessibility is something that needs to be done. And then you have and you have all OFCCP and the EEOC continuing to take that approach.

And that's that's the position across administrations. You have the Department of Justice saying this. On the national level it's very clear that this is the direction that the regulatory agencies are moving, even even though there's still some differences in the case law based on different circuits, there does seem to be a push toward a national view that you have to have an accessible website. And we can talk about what that means specifically.

Then on the state level and local level, you see that because the ADA typically doesn't have a doesn't have a compensatory damage component, and that's typically you're seeking injunctive relief and attorney's fees when you're a plaintiff bringing an ADA claim. What you've seen is a lot of plaintiffs moving towards some of the state and local laws which provide for compensatory and sometimes punitive damages.

You mentioned the California Unruh Act. You also have and probably the biggest one at this point is the New York Human Rights Act, both the state and the local, which, you know, many of the lawsuits are being brought under. So, you know, what typically you'll see is you'll see an ADA claim combined with a California Unruh Act claim or a New York state claim.

They'll bring that ADA claim to bring the claim in federal court, often, and they'll have supplementary jurisdiction relating to the state claim. Or maybe they'll just bring the state claim, depending on where they are. So these in many ways, you have to take a really close look at the state laws and the state precedents because that's where there's an ability to get compensatory damages.

And you're seeing that more and more be the focus of these suits.

Reeve Segal

Right? Yeah, I know in California with the Unruh it's about \$4,000, I think, for compensatory. And then, of course, attorneys fees can go up thousands of dollars. But would you say this is sort of a numbers game where they where the plaintiff's side wants to sort of hit as many potential targets as possible and get, you know, 5, 10, 15, 20 grand from them rather than hit one for a million?

And it's sort of like how it used to be the wild, wild west with the physical disabilities space, with restaurants and wheelchair ramps and that sort of thing.

Craig Leen

Well, I think it's a complex question. I think that on the one hand, you do see on the plaintiff's side, a lot of people who believe very strongly in disability inclusion and these acts, that they believe in what they're doing. But there is concern and I think this concern is even being expressed by a number of legislators that, you know, you want the courts to be used for substantial suits where there's a where there's a material violation of the ADA or, you know, a failure to have website accessibility that impacts people and that those, you know, you want to see action, you know, the focus of efforts be there. For situations where you have like a technical violation, but you're seeking to be accessible and have website accessibility, I think there's a concern that too many lawsuits are being filed in those areas on very technical violations that that basically in what's driving those claims is not the substantive legal issue for the person with disability who is making the claim, but it's the attorneys fees and the damages that could be automatic that come with that technical violation.

So I think it's important. So, you know, there's arguments on both sides here. I think from the management side, what I would say is, you know, companies would obviously prefer a letter to a lawsuit filed out of the blue and would actually probably prefer you to reach out to them and let them know about it to correct it.

Having said that, because of the fact that you do have these fee shifting provisions and these attorney's fees clauses, you're probably going to continue seeing a lot of these lawsuits brought, and a lot of demand letters sent until you see congressional action or state action that limits these types of suits.

Reeve Segal

Right. And in terms of the lawsuits, the next...

Craig Leen

[inaudible.] I'm sorry, what do you say Reeve?

Reeve Segal

No, continue. Yeah. What are you going to say?

Craig Leen

Well, you know, one thing is you might, you know, one thing I've seen discussed a lot, sort of the good faith, sort of safe harbor provision where you get a letter and if you respond to it and you make the correction, then then you don't you're not subject to a lawsuit. The counter points that have been made about that are well, you don't want companies just waiting until they get a letter.

You want them to be proactive. And in fact, that's a lot of my practice is advising, you know, a lot of companies out there, they're not only, you know, they don't want to be sued, obviously, but also they want to they're committed to diversity, equity, inclusion and accessibility. So they

want to be proactive and they want to go beyond the requirements of law and have these accessibility programs in place. And that's part of who they are as a company. And and there are companies like that as well. And it's important to note

Reeve Segal

I know. That's a good point. And if it, you know, continuing with the funnel approach here, once they've targeted the industry or the company that they want and then they send a demand letter, and if it doesn't get resolved, then the next step in the funnel is to file a lawsuit. And I think you had mentioned this previously, when you look at some of the elements, this is a typical New York Southern District complaint.

It sort of mixes some of the ADA. And like you said, there could be some potential state, you know, requirements that that have allegedly been violated. And, you know, these are, again, very pro forma type of complaints where we've got, you know, the the alleged, you know, failures that the plaintiff or sorry, that the company has failed to do.

Like, for example, the screen reader fails to read the banner, the screen reader skips over certain texts. And I don't think they usually get too specific. I think they're trying to cast a bit of a broad net on on what they see as the website, you know, having been in violation of. But, you know, these are sort of not very, you know, unique complaints.

I mean, they could fire off, you know, five or ten of these in a day. It seems to be our experience.

Craig Leen

I think the underlying concern from the company's perspective is that they could be in compliance. They could be filing, pardon me, they could be following Web Content Accessibility Guidelines 2.1 AA, for example, which is, you know, I think generally viewed as the current standard. They could be following that and yet still have a couple of technical issues. And, you know, and they may end up being subject to a lawsuit or to having to pay you know, under the state laws, damages, or potentially under the federal law, attorneys fees.

So... and that's where I think, you know, you want to encourage companies to comply. And to and you don't want them to still be subject to suit if they comply. And so there is a difference in when I was at OFCCP, we always treated this differently. There's technical violations and then there's material discrimination violations. And, you know, right now I think the current state of the law doesn't seem in this area to recognize the difference between the two.

Reeve Segal

Right? Definitely. I think, yeah, you're talking about more of sort of the spirit of the law approach versus kind of the technical thing. And if their real concern on the plaintiff's side was getting the website fixed, then they should be okay with giving the defendant time to fix it and make the changes. But if they're really just interested in money and plaintiffs' fees than, you know, attorney's fees, then they just want to get their money and frankly, maybe it sounds like

they don't even really care. I mean, they do want the site to be fixed, but they're ready to move on to the next victim.

Craig Leen

Well, I think I think the concern is that for for like for a company or let's say a contractor that's subject to OFCCP, if it's the EEOC or OFCCP talking to you about your website, you can talk to them about it. You can show them what you've done to comply. They may end up only finding a technical issue and then they can find you to be in compliance.

They can enter into an agreement with you and you're dealing with one entity that speaks for the country. I think the issue with sort of the decentralized nature of our of our private litigation system is that you could be sued by five different plaintiffs. And in fact, you could be sued successively. And every one of them may want you to do something different.

And in the fact that you comply with one doesn't necessarily mean you won't be subject to suit by another. So, you know, there's not it's very and I do have to say it would be helpful to have a general national standard as well so that companies know what to comply with and at this point, DOJ still hasn't come out with regulation setting that national standard.

Reeve Segal

True. And then, you know... [inaudible]

Craig Leen

Nor Congress.

Reeve Segal

Right.

Craig Leen

Has come out with the national standard.

Reeve Segal

And then the final step in the process then is, you know, what we call the Prayer for Relief. This is what the plaintiff is actually looking for when they file the lawsuit. And like we said, there's sometimes compensatory damages. And like you said in New York here, for example, in Section E, they've got their own civil rights acts that could be violated.

And then the main thing, too, that the plaintiffs' attorneys are focused on are the award and costs for the reasonable attorney's fees and expert fees. That's where they really kind of make their money and they kind of can hold this threat over the alleged defendants in the cases. So that's what I think's driving. I mean, I feel like if there was no attorney's fees and, you know, maybe just a warning to a website, I feel like we wouldn't see as many of these lawsuits.

I think this is sort of what's causing the big, you know, numbers that we see, especially in New York and California.

Craig Leen

I think in the long run and I saw this when I was OFCCP Director, I think what's preferred by the stakeholder community, by companies and even ultimately by disability advocacy groups, and I consider myself a disability advocate. I'm on the employer side and I advise companies on compliance. But there's a lot of companies that are that are committed to accessibility, diversity, equity, inclusion, accessibility principles.

Reeve Segal

Right.

Craig Leen

I think, though, that the point is that, you know, when you're in a situation where there's not really a national standard that's been set and you're having different approaches by the different regulatory agencies, and then you have all these private plaintiffs bringing suits, it's extremely hard to comply.

Reeve Segal

Right.

Even if you want to, it's extremely hard to comply in a way that will assure you that you have a safe harbor, that you're not going to be sued.

Craig Leen

So I think that's the underlying concern I would raise. It would be useful... the more that we move toward sort of a national approach where there's a standard that companies can clearly comply with. And if they if they make good faith efforts and they substantially comply with it, they wouldn't be subject to suit. I think that that is preferable in the long run for compliance and for helping individuals with disabilities to make sure that every website they go to is accessible for them.

That would be the goal.

Reeve Segal

Right? Definitely. Yeah. The decentralized approach right now is, as we'll see, has got a lot of issues. And, you know, just taking a step back, the methodology that we use here at Accessibility.com on on the cases that that we're going to be showing you now and pulling the statistics from. We're just using verifiable cases to show that they've been on the docket and we've actually reviewed each individual pleading.

We know they're all website accessibility lawsuits. So we're not including, you know, non-digital property here and our database is freely available and, you know, to provide insights and the

metrics and the details of the lawsuits themselves. And so a lot of times you'll see websites where they're claiming the lawsuit numbers are higher, but that's because they're not really looking fully at website accessibility lawsuits.

Sometimes they just look at disability lawsuits generally, and then we get into these other types of cases involving, you know, ramps and the, on hotel accommodations. But we here are very much focused just on the website accessibility. And, you know, when we look at that, at the number of cases, they continue to be growing every year from our database that, you know, went up about 1.5% over the last year.

And then, you know, an interesting note, it looks like 97% of the demand letters are settled prior to the lawsuits. So that's again, just pointing to the fact that a lot of these plaintiffs would like this to be resolved. The plaintiffs' attorneys as quickly as possible, sort of take their money and run versus trying to drag out an expensive lawsuit over you know, a long period of time.

It seems like it's a bit of a numbers game for them.

Craig Leen

Yeah. I would just emphasize the point, which is that 97% of demand letters are settled prior to filing a lawsuit. And when you look at these numbers, an estimate would be 1500 demand letters a week. A week in 2022. So that's why I mentioned that if you're a company doing commerce, doing business over the Internet, you know, you're... there's a high likelihood at some point you're going to get a demand letter.

You don't have a fully accessible website.

Reeve Segal

And I think a lot of people, sorry to interrupt you. A lot of people are when they see things, they just think, oh, a lawsuit, you know, or my problems only start once the lawsuits filed. But when we're seeing this 2300 or so lawsuits that are being filed, that's just the ones where an actual suit is being filed in a court.

But once you get the demand letters, I mean, your problems are starting then and that's exponentially larger, you know, number.

Craig Leen

Yes. And I see a question. Why are a majority of cases filed in New York or California? You know, this is an important question, and it's because of the two statutes that we mentioned. The two state laws that are pretty broad in terms of the types of damages that they allow. The type of remedies. Which ultimately and also because the jurisdictional laws are fairly broad as well, which means, for example, in New York, if if you have a plaintiff who lives in New York and access to the website, whether or not your website is based in New York, New York takes the position that that individual has jurisdiction.

So, you know, that's the underlying reason. So you have these two laws which provide remedies that are beyond the ADA and you have a sort of a permissive approach or jurisdiction where you can find a plaintiff, you know, in New York to bring the claim. So why not bring the claim in New York, raising the state law? There's a significant incentive to as opposed to going to another state where the law may not be as helpful, the state law. Why not find someone in New York or California where there's another law? But most are brought in New York.

Reeve Segal
Right Definitely.

Craig Leen
Because of the New York law.

Reeve Segal
Oh, yeah. And we're going to see that as we look at dive into some of the data. And, yeah, you know, sort of just some of the highlights here to look at is that the top filing plaintiffs continue to file a 100 plus lawsuits. And last year, at least two plaintiffs filed 100 or more lawsuits themselves. And Perla Magento recorded the most with 108.

So again, that goes back to our conversation of this isn't sort of just grassroots or grandma or sort of you just have, you know, yourself, let's say, having a disability and having an issue with the website and filing lawsuit. These are almost sort of professional plaintiffs where all day, you know, they're they're going through websites trying to find issues, and it's almost a bit of a job for them.

And the same things echoed with the lawsuits where three firms themselves filed 340 lawsuits each. And last year one hit 372. And five firms accounted for more than two thirds of all, you know, the website accessibility lawsuits. And all five of the 2022 firms were in the top six over the last 2 - 3 years. So we're seeing a pattern of the repeat offenders, the same plaintiffs, the same firms time and time again and a lot of sort of specialization in this area.

Craig Leen
Yeah, I think that the the difference there and what you're seeing is like in the area of employment law, if you have a lawsuit brought against a company or an OFCCP concern or something like that, the there's a limitation to who can bring the claim because those who have standing are the employees, which is a set universe.

What you're seeing here is that, you know, you don't have to be an employee or necessarily have privity with a particular entity. As long as you go on their website and seek to utilize their services, and you have a disability, that may allow you to bring the claim.

Reeve Segal
Right.

Craig Leen

You know, that depends on the standing laws and things like that.

And I don't want to overstate that, but obviously that's what's what you're seeing. You're seeing as a set of plaintiffs, a group of plaintiffs bringing cases over and over again. Now, I'm not going to comment on that specifically, but what I would say more generally, I think the goal of our system ultimately is that you when you have a plaintiff who has a disability, who tries to use a particular website to obtain something that they need in the normal course of their life and are unable to do that because of an impediment that exists, that's probably what the ADA was adopted for, or Section 503, not the repeat claims.

Having said that, the repeat claims are obviously happening and are allowed. And they're making an impact. And so it's important for companies to understand that and to plan for that. So, you know, the best way to address the fact that these claims are being brought over and over again is to come into compliance in advance.

Reeve Segal

Right.

Craig Leen

Then a claim can't be brought against you.

Reeve Segal

Definitely. And you can see here from the lawsuits by state last year, New York continues its dominance as the top filing state. It had more than 69% of cases 2022 are filed in the Empire State. And you know, taking about 7% more of the lawsuits share year over year. So keeps gaining in dominance, New York . During each month, New York was responsible for at least half of the country's cases and was as high as 95% of in one month.

All the cases were filed in New York. And then California is a bit of a distant second, but a big lead over third with 649 filings last year. And it's again been the second most popular state to file these types of lawsuits in for the last few years. And Florida and Pennsylvania are, you know, a distant third with 58 and 19 cases, respectively, and then just one out of North Carolina and Pennsylvania.

So it seems to be the big two. Yeah.

Craig Leen

And I think you're going to continue to see that as being somewhat unique to website accessibility lawsuits. Because, you know, typically to have standing to bring a claim that's based on a physical, accessibility issue like where you actually have to go to the place.

Reeve Segal

Right.

Craig Leen

And that's and then find that there's not an adequate ramp or something like that and not be able to access the building or something like that.

Whereas here, going on... that you can go on 50 - 100 websites in a day.

Reeve Segal

Right.

And you know, so that's why you're going to continue to see a lot of the lawsuits filed in only two states. As long as you have that plaintiff in New York, they can go on websites all over the United States that are based all over the United States, but they're on the worldwide web.

Craig Leen

So anyone can access them and they access them from New York. There's jurisdiction. According to New York, there's jurisdiction under the statute.

Reeve Segal

That's right. That's why we're going to see most of the plaintiffs themselves, like you said, are either residents of New York or California. That seems to be the main requirement. And then. Okay, go ahead. Let's file suit.

Craig Leen

I think if you saw, for example, another state, it could be any state. Illinois. It could be Washington. It could be North Dakota. Adopt a more permissive or more broad law allowing for more remedies, than you'd see probably a lot of the claims moved there.

Reeve Segal

Right, Exactly. Let's move on to the next slide here.

Craig Leen

And that's why, again, it's helpful to have a national standard because, really, it shouldn't be one state determining the law for the whole country.

Reeve Segal

Right. Because we can't say New York and California are sort of the states that are suffering the most from these types of violations. It's all throughout the country. But since it's the most advantageous for the plaintiffs' firms, this is where the suits are coming from.

Craig Leen

Yeah. And New York and California are probably, you know, based on the laws that they passed, are probably good with that. But the point is from the perspective of sort of, you know, large

national companies and OFCCP and EEOC, you know, just my opinion, you know, related to those entities, it makes sense to have a national standard.

Why would you allow a jurisdiction that doesn't represent the whole country to set the standard? The standards should be set by Congress or it should be set by... If it's going to be a national standard, in practice, it would be better if it was EEOC or OFCCP or Congress setting that standard in my opinion.

Reeve Segal

Right. And then as we moved on to the most targeted industries, half of the lawsuits were focused on consumer staples, consumer discretionary and consumer durables. One law firm filed over 60% of the 250 plus cases against food restaurant and other related websites using six different plaintiffs. And, you know, it's hard to tell with the industries whether there's sort of any trends in the society that reflect off of which industries are targeted.

For example, if a new phone comes out or suddenly, you know, phone manufacturers getting hit, or is this sort of a bit random on sort of whichever mood that the plaintiff's attorney is in? You know, I don't think they care so much which sites they're going after, as long as they're sort of maybe money at the end of the door, maybe it's...

Would you say larger companies are obviously bigger targets than sort of more of the mom and pops or we're seeing everything get hit?

Craig Leen

Well. I mean, I think that, you know, I'm sure if you asked you know, a plaintiff-side attorney, they may have... they may want to touch on a lot of different industries because they may want to have an impact there. You know, I don't want to... I'm sure that they believe in what they're doing. And I think... and the rules that we currently have have allowed them to do that.

I think that the concern I think more from a compliance perspective is, again, that, you know, why is the particular industry that's targeted dependent on the plaintiff's bar? Why wouldn't it be determined by national regulators, for example? I think that's the... because like you said, there are incentives that are different. If you're leaving it to private litigation there, the focus will be on those industries that are easiest probably to get a decision from. Doesn't mean they'll be the sole focus, but that's the incentive.

And, you know, but yet, you know, you want these rules to apply generally across industries. Now, having said all that, looking at these particular industries, I would say that, you know, they're picking industries. One, they're all consumer focused. Retailing or consumer focused, which is probably for jurisdictional reasons. Because they want to show, you know, when you look at the different case law out there right now about when does website accessibility apply under the ADA, you have circuit splits. Your circuits take different positions.

But generally, if you can tie it to purchasing over the Internet, that's probably your best jurisdictional argument, or hook, no matter where you are in the country. So, you know, that's probably why they're focused on the consumer aspects. And then two, I would say, you know, I'm not I'm not certain if they're focusing on the bigger versus the middle-sized companies.

What I've seen, what I've seen from the stats is a lot of the lawsuits are being brought against middle and smaller sized companies who don't, who may not have website accessibility at all.

Reeve Segal
Right.

Craig Leen
That they haven't put the funds into it. And you do have some where they're focusing on technical issues, and that's probably more with the bigger ones.

I think the concern with the bigger companies, if you're looking at it from the plaintiff's side, is that the bigger companies are more likely to have at least some compliance. They may have a lot of compliance and they're more likely to defend themselves probably. But... but I don't think any part of the economy has been immune from these sort of filings.

And what I would, you know, I tend to advise larger companies that are seeking compliance. And what I would tell them is take a look closely at the the WCAG 2.2 AA. Look at the DOJ's recent guidance that they published and take proactive steps to have website accessibility. Is the best way to do it. It's it can be done at a reasonable cost if you're doing it in advance.

And then you don't have to worry about these lawsuits.

Reeve Segal
Right. And then when we look at the plaintiffs who filed the most lawsuits, you know, this is the point we were making earlier, that it's you know, you can see 108 filed by one plaintiff, another 100... 80. So again, these are sort of, for lack of a better word, but a professional plaintiffs, not just someone who happens to come across the website.

And, you know, for the second straight year, we've got an individual with more than 100 lawsuits being filed. And this first trend started in 2021 where we used to see numbers maybe in the 60s - 70s... Now it's, you know, we're reaching triple digits just from one particular plaintiff. And that's not even a law firm. This is just the individual . And two of the top plaintiffs from 2022 appeared on our list in 2021.

So we're sort of seeing these repeat offenders over and over again going against various companies for alleged website accessibility issues. And then we look at the law firms themselves. We see the same pattern where, you know, Stein Saks was the top firm, you know, in 2020 and it's again in 2022 with 372 lawsuits filed. And, you know, these five firms have, again, two thirds of all the lawsuits being filed.

So it's a very sort of concentrated area of the law and, you know, we're seeing three firms with more than 340 cases. And each of the top five of these firms were the top six in 2020, 2021, and this year. So it's a real sort of concentrated area where just a few of the top firms are the main ones doing it.

And you'll see the top three are New York based and then the next two are California. So that's again, the hotbed for for all of these lawsuits. And big picture wise, there's multiple lawsuits on the rise of 143% increase in companies that have received multiple lawsuits year after year. And I think you were touching on this earlier where companies can think that they've been sued once and they fix whatever the problem is, but then all of a sudden they're sued again.

So, you know, I don't know if you've run into that in your dealings with clients, but that's a definite problem where...

Craig Leen

I know that's a significant concern of companies. That was even when I was at OFCCP, there would be concern that, okay, you have the federal agency taking this position, but that doesn't necessarily protect us from being sued separately. And we may even have a pending lawsuit that separate by the private plaintiff's bar. And, you know, that's going to always be an issue.

And I would submit to you the concern about having so many potential avenues for a lawsuit to be brought against a company... There is an argument that that can hurt compliance sometimes because a company may feel like, well, and I think this was referenced in one of the slides, may feel like, oh, I just going to wait until I get a lawsuit and then I'm going to comply because then I'll know what I need to do to satisfy that individual.

But the point here for companies is that is not the best approach. Because the point is that you could be sued multiple times. And what's better is not to have it make an agreement, a settlement agreement with a particular plaintiff who does not speak for DOJ or or for the federal regulatory agencies. The better approach is to proactively, when you put together your website, make sure that it's accessible and it's and it can be done at a reasonable price and it resolves all of these issues.

So even if you do get a demand letter from a particular plaintiff, and you end up settling it, I would still recommend using that as an opportunity to bring your website into compliance.

Reeve Segal

Right. And then as we go...

Craig Leen

The best way to avoid the lawsuits. And have a yearly audit done. There's companies that will come and audit your website. They'll give you a report and tell you, did you get an A, an A minus, a B plus. Are you compliant? You know, I think one at the very least if you have put

together a program or an approach where you have website accessibility, you're much less likely to be sued. Because then it takes more time. They'll have to go through and look, well, is there a technical violation or something like that that we want to bring? You're not going to be the preferred defendant if you have if you come into some degree of compliance.

Reeve Segal

Right. And then when we're looking going forward in 2023, you know, we we think we're going to keep seeing an increase in in these lawsuits, maybe, you know, even upwards of 200% increase in companies that have received multiple lawsuits. You know, as you said, once you get sued once, it's not a guarantee that you're not going to get sued again unless you've done what it takes to get your website properly fixed and vetted.

So so that we see as a problem that's that's going to continue. And, you know, we've seen pretty fairly consistently the number of lawsuits in total going up. 2020 was the only year we saw a slight downturn just because of COVID. But, you know, 2019, it went up. 2021 went up. 2022 went up. So we think we're there's going to be a continued, you know, explosion of growth in litigation.

And, you know, with the volume of cases that that are being brought, history is teaching us that, like we said, it's both large and small companies can get hit. So, you know, just because you have a small website doesn't mean you're immune to this. And, you know, with WCAG 2.2 coming up, maybe in the summer, 2023 with possible approval, then this could be a new catalyst for a batch of lawsuits.

And you know, what do you think on WCAG 2.2? Do you think is that sort of going to be even more stringent factors that will make some of these websites more more likely to to get sued because there's even a wider net?

Craig Leen

The... well, you know, you're going to continue seeing updates from 2.0 to 2.1, which is the current one from 2018. And then 2.2, which my understanding is will probably come out in 2023. You know, I think there was a big difference between 2.0 and 2.1, which started to focus more intellectual cognitive disabilities and, you know, a broadend just sort of the neurodiversity umbrella and of disability.

So, you know, if you have a DEIA program, I would I would suggest incorporating website accessibility into that program and really make it part of what you're doing as an organization. When you look at Web Content Accessibility Guidelines, sort of the principles that underlie it. They have four. You want websites to be perceivable, to be operable, understandable, robust. And what it essentially means is it needs to be a comprehensive approach to disability inclusion and accessibility.

So someone who's blind needs to be able to use your website. Someone who's deaf needs to be able to use your website. Someone who's colorblind needs to be able to use your website. That

requires you to have, you know, captioning, for example. It requires you to have a screen, a screen reader to be able to read the screen. It requires the ability for people with disabilities who are using your website to be able to change the contrast, to change the color of the of the print.

There's a number of requirements. But the point is, that's also part of what companies are doing generally with their workplace, which is to... and also with their customer base, is to make their workplaces more accessible. So if you take this and make it part of your DEIA program and really commit to it and then do the updates as they come out, it's something that your company can really get behind.

And it could be part of your, it can be part of your brand. It can be part of who you are. Which is what I'm seeing more companies do. Now having said that, WCAG 2.2 will have a number of additional requirements as you continue to see increases in technology that continue trying to make it more accessible for people with all types of disabilities, all sorts of disabilities.

And you're going to probably see after that in four or five years. WCAG 2.3 So this is something that's not a one time action. You know, most companies don't have their website from 1999 or 2010 either. They'll keep updating it. But from now on, when you update it, every time you're doing that update, make sure you're also including an update with the most recent, you know, website accessibility standards.

Reeve Segal

Right. Well, yeah, we know some people have questions possibly on our presentation. And sort of a quick one that came to mind for me is, you know, I do like this idea that you've suggested, Craig, about not having sort of a decentralized approach to website accessibility lawsuits. Generally how would you see if sort of the DOJ or if there was a centralized approach to it being handled, for example, would let's say I was a plaintiff's attorney and I found a website I thought was not running, you know, didn't have proper website accessibility standards. Would I send a letter to the that company? And then that company would send something to the DOJ and they would sort of act as sort of a bit of a judge and jury and decide things? Or would the DOJ themselves be going through websites and giving people updates? Or do you sort of see it as a hybrid where some of the plaintiffs' firms are going to be driving it or?

Craig Leen

I mean, I don't think I'm not saying that companies will want DOJ to bring a claim against them. What I'm saying is, is that and DOJ can already bring claims under the ADA in appropriate circumstances. It's just that, you know, obviously most of the claims are being brought by the plaintiff's bar. What I was suggesting was that DOJ should issue regulations that establish what that standard is and it should be uniform.

Congress should consider preempting the field and establishing standards that companies you know, and they can also set up. I saw one of the questions was should it depend on how big the

company is? Well, it can. You know, one of the issues with these lawsuits is the the New York laws, for example, one of them, I think the state one is, is five employees.

I think the city one is no employees. It could be vice versa. So it applies to companies no matter how small they are. Whereas the ADA has traditionally had the 15 employee standards, so before the ADA applies to them. And now, of course, you know, I'm talking more and I'm focusing more on the employment aspects of the ADA and things like that.

But, you know, they could look at whether law should have a a jurisdictional threshold of how large the company is. How much business it does, etc., to what standard it needs to follow. Having said that, if they're in commerce and they're making money, I think there's always going to be the argument, well, why not? You know, you want to make sure that anyone can access this particular website, just like you want people to access buildings, you . So and if you're building a building, it needs to comply with the ADA no matter how big your company is, for example.

So, you know, I think that you're going to have that sort of tension in the in the in the law always. But the point is, if you're in commerce, it really, I think I saw one slide or I saw a part of the report that said the average cost of these lawsuits is \$350,000 or something like that. You know, and these could be small lawsuits that are brought against you.

But then in the end, the average cost is \$350,000, which means I can go much higher. In that sort of circumstance, take the act in advance. It's much less expensive to bring someone in and take a look, do a brief audit of your website and update it. Then you avoid all this this. You know, and I would suggest to general counsel, you know just take the step and do it because you don't want to get involved in these lawsuits in New York or California.

Reeve Segal

Right. Right. And let me see here if we have some specific questions from any of the participants. So let's see. Here we go. Here are a few that came up. I don't know if any of these... You you can see them on your screen? Let's see.

Craig Leen

The questions?

Reeve Segal

Yeah. If there's any. I know we probably may have answered some of these along the way. But...

Craig Leen

Why do you think so many companies don't address accessibility? You know, that's that's a true statement. You know, in terms of DEIA programs, which I'm a strong proponent of, and I help companies put them together, only about 5% of them include disability, according to a couple

of studies I saw. And and, you know, that's one reason why I always say add the A to DEI. Try to make sure you're encouraging and embracing disability in your DEIA program.

You have an ERG for people, an employee resource group, for people with disabilities. Have a centralized accommodation system. I think, you know, that ties in the website accessibility, too. A lot of times if companies don't have a centralized accommodation system or don't even include disability in their DEI program, they probably are not. They probably don't have website accessibility either.

So you know that that is an issue that you see a lot. I think it's starting to change. I think you are seeing more of a focus of including disability and website accessibility is getting a lot of focus. So I think in the next three or four years you'll see that change.

Reeve Segal

Definitely See anything else? We talked about majority of New York and California, why the cases are coming out of there. Do you feel legal action is taken as many feel it's the only way to bring attention to the issue?

Craig Leen

I mean, there's a variety of ways to bring attention to an issue. You could you could contact the ADA coordinator for a company or or write to, you know, you could address it directly. I think a lot of people who... I will tell you one point I would make is because I have a daughter with profound autism and who uses a wheelchair often in public.

And and I push her in the wheelchair. And, you know, when we come to a non-accessible place, I typically will bring it up with the company because I want to get in there. And I want them to and I want to point it out and use it as a teaching moment.

Reeve Segal

Right.

Craig Leen

And so that's typically how I would handle that situation.

Having said that, you know, obviously there's still a lot of places that aren't accessible fully. So, you know, that's probably why you continue to see a lot of lawsuits combined with these incentives that I mentioned that are built into having these sort of state laws that are very broad, allowing claims to be brought on technical violations and again, and not having sort of a national uniform, unified standard that companies can comply with.

And so, again, I would advise companies the best way to, one, embrace disability and accessibility and two, avoid these potential lawsuits is to come into compliance in advance. And again, even though there's not a national standard, the safest approach would be to do WCAG 2.1 AA. That's what I typically see. Will that guarantee you not being sued?

No, because there's not a national standard, but that's the general standard in the industry and you can be proud of that and you can even put that on your website and tout that is something that you're committed to that shows your good faith.

Reeve Segal

Great. Well, thank you, Craig, for your time today. And it's been a real honor to have you on the Trends in Digital Accessibility Lawsuits presentation. And so if anyone has any questions or other follow up issues they'd like to discuss, Lori will probably put our contact information up on the presentation. We really appreciate your time today.

Craig Leen

It's my pleasure. Thank you for bringing attention to these issues and for the companies listening. Please take a look at accessibility. And you know, no matter what you think about these lawsuits, use this as an opportunity to to incorporate disability into your DEI programs, which is a positive thing. And think about compliance in advance, which will avoid the lawsuits.

And that's the best approach. And and it's the most accessible approach. So thank you. It was a pleasure to be here today.

Reeve Segal

Thank you.

Closing

Lori

Thank you so much, Craig and Reeve, for such a great presentation on last year's lawsuits in website accessibility. It it's, you know, a growing trend. Basically, anyone, any company, any size could be targeted. And it's a great opportunity to make an effort to be accessible because not only is there the the fear of litigation, but it's just the right thing to do to make your website and digital assets accessible to anyone out on the Internet looking to purchase from you.

It will help grow your revenue and so on. We have a series coming up in March, April and June on Design, Develop, and Deploy for Accessibility. So that's a great three-part series that will be hosted and moderated by Joe Devon and it will walk you through how to design your accessibility process, how to develop it, and how to deploy across your organization and to your customers.

But before we head get ahead to that event, in February, we have Risky Business? Only If You're Not Compliant. So that's going to take a look at WCAG and some of the web accessibility standards that could affect your organization today. Again, thank you to Reeve Segal and Craig Leen for going through the data and trends and comparisons on website accessibility lawsuits from 2022.

Thank you to our sponsors Verbit, Barnes Creative Studios, AccessibilityWorks and the Bureau of Internet Accessibility for sponsoring today's event. Head on out to [Accessibility.com/events](https://www.accessibility.com/events) to register for any of our upcoming events for this year or to check out our sponsors for the events as well. And you can also see the bios of the presenters.

You'll receive an mail from me this evening with a link on how to watch today's presentation on demand, as well as get the transcripts and the slides. Thank you so much for being here today. We appreciate you. Have a great rest of your day.