

# Publications

## ADA “Website Accessibility” Lawsuits Target Online Retailers and Wholesalers

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If your agricultural business operates a retail or wholesale website, you could be susceptible to the recent wave of “website accessibility” class action lawsuits being brought under the Americans with Disabilities Act (ADA). Generally, a “website accessibility” lawsuit alleges that a business discriminated against a disabled individual because he or she was unable to effectively use that business’s website. Lawsuits have exploded since 2016, with each year seeing an increase in cases over the previous year. In 2020, roughly 10 federal class action lawsuits were filed each day with no signs of this litigation slowing down.

The motivation for these cases is simple: the law allows plaintiffs’ attorneys to recover their fees, and determining whether a website is “accessible” is a vague and fact-intensive question which prolongs the litigation. These two factors place defendants in a precarious position—either pay a lower settlement now or risk having to pay both sides’ attorneys’ fees after extensive litigation. Often, businesses choose the settlement option. This client alert answers some basic questions about this wave of ADA lawsuits.

### What is the ADA and How Could it Apply to My Company’s Website?

The ADA became law in 1990, before the widespread use of the internet. The law guarantees to individuals with disabilities equal access to all of the programs, services, and activities of a private or public company. The ADA is broken down into three “titles.” Title III, relevant here, prohibits discrimination on the basis of an individual’s disability in a place of “public accommodation.” The ADA provides a non-exclusive list of types of “public accommodations”, which includes sales or rental establishments. In the agriculture context, a “public accommodation” would include any business engaging in wholesale or retail sales or rentals, **such as the sale of seed, crops, animal feed, or equipment.**

Title III lawsuits were traditionally aimed at forcing businesses to comply with the ADA by making physical changes to their brick and mortar locations. For example, the classic ADA lawsuit involves suing a business to install a wheelchair ramp.

In 2016, plaintiffs' attorneys began to sue under the theory that a business violates the ADA when its website is not accessible to individuals with disabilities. Most often these plaintiffs are vision or hearing-impaired and it is difficult or impossible for those individuals to navigate the website. While there are some outliers, courts have largely embraced the theory that a website can be a place of public accommodation such that the ADA applies.

## How is a Website “Accessible”?

The non-legal answer is that a website is accessible when a user with a disability can reasonably perceive, navigate, contribute to, and operate a website in a similar manner to a non-disabled person.

For instance, most vision-impaired individuals cannot view pictures on a website. To make that picture accessible, a website can add “alt text” which is a text description of the photo. When paired with a screen reader (a program which reads digital text to vision-impaired users), the user then has an understanding of what the photo shows.

The legal answer is that there is no defined standard on what makes a website accessible, which makes the risks of litigating “website accessibility” cases even higher for defendants. The U.S. Department of Justice (DOJ) has not promulgated rules or regulations on this topic, despite having the legal authority to do so under the ADA. There are, however, several non-profits which publish standards and guidelines. The most prominent is the World Wide Web Consortium’s Web Content Accessibility Guidelines (WCAG), and most plaintiffs’ attorneys cite them as the required standard for website accessibility. Yet even the WCAG has some subjectivity, and plaintiffs’ attorneys do not hesitate to bring actions where there is partial compliance with WCAG. Because of this subjectivity, even companies with sophisticated ADA compliance programs still get sued.

## My Company Only Sells/Rents Products on a Website, Does the ADA Still Apply?

The U.S. Supreme Court has yet to decide this issue and federal circuit courts are split on it. That said, if your company operates a website that sells products across the country, then plaintiffs’ attorneys will most likely bring their lawsuits in jurisdictions which have found that stand-alone websites are “places of public accommodation”.

## What are the Potential Penalties/Costs if My Company’s Website Violates the ADA?

These cases most often are class action lawsuits with plaintiffs seeking their attorney’s fees and the court ordering re-design of the website in question. They can settle for tens of thousands of dollars. There is also the possibility for the DOJ to bring actions and seek damages, but we have not yet seen substantial enforcement from the DOJ.

## What can I do to Limit my Company's Exposure/Risk?

In general, the best way to limit risk is to make your company's website more accessible. Also, there are other legal notices/disclosures and strategies your company can implement to reduce vulnerability. Our firm has experience in counseling clients on ADA website accessibility issues including, engaging vendors and assisting in website accessibility audits and remediation efforts, drafting notices and disclosures, pre-litigation dispute resolution, and, if necessary, website accessibility litigation.

If you would like more information, or if you have any questions, please contact Tom Fusonie, Dan Shuey, Chris LaRocco, or your Vorys attorney.