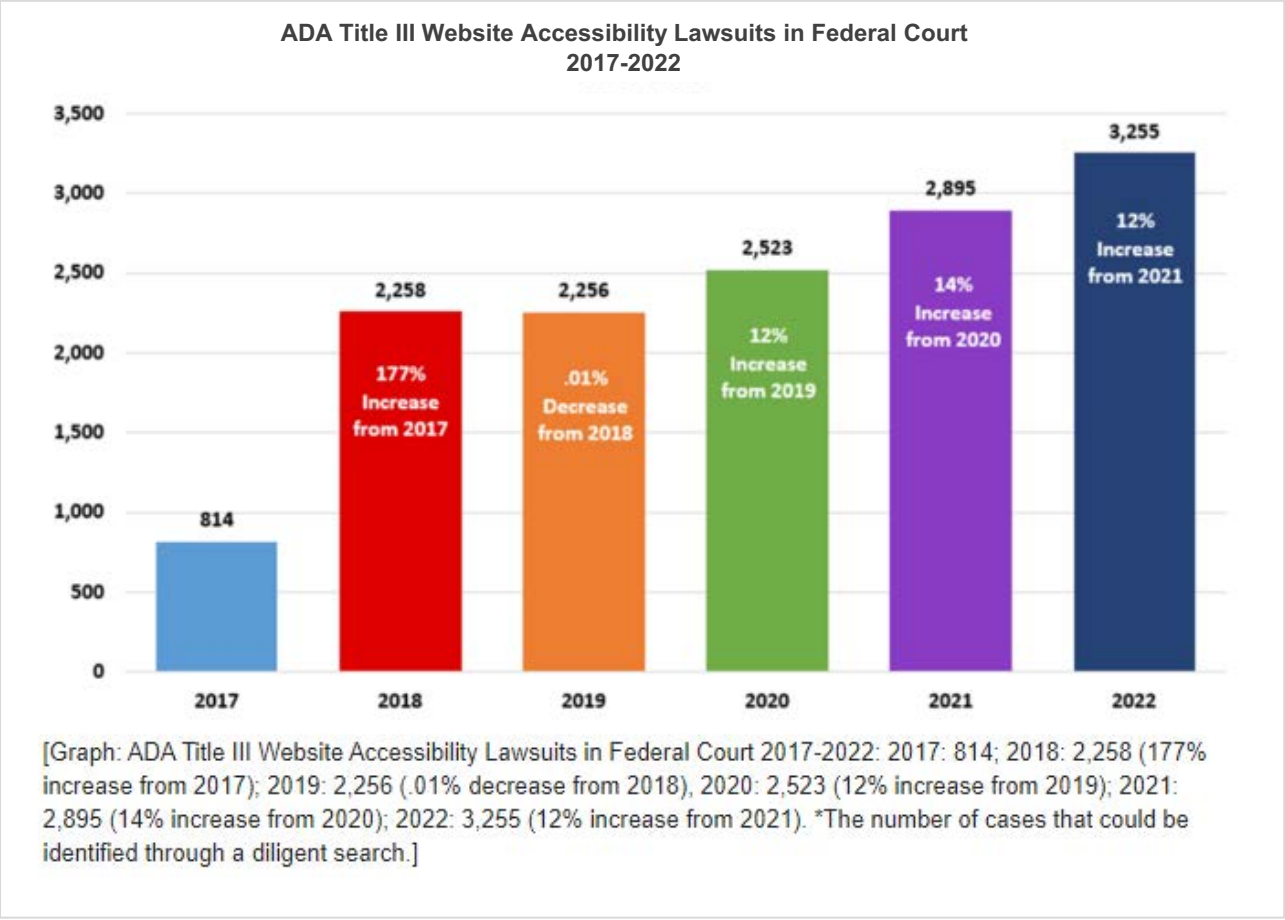
Employment Practices Liability (EPLI) and Third-Party ADA Claims

Third-party Americans with Disability Act (ADA) claims are nothing new in the realm of Employment Practices Liability. As McGriff said in a 2022 advisory, claims will continue to increase.

So far this year, the trend continues with the number of ADA court cases on the rise. In particular, ADA Title III case filings in federal court have been on a sharp upward trajectory since 2013. In 2021, there were 11,452 ADA Title III cases, a significant increase year over year from 4% to 63%.[1]



[Graph: ADA Title III Website Accessibility Lawsuits in Federal Court 2017-2022: 2017: 814; 2018: 2,258 (177% increase from 2017); 2019: 2,256 (.01% decrease from 2018), 2020: 2,523 (12% increase from 2019); 2021: 2,895 (14% increase from 2020); 2022: 3,255 (12% increase from 2021). *The number of cases that could be identified through a diligent search.]

In 2022, approximately 30% of the McGriff-reported Employment Practices Claims were Title III ADA matters, an increase of 15% compared with the prior year. We are anticipating a similar increase by the end of 2023.

Customers and/or guests of a business or to a business location can file ADA claims whether they actually become customers of the business or not. These types of claims are typically related to ADA compliance and/or web accessibility. They can cost thousands of dollars and countless hours to defend.

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Acheson Hotels v. Laufer

On March 27, the U.S. Supreme Court granted a petition by Acheson Hotels LLC for a writ of certiorari.[2] The question presented was whether a self-appointed ADA "tester" (a private citizen who goes from business to business looking for ADA violations) has Article III standing to challenge a hotel's failure to provide disability accessibility information on its website, even if the tester has no intention of visiting the hotel.[3] It's a question that has divided the circuit courts for years, with the Fourth, Ninth, Eleventh, and (most recently) First Circuits answering the question in the affirmative and the Second, Fifth, and Tenth Circuits taking the position that a plaintiff must actually show an intention to patronize a hotel in order to establish Article III standing. The Supreme Court's decision in Acheson Hotels will no doubt have a major impact on future ADA lawsuits.

The plaintiff, Deborah Laufer, has filed more than 600 federal lawsuits against hotel owners and operators claiming that hotels fail to disclose accessibility information on their websites.

ADA Title III and Web Accessibility

ADA Title III applies to businesses that are considered "public accommodations."[4] Businesses that fall under this category include, but are not limited to, restaurants, hotels, retail stores, libraries, parks, and daycare centers. And while these businesses must ensure that their physical domains are accessible to people with disabilities, U.S. courts now apply ADA accessibility requirements to their online domains. The Department of Justice (DOJ) considers websites as public accommodations that must comply with ADA Title III.[5] Businesses and organizations that fall under the category of "public accommodations" must therefore make their websites accessible to people with disabilities.

Web Accessibility Lawsuits

The sharp increase in web accessibility litigation can be attributed to several factors. First, people with disabilities need access. Second, while the Web Content Accessibility Guidelines (WCAG) provide established benchmark standards for compliance, they have not been officially added to regulations supporting the ADA. The absence of clear, defined regulations for web accessibility in places of public accommodation means specific expectations vary drastically across organizations and industries. To add to this confusion, U.S. circuit courts interpretations vary as it pertains to the ADA and web accessibility, resulting in conflicting precedents.

Again, while the ADA is meritorious, plaintiffs' lawyers have found a lucrative niche by engaging the services of ADA testers. This is nothing new. Businesses for some time now have had to respond to "drive-by lawsuits," which are filed by plaintiffs who spot potential ADA violations — such as the technical requirements for accessible entrances — by simply driving down the street.

EPL Insurance Coverage: Coverage IS Available for Third-Party ADA Claims

An EPL (Employment Practice Liability) policy is a liability policy that protects employers against claims of alleged discrimination (in addition to other coverages) by a customer or employee. Many EPL policies can be endorsed to provide coverage for the business owner for these exact types of cases. As one would expect, the coverage provides defense costs and damages but does not cover the remediation needed to bring a subject space up to compliance.

Here are some terms and conditions to pay attention to (keeping in mind that coverage still will be limited):

- **Definition of Claim:** If elements of your website are not compliant with the ADA, you may receive a demand letter from an individual or organization detailing the specific ADA violations.[6] The formal letter will demand that you take action to correct these violations, and will typically include a deadline by which, if corrective action isn't taken, legal action could be pursued. The demand letter, as well as the lawsuit, would fall under a broad definition of claim that will need to be reported in a "Claims Made" EPL Policy as a condition for coverage.

- **Third-Party Coverage**: Since these claims are brought by clients or customers, at its most basic, the policy would need to provide coverage for claims brought by third parties. The broader the definition the better. Review definitions that limit third-party party coverage to sexual harassment since they do not include coverage for these type of claims.

- **Website/Media Coverage:** Considering the digital nature of these lawsuits, the policy's definition of "wrongful act" should specifically include conduct that takes place via electronic communication, electronic media and/or websites. For companies providing SAAS (software as a service) solutions, that should be expanded to include software and media.

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- **Broad Definition of Discrimination:** Third-party coverage by default includes claims brought by persons (other than employees) who may allege harassment or discrimination similar to employment laws. In situations where the policy contains a definition of third-party discrimination, it should be sufficiently broad to include "any actual or alleged violation of any discrimination laws." Policies with a more restrictive definition may be inadequate to cover these types of claims.

- **Coverage for Injunctive Relief:** Website accessibility lawsuits almost always include a request for injunctive relief, meaning the company must implement remedial measures to make their website ADA compliant. For that reason, the policy must include "requests for injunctive and non-monetary relief" within its definition of "claim." It's also important however to remember that most policies explicitly exclude injunctive relief from the definition of "loss." So any costs related to implementing those remedial fixes, such as hiring a web designer or software developer to implement those required compliance changes, will almost always have to be paid by the organization.

- **Fines and Penalties:** Fines for ADA violations can range from $50,000 to $75,000 for the first violation, or twice that for any subsequent violation. Generally, fines and/or penalties are excluded under the policy's definition of "loss." These costs are usually paid by the company. You could negotiate with the carrier and request that coverage for fines and penalties be included (subject to the most favorable jurisdiction), an enhancement some carriers will agree to.

- **Plaintiff's Attorney Fees:** In many cases, the courts may award attorney's fees to a prevailing plaintiff, so it's important to review your EPLI policy to ensure claimant's attorney's fees are included as a covered loss. The broader the definition of "loss" or "damages" the better.

- **The Hammer Clause:** The hammer clause contained within an EPLI policy is used to incentivize a policy holder to accept the insurance company's stance regarding any potential settlement. It holds the insured responsible for a specified percentage of any settlement amount above the initial settlement proposed by the insurer. Policies with hard hammer clauses can create a slight conflict of interest. The insurance company may offer a "nuisance payment" to expedite litigation, however the insured, believing they've done nothing wrong, may prefer not to settle. In the interest of opposing these claims as aggressively as possible, policyholders should carefully review the hammer clause, asking for it to be removed.

We will continue to monitor developments related to this case. If you have any questions about this advisory and/or your EPL Insurance Policy, please contact your McGriff Broker.

[1] https://www.adatitleiii.com/2023/01/plaintiffs-set-a-new-record-for-website-accessibility-lawsuit-filings-in-2022/
[2] https://www.scotusblog.com/case-files/cases/acheson-hotels-llc-v-laufer/
[3] Laufer v. Acheson Hotels, LLC, 50 F.4th 259 (1st Cir. 2022), cert. granted, No. 22-429, 2023 WL 2634524 (U.S. Mar. 27, 2023
[4] https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/february-2022/title-iii-americans-disabilities-act-website-compliance/
[5] https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act
[6] https://ccbjournal.com/events/web-accessibility-compliance-in-2022-how-to-respond-to-an-ada-demand-letter-or-avoid-one-altogether

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