



BOUSQUET HOLSTEIN PLLC

# ADA TESTER CLAIMS

**Presented by  
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**Practice Areas**

Litigation  
Employment Discrimination  
Agriculture  
Alternative Dispute Resolution  
Appellate Law  
Banking and Financial Institutions  
Government Relations

**Education**

J.D., Albany Law School, 1997  
B.A., Hamilton College, 1990

**Admissions**

New York, Massachusetts,  
United States District Court-Northern  
and Western District of New York

Micha is an experienced Labor and Employment and litigation attorney who has handled matters in a broad spectrum of practice areas. He has extensive experience advising employers and employees in matters involving labor and employment law and has the ability to understand both sides of his cases. Micha is a tough advocate for his clients who has handled many discrimination matters brought under Title VII, the New York State Human Rights in New York Division of Human Rights, the EEOC and in New York State and Federal Court. Micha has also litigated suits alleging violations of the Fair Labor Standards Act and New York Wage and Hour Law as well as wage and hour audits by the New York State and federal Departments of Labor. Micha has also argued appeals before the Second Circuit Court of Appeals, New York Court of Appeals and various appellate divisions.

In addition to his litigation practice, Micha is experienced in alternative dispute resolution and has used these techniques to successfully resolve matters for his clients. He is a member of the Roster of Qualified ADR Neutrals for the Third and Fifth Judicial Districts and is a mediator for the United States District Court for the Northern District of New York.

Micha is the Chair of Bousquet Holstein's Litigation Department and is a member of the firm's Management Committee. Prior to joining the firm, Micha practiced with a large law firm in Central New York and served as confidential law clerk to the Honorable Howard G. Munson, Senior United States District Judge and as senior confidential law clerk to the Honorable Gary L. Sharpe, United States Magistrate Judge.





## **Employment, Labor, and Discrimination Practice Group**

In recent years, there has been an explosion of employment-related lawsuits. This trend is the result of several factors, including the growing awareness by employers and employees alike of their rights and responsibilities in the workplace, and the proliferation and development of new case law and statutes on discrimination and other employment topics. The complex and dynamic nature of this area of law increases the need for our clients to act with adequate knowledge and direction.

The Employment and Discrimination Practice Group provides representation to employers, large and small, and to employees. Our attorneys make it a priority to become familiar with our clients' businesses. We emphasize addressing employment and discrimination issues before they become problems and we advise our clients in all areas of human relations practices to satisfy an employer's business objectives while improving employee productivity and morale.

We have assisted our clients in the preparation of employment contracts, employee handbooks, and employment policies on sexual harassment, drug testing and employment references. Clients implementing these policies often consult us to ensure that they follow all relevant federal and state laws and regulations, minimize the potential for liability, and maintain employee morale. Our goals are always the same: to ensure compliance with all relevant laws, to limit exposure to liability, and to maintain a positive workplace atmosphere in which employees are treated fairly.

Our attorneys maintain expertise in several distinct areas, such as Title VII of the Civil Rights Act, the Age and Discrimination in Employment Act, the Americans with Disabilities Act, Wage and Hour Law, the Family Medical Leave Act, and many other employment laws and regulations.





*Employment, Labor, and Discrimination Practice Group continued...*

In some cases, the deterioration of an employment relationship cannot be avoided. In these cases, the Employment and Discrimination Practice Group assists employers and employees in the separation process. Our counsel is often sought to ensure that employers follow appropriate procedures when severing the employment relationship, which regularly includes the negotiation and preparation of severance and release agreements.

We represent clients in all forms of adversarial proceedings and have provided representation before various federal and state agencies such as the New York State Division of Human Rights, the Department of Labor, the Unemployment Insurance Appeal Board and the Equal Employment Opportunity Commission. In every stage of these proceedings, from investigation and settlement conferences to hearings and appeals, our involvement has been highly effective.

Our Litigation experience includes federal and state court litigation of breach of employment contracts, age discrimination, sex discrimination, race discrimination, national origin discrimination, whistle-blower and retaliation, violation of non-compete agreements, and other employment-related claims.

We continually monitor developments in this dynamic area of law. By keeping clients aware of changes in the law, assisting in the development of sound employment policies and practices, and advocating on our clients' behalf, we reduce our clients' potential for liability and foster a more productive and satisfied workforce.





Title III of the ADA regulates places of public accommodation, which include businesses that are open to the public and that fall into one of 12 categories, such as hotels, motels, restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices.

- I. Title III prohibits discrimination on the basis of disability in the activities of places of public accommodation.
- II. It also requires newly constructed or altered places of public accommodation to comply with the ADA accessibility standards.





III. Title III creates a large group of potential Plaintiffs

1. Anyone with a physical or mental disability is a potential Plaintiff

IV. Large group of potential Defendants.

1. Very difficult to be in complete compliance with ADA regulations.
2. Can be liable without any culpability – intent to violate the ADA is not a factor.
3. No administrative exhaustion requirement.





- V. Its big business for Plaintiffs and attorneys.
  - 1. The ADA has attorney fee provisions.
  - 2. Attorney fees can start to accrue even before suit or notice of the ADA violation.





VI. ADA Testers are active in CNY.

VII. Be on the look out for “Drive By” and “Surf By” Lawsuits.

1. One tester alone has brought forty Surf By lawsuits in the Northern District of New York.
2. This tester is targeting small motels and inns which presumably lack the resources to fund a defense.







VIII. Drive By and Surf By are terms used to describe the various types of ADA testers.

1. Drive by refers to ADA access claims brought by plaintiffs who do not actually enter the place of public accommodation.
2. Surf by refers to claims regarding non ADA compliant websites.

IX. The ADA permits these types of claimants because testers are not required to have suffered monetary damages.

1. Technical violations of the ADA are enough – not necessary to actually be denied access.





X. Surf By claims are increasing.

1. These suits allege that the Plaintiff has been denied equal access to websites.
  - a. Federal courts in New York have held that a website can be a place of public accommodation.
  - b. Common for websites to be out of “compliance.”
    - i. The problem is that there are no regulations or guidance defining ADA compliance for websites.
    - ii. Leads to equal access claims.





XI. Surf By Website claims are particularly problematic because of this lack of certainty about what is an accessible site.

1. Web Content Accessibility Guidelines (WCAG) offer some guidance.
2. WCAG is an attempt to provide a single standard of accessibility but not enough to prevent suits – especially without federal regulations.
3. <https://www.w3.org/WAI/standards-guidelines/wcag/>





## XII. Common claims: Things to look for:

1. Counter top, drinking or soda fountains/kiosks not accessible.
2. Lack of accessible seating.
3. Improperly configured bathrooms.
  - a. Incorrect sink and mirror heights.
  - b. No wheelchair access.
4. Touch screens are not accessible to vision impaired or for wheelchair access.
  - a. Gas station kiosks not accessible for hearing or mobility impaired.





5. What to do to avoid risk.
  - a. Again its very difficult for a small business to be in full ADA compliance.
6. Employ professional services such as accessibility design consultants or contractors, architects or attorneys.
7. Web designers offer ADA compliance services.
8. Insurance.
9. Written ADA Compliance Policies.





10. What to do if a claim is made by an ADA tester.
  - a. Two forms:
    - i. Demand letter.
    - ii. Services of a Summons and Complaint.
  - b. In each case, don't ignore it.
  - c. **Contact your attorney immediately.**
    - i. Corporations cannot represent themselves in New York.





11. While ADA lawsuits can be difficult to defend, there are defenses and strategies that an experienced attorney can utilize to position the case for a resolution.

1. ADA Testers typically seek relatively small settlements.
  - a. Settlements are usually far less than the cost of defense.
2. ADA Damages are limited to injunctive relief – no money damages.
  - a. Only attorneys fees.





3. The ADA is not the only problem – New York Law also applies.
  - a. The New York State Human Rights Law (HRL) prohibits discrimination against persons on the basis of disability. It also ensures access to places of public accommodation.
  - b. Monetary damages are available under the HRL.





4. The New York State Civil Rights Law also applies.
  - a. It entitles all person to full and equal accommodations in places of public accommodation.
  - b. Penalties between \$100-500 **per violation.**
    - i. Violators may also be subject to Class A Misdemeanor charge.