Americans with Disabilities Act:

Website Accessibility

Gretchen Lehman, Esq., Attorney, Ogletree Deakins
Title II and III of the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act (“Section 504”)

Title II of ADA applies to state funded entities

Title III of ADA applies to private places of public accommodation

Section 504 applies to entities receiving federal funds
What does this mean?

- These statutes require that “places of public accommodation” be accessible to individuals with disabilities.
- DOJ and courts have interpreted websites of places of public accommodations to be subject to regulation and must be made accessible to individuals with disabilities.
What Is Website Accessibility?

- Website accessibility is simply the design of a website to permit users with these disabilities to have equal access to the website.
- Deaf or Hard of Hearing
  - Untranscribed audio elements
- Blind Users (using “screenreading” software)
  - Cannot access undescribed images
  - Cannot navigate by mouse
What Is Website Accessibility?

- Low Vision Users
  - Color contrast, non-adjustable font or screen size
- Users with Limited Manual Dexterity
  - Need speech recognition and/or keyboard alternatives
  - Cannot navigate by mouse
- Epilepsy
  - No flashing content
“Nexus” theory

42 U.S.C. § 12182(a): “No individual should be discriminated against on the basis of disability in the full and equal enjoyment of the good, services, [etc.] of any place of public accommodation. . . .”
28 C.F.R. § 36.303(c): “A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.”

- DOJ’s new pet theory: broader, but obligations more vague
Are These Websites Required to Comply with the ADA?

- Websites with nexus to a place of public accommodation that offers e-commerce
  - Retail, hotel, restaurants
- E-commerce websites with no connection to a place of public accommodation
  - Online only entities
  - Inconsistent decisions throughout country as to whether they must be accessible
Are These Websites Required to Comply with the ADA?

- Information only websites
  - Websites of places of public accommodation with no e-commerce
- Websites of places that are not places of public accommodation
  - Manufacturing facility, etc.
How Do You Define Accessibility?

- 1991 ADA Standards for Accessible Design—promulgated by DOJ
  - Updated in 2010
How Do You Define Accessibility?

- Design requirements for construction and alteration of places of public accommodation
  - Does not address internet
- Clear standards for brick and mortar facilities
How Do You Define Accessibility?

  - Three “priority” levels: A, AA, AAA
- Not “official,” but widely accepted
• DOJ ANPRM in 2010
  • Title II and Title III
• Flurry of regulatory activity in 2015/2016
DOJ was to issue NPRM for Title II in July 2017
Title III NPRM “during fiscal year 2018”
January 2017 Access Board announces Final Rule
  Federal agencies and contractors
  WCAG 2.0 AA
Strongly suggested that WCAG 2.0 AA will be standard
▪ December 26, 2017, DOJ officially withdrew both ANPRMs
  ▪ Title II and Title III

▪ To evaluate whether regulations were “necessary and appropriate.”

▪ Such evaluation “will be informed by additional review of data and further analysis.”
Effect of Change in Administration

- Unlikely that regulations will be implemented anytime soon
- Currently no established standards by which entities may gauge compliance with ADA
- All that is certain is that websites must comply with ADA—not certain exactly what constitutes “compliance”
DOJ Enforcement Actions

- Low damages/penalties, but rigorous enforcement and monitoring when DOJ is involved
- DOJ’s 2015 Statements of Interest in Harvard and MIT cases make clear that DOJ finds a current obligation to make websites accessible
- WCAG 2.0 AA appeared to be standard
DOJ Pivots in Letter to Members of Congress

- June 20, 2018, letter to Attorney General from a large bipartisan Congressional contingent seeking guidance and clarity with regard to website accessibility

- “Absence of a specific regulation does not serve as a basis for noncompliance with a statute’s requirements”

- Public accommodations have flexibility in how to comply with the ADA’s general requirements of nondiscrimination and effective communication.
▪ “Noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA”

▪ Effect of new administration?
Private Enforcement Activity

- Firms in New York, Miami, Southern California, Pittsburgh
  - Chicago, Southeastern U.S.
- In wake of DOJ’s June 2015 Statements of Interest, private firms have sent thousands of letters, filed hundreds of lawsuits
Plaintiffs are serial filers

Demands for injunctive relief, attorneys’ fees, and compensatory damages in some jurisdictions

- CA’s Unruh Act, NY State and Local Law

Remediation demands may be more flexible than governmental enforcement
Private Enforcement Activity

- UsableNet, Inc.'s 2018 ADA Web Accessibility Report reported an 181% increase in website accessibility litigation from 2017 to 2018
- 814 Cases in 2017 to 2,285 Cases in 2018
  - 96% of lawsuits filed in New York or Florida
- Retail is most commonly targeted industry (38%)
Thirty-Four Percent of Website Accessibility Lawsuits filed in Florida Courts

- Prevalence of claims in Florida has led many courts to adopt expedited discovery orders
  - Speedy exchange of predetermined discovery or inspection information
  - Mandatory mediation
- Companies must move quickly once a case is filed
Aggrieved individuals can file complaints with OCR regarding alleged lack of accessibility of websites

Aware of an advocate who has been filing dozens of OCR complaints on a weekly basis

Does not appear to be a connection between law firm demand letters and OCR complaints

Change in procedure following massive influx of complaints resulting in closure of most investigations
Court Interpretations Regarding Accessibility

▪ “Nexus” theory

  
  ▪ Title III of the ADA’s coverage is not limited to the physical boundaries of a “place of public accommodation,” but likewise extends to the goods and services provided by such a place, including a website
Court Interpretations, Continued

- *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279 (11th Cir. 2002)
  - Inaccessible means of establishing eligibility for television gameshow was discrimination because it impaired access to the place where the gameshow was filmed

  - Website only covered if it affects access to a physical place of public accommodation
“Auxiliary Aids and Services”

42 U.S.C. § 12182(b)(2)(A)(iii), which requires public accommodations to provide “auxiliary aids and services” where necessary to allow persons with disabilities equal access to a public accommodation’s goods, services and the like.

DOJ’s 2015 Statements of Interest
Website Itself is NOT Place of Public Accommodation

Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000)

Cullen v. Netflix, Inc., 880 F. Supp. 2d 1017, 1023 (N.D. Cal. 2012) (“websites are not places of public accommodations under the ADA because they are not actual physical places”)

Website Itself is NOT Place of Public Accommodation

Peoples v. Discover Fin. Servs., Inc., 387 Fed. Appx. 179, 183 (3d Cir. 2010) (in the context of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12182 (“ADA”), the term “public accommodation ... is limited to physical accommodations”)

Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010–11 (6th Cir. 1997) (stating that a public accommodation is a physical place)
Website Itself Is Place of Public Accommodation

- Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, 37 F.3d 12, 19 (1st Cir.1994)

- Doe v. Mutual Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir.1999) (Chief Judge Posner noted that facilities that exist in electronic space, including a website, are covered by Title III)
Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 570 (D. Vt. 2015) (holding that website was place of public accommodation in absence of any physical structure)

Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F.Supp.2d 196, 200 (D.Mass.2012) (ADA covers not only transactions taking place over the phone or through correspondence but also “applies with equal force to services purchased over the Internet”)


“It is unambiguous that under Title III of the ADA, dickblick.com is a place of public accommodation.”

  - If the website is a privilege or amenity of the physical place, that is sufficient to support a website accessibility claim.
Despite flexibility suggested by DOJ, conformance to WCAG 2.0 or 2.1 likely remains the only predictably safe standard to ensure that websites comply with the ADA

- Retain knowledgeable consultants and outside vendors to make necessary updates
- Draft contracts to bind consultants to comply with WCAG 2.0, Level AA
- Provide certificate of compliance if possible
Best Practices

- Website Audit
- Remediation Plan
- Website Accessibility Policy and Training
- Hotline
- Parallel Website
Company is committed to ensuring that our website is accessible to everyone. To make the use of our websites a positive experience, we endeavor to conform to the Web Content Accessibility Guidelines (WCAG) 2.0 A/AA. We continuously seek to enhance our website, and increase the accessibility of our digital content, for all of our customers. If you have an accessibility-related question or comment, or if you are having difficulty accessing information on this website, please email us at company.com so that we can provide you with the information you need through alternative means.

Company works to make its website accessible to all, including those with disabilities. If you are having difficulty accessing this website, please call or email us at 800.555.5555 or company.com so that we can provide you with the services you require through alternative means.
Business Interruption & System Failure Coverage

Greg Wagner, Vice President, Cyber Underwriting

Corvus
What is Business Interruption Coverage?

Business Income Loss and Extra Expenses incurred as a result of a total, partial, or intermittent interruption or degradation in service on an Insured’s computer system caused directly by a privacy breach, security breach, administrative error or power failure.

• Business Income Loss = Net profit before income taxes the insured is prevented from earning during the interruption period. Also includes normal operating expenses, including payroll.

• Extra Expenses = Costs to continue “normal” operations

• Administrative Error = E&O by an employee in the processing of digital assets

• Power Failure = Only where under the direct operational control of the Insured
Contingent Business Interruption

Insured is adversely impacted as a result of a network outage suffered by an outsourced service provider.

*Claim Example:* Insured is an online retailer that relies on a web hosting service provider to host their websites. The hosting provider suffers a denial of service attack, causing a network outage of 24 hours. As a result, the insured is unable to generate revenue and suffers a financial loss.
First party business interruption expenses incurred as a result of unplanned or unintentional outage – NOT necessarily breach related.

- Failure in power supply under the insured’s operational control
- Accidental physical damage or destruction to electrotonic media
- E&O of an insured or outsourced service provider related to the mishandling of digital assets
- Acts of God are typically excluded
System Failure Claim Scenarios

- Employee trips in server room, causing damage to digital assets and leading to a prolong network outage
- Failure in backup generators
- Electrostatic build-up
- May happen at the hands of the insured or their outsourced service provider
Impacted Industries

• Manufacturing
• Utilities
• E-Commerce
• Supply Chain Service Providers
• Public Entities
• Most Businesses today!
How is the Exposure Underwritten?

- Nature of Operations – What happens if the insured (or their outsourced service provider) suffers a prolonged network outage?
- Underwriters less concerned about PII count, and more concerned about recovery time
- Redundancy and “Defense in Depth” IT security strategy
- Disaster Recovery and Incident Response Planning – are these tested?
- What IT vendors does the Insured utilize?
- Is sensitive data regularly backed up at secure location?
Not All Coverage is Created Equal – What to Look For

- Waiting Period
- Period of Indemnity
- Scheduled Providers vs. Blanket Coverage
- Look for Contingent coverage
- Voluntary Shutdown Coverage
- Forensic Accounting Coverage
- Exclusions
Questions?
Merriam-Webster Definition

1. A tall, Asian herb (*Cannabis sativa* of the family Cannabaceae, the hemp family) that has a tough fiber and is often separated into a tall loosely branched species (*C sativa*) and a low-growing densely branched species (*C indica*);

   a. **Hemp**: cultivated for its tough bast fiber and edible seeds and oil; note that hemp is often distinguished from cannabis by possessing very low levels of the psychoactive substance THC.
2. The psychoactive dried flower buds, leaves, or preparations (such as hashish) or chemicals (such as THC) that are derived from the cannabis plant, especially

a. Marijuana: the psychoactive dried resinous flower buds and leaves of the female hemp or cannabis plant that contains high levels of THC and are smoked, vaped, or ingested especially for their intoxicating effect; note that several substances (such as CBD) lacking psychoactive properties are extracted from the flower buds of marijuana and are used medicinally.

b. Cannabinoid:
   • any of the various naturally-occurring, biologically active, chemical constituents of hemp or cannabis including some that possess psychoactive properties;
   • a substance that is structurally or functionally similar to cannabinoids, whether naturally produced within the body or synthetically produced to mimic the effects of natural cannabinoids.
Recreational Marijuana

[Map showing states with recreational marijuana legal status]
Allow CBD Possession & Use
Controlled Substances Act of 1970
Listed Marijuana as a Schedule 1 drug* along with heroin, LSD, Peote, Quaaludes

1970

1996

1997-2010

2013

2014

2016

2018

2019

2019

15 More States Allow Medicinal Marijuana
Rohrabacher-Farr Amendment
Revised Farm Bill
SAFE Banking Act
Passed by the House Financial Services Committee

California Allows Medical Marijuana
The Cole Memo
Jeff Sessions

*Schedule 1 drugs: high potential for abuse; no accepted medical treatment use; and lack of accepted safety for use under medical supervision

STATES Act
Reintroduced in Both Senate & House

Professional Liability Underwriting Society
Cannabis as an Industry

$8B Sales in 2017
Projected to be $22B by 2022

$42B Illegal Sales
in 2017
Projected to be $5B by 2022

Industry Broadens
Growers, processors, laboratories,
food/drink/supplement
manufacturers/distributors,
dispensaries, retail outlets,
vape/paraphernalia products, etc, etc

Expanding Delivery Methods

The CBD Craze

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Expanding Delivery Methods

The CBD Craze
From Seed to Sale

Cultivation
- Growers
- Inventory (plants, seeds, clones)
- Laboratories

Quality Assurance Testing
- Samples
- Product testing laboratories
- Test equipment, test results, product labels
- Analytical laboratories
- Manifests

Harvest & Manufacturing
- Flowers and waste
- Extraction equipment
- Laboratories
- Processors
- Manufacturers (food, drink, medical)
- Prepackaged goods or derivatives (oil concentrate)
- Manifests
- Vaporizers and other smoking devices/accessories
- Ancillary product, vape, and paraphernalia
- Rolling paper manufacturers
From Seed to Sale

Transportation
- Manifests
- Shippers, distributors, warehouses, logistics, 3PL
- Drivers
- Equipment
- Couriers and carriers for hire

Medical
- Individual practitioners (physicians, dentists, physician assistants, nurse practitioners, CRNAs)
- Medical marijuana evaluation clinics
- Pharmacists

Dispensary
- Retail
- Hospitality business (bakeries, coffee/cannabis shops)
- Vaporizers and other smoking devices/accessories
- Ancillary products, vape, and paraphernalia
- Pharmacies
- Hemp – dietary supplements
- CBD, cannabidiol
- Budtenders/sales associates
Insurance Needs of the Industry

- Property
- Casualty
  - Premises
  - Products
  - Excess/Umbrella
- Professional
- D&O/EPLI
- Medical
- Other
  - Auto
  - Work Comp
  - Homeowners
Excess & Surplus Lines vs Admitted
Industry Poised for Significant Growth/Expansion
Improved Risk Management & Sophistication
Potential FDA Oversight
Federal Barriers Coming Down
Questions?
Cannabis in the Workplace:

Legal Representation of Insureds

Gretchen Lehman, Esq., Attorney, 
Ogletree Deakins
State Marijuana Laws in 2019

- Thirty-three States and the District of Columbia currently have passed laws broadly legalizing marijuana in some form
  - DC and 11 states have adopted most expansive laws legalizing marijuana for recreational use
    - Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington
Most other states allow for limited use of medical marijuana under certain circumstances

- In the Southeast, Florida, Louisiana, Arkansas, and West Virginia have medical marijuana laws
- Types of medical conditions that allow for treatment vary from state to state
- Some states restrict the forms of marijuana that qualify for medical use
Most MML Provide Employers Are Not Required To Accommodate Intoxication, Use, Or Possession At Work

AZ, CT, DE, IL, ME, MN, NV, PA, and RI law contain anti-discrimination provisions, for example:

“[A]n employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon . . . a patient’s positive drug test for cannabis . . . unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment.”

“Medical use” does not include the use of marijuana “in a qualified patient’s place of employment, except when permitted by his or her employer.”

“Does not exempt a person from … any requirement under law to submit to a breath, blood, urine, or other test to detect the presence of a controlled substance.”

Section 381.986, Florida Statutes.
Section 381.986, Florida Statutes.

“This section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy. This section does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working while under the influence of marijuana. This section does not create a cause of action against an employer for wrongful discharge or discrimination. Marijuana, as defined in this section, is not reimbursable under chapter 440.”
What Does this Mean for a Drug-Free Workplace?

- Duty To Provide Safe Workplace Paramount.
- Medical marijuana may have positive medical benefits, but there are potential negative effects, particularly in an inherently hazardous work environment.
Potential Negative Effects

- Effects to the Central Nervous System
- Changes in sensory perception
- Short-term memory problems
- Impaired thinking
- Impaired motor performance
- Loss of balance and coordination
- Decreased attentiveness and alertness
- Prolonged response time to stimuli and danger
- Decreased ability to judge distance and space
- Impaired ability to perform complex tasks
Potential Negative Effects

- Some of these negative effects could prove disastrous on a job site.
- A problem with medical marijuana is determining whether an employee is potentially subjected to these negative effects on a jobsite.
- Currently, there is no reliable metric for determining when a particular level of THC from marijuana usage impairs the user and for how long the user remains impaired.
- Chronic use may present long-term brain effects.
What Can Employers Do?

- Remind employees that on-the-job impairment is not tolerated and that medical marijuana is no exception
- Update your drug-free workplace policy and drug-testing policy and procedures
- Provide employee education on company policies and impact of legal changes (with emphasis on safety)
- Train supervisors and managers on how to spot issues that may need further consideration
- Offer employee assistance where appropriate (e.g. for serious health conditions under the FMLA or disabilities under the ADA)
ADA/FMLA Considerations

▪ No Duty To Accommodate Illegal Drug Use Under ADA.
▪ Recovering Addict Provisions Apply.
▪ But, An Employer May Have A Duty To Engage In The Interactive Process If The Employer Has Reason To Believe The Employee Is Disabled.
▪ Employer May Also Have To Consider Whether FMLA Or Other Leave Is Appropriate For Underlying Medical Condition.
Under DOT Regulations, Marijuana Use Prohibited For Safety-Sensitive Employees:

- Bus Drivers And Subway Operators (FTA).
- Truck Drivers (FMCSA).
- Pilots And Aircraft Maintenance Personnel (FAA).
- Locomotive Engineers (FRA).
- Ship Captains And Crews (USCG).
“The Department of Transportation’s Drug and Alcohol Testing Regulation -- 49 CFR Part 40, at 40.151(e) -- does not authorize ‘medical marijuana’ under a state law to be a valid medical explanation for a transportation employee’s positive drug test result.”
Other Federal Considerations?

• Employers with federal contracts may be prohibited from accommodated marijuana use under the terms of those contracts – read carefully

• On January 4, 2018, Attorney General Jeff Sessions announced a retreat from the USAO’s previous approach to state marijuana laws
California and Washington

• **California**: California’s medical marijuana statute “merely exempt[s] medical users … from criminal liability.”
  

• **Washington**: “Implying a cause of action against a private entity is inconsistent with a statutory scheme intended to provide an affirmative defense to state criminal prosecution.”
  
“This case requires us to determine whether the use of medical marijuana in compliance with Colorado’s Medical Marijuana Amendment…, but in violation of federal law, is a “lawful activity” … Colorado’s ‘lawful activities statute.’”

“This statute generally makes it an unfair and discriminatory labor practice to discharge an employee based on the employee’s ‘lawful’ outside-of-work activities.”
Brandon Coats claimed Dish Network violated the lawful activities statute by firing him because of his state-licensed use of medical marijuana at home during non-working hours.

He claimed that the Medical Marijuana Amendment makes such use “lawful” for purposes of lawful activities statute notwithstanding any federal laws prohibiting medical marijuana use.
“Nothing in the language of the statute limits the term ‘lawful’ to state law. Instead, the term is used in its general, unrestricted sense, indicating that a ‘lawful’ activity is that which complies with applicable ‘law,’ including state and federal law.”

Christina Barbuto had a prescription for medical marijuana to her Crohn’s disease under Massachusetts law for Crohn’s disease and tested positive for marijuana. She filed suit under the State ADA.

The MML also provides, “Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions.”

- A “handicapped employee has a right under [Mass ADA], not to be fired because of her handicap, and that right includes the right to require an employer to make a reasonable accommodation for her...”

- “To declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients....”
Legalization ≠ Accommodation -- (Except Maybe In AZ, CT, DE, IL, ME, MN, NV, PA, And RI)

Duty To Provide Safe Workplace Paramount.

- No State Currently Restricts Employer Prohibition On Recreational Use.
- Beware of “Lawful Off-duty Conduct” Litigation and Massachusetts.
Establish And Communicate Clear Drug Policies

- Employers (Except In AZ, CT, DE, IL, ME, MN, NV, PA, And RI) May Enforce Drug Testing Policies To Exclude Employees Who Test Positive For Marijuana.
- Beware ADA Risks In Drug Tests Positive For Rx Drugs.

- Uniformly Enforce Drug Testing Policies To Avoid Discrimination Claims.