2018 EMPLOYMENT LAW HOTSPOTS

ADA Website Accessibility - Marijuana in the Workplace - Ban the Box Laws

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Today's Agenda

ADA Website Accessibility

Marijuana in the Workplace

Ban the Box Laws

ADA Website Accessibility

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Legal Implications of Inaccessibility Under Federal Law

- Americans with Disability Act of 1990 ("ADA")
- Rehabilitation Act of 1973
- Air Carrier Access Act
- 21st Century Communications and Video Accessibility Act

State and Local Laws

Most states and many localities have human rights / anti-discrimination laws prohibiting discrimination on the basis of disability and requiring accessibility in various public entities

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Title III of the ADA - Who Is Covered?

- Governs places of public accommodation
- Places of public accommodation include:
  - Places of lodging
  - Restaurants and bars
  - Entertainment venues
  - Places of public gathering
  - Retail stores and shopping centers

Continued…

Title III of the ADA - Who Is Covered?

Continued

- Service establishments
- Public transportation centers
- Museums and galleries
- Public places of recreation
- Schools
- Social service centers
- Sports facilities

Title III of the ADA - A Civil Rights Law

- Title III guarantees individuals with disabilities the "**full and equal enjoyment** of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation"[42 U.S.C. §12182(a)]
- Key Types of Disabilities/Impairments
  - Visual (blind/low vision)
  - Aural (deaf/hard of hearing)
  - Physical (*e.g.*, can't use hands)
  - Cognitive (*e.g.*, learning disability)

- General Prohibitions
  - Denying participation or the opportunity to participate
  - Providing unequal benefits
  - Providing separate benefits/not having an integrated setting

Sources of Website Accessibility Obligations - Background

- Title III of the ADA:
  - Prohibits places of public accommodation from discriminating on the basis of disability
  - Requires "full and equal enjoyment"
  - Does not explicitly define whether a place of public accommodation must be a physical place or facility, nor does it directly address whether it could be read or interpreted to apply to a non-physical place or facility
  - Currently, tension exists regarding whether Title III applies to websites which exist independent of a physical place

Three Approaches to Application of Title III to Websites

- **Strict construction**: "places of accommodation" are limited to physical places so Title III does not apply
- **Nexus:** Title III applies when there is a sufficient connection between the goods and services of traditional "places of accommodation" (*e.g.*, a restaurant or hotel) and the alternative consideration (*e.g.*, website)
- **Spirit of the law:** "places of accommodation" are not limited to physical places so Title III does apply

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Scope of ADA Coverage: The Current Judicial Landscape

Strict Construction: Title III applies only to physical places – "pure" websites are not subject to the ADA.

- *Oulette v. Viacom* (D. Mont. 2011)
- *Young v. Facebook, Inc.* (N.D. Cal. 2011)
- *Earll v. eBay, Inc.* (N.D. Cal. 2011)
- *Jancik v. Redbox Automated Retail, LLC* (C.D. Cal. 2014)

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Scope of Coverage: The Current Judicial Landscape

Nexus: Title III applies only if there is sufficient connection between the goods and services of traditional "places of accommodation" (*e.g.*, a restaurant or hotel) and the alternative consideration (*e.g.*, website): 3rd, 6th, 9th and 11th Circuits

Nexus – Key Decision

Nat'l Federation of the Blind vs. Target Corp.
452 F. Supp. 2d 946 (N.D. Cal. 2006)

- Held that Title III covers websites in situations where a nexus exists between the website and a physical place of public accommodation
- Resulted in a court approved class settlement agreement in which Target agreed to:
  - Establish a $6 million fund for the settlement class
  - Take steps necessary to make its website accessible to the blind by early 2009 and obtain "certification" from NFB;
  - Pay attorneys' fees and costs

Scope of ADA Coverage: The Current Judicial Landscape

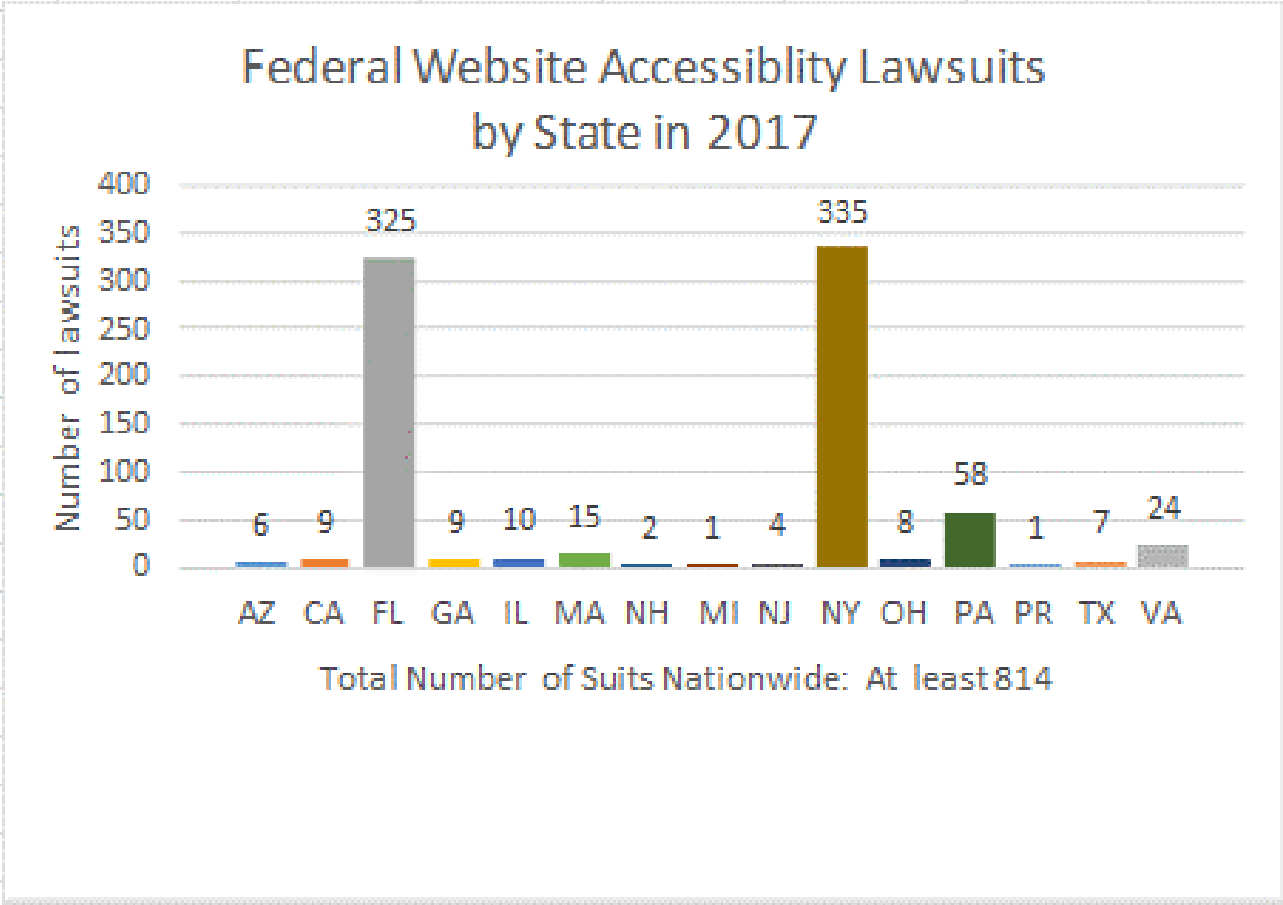
Spirit of the law: Title III applies to "pure" websites: 1st, 2nd and 7th Circuits

- ***Morgan v. Joint Administration Board*, 268 F.3d 456, 459 (7th Cir. 2001)**: "An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store."
- ***Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012)**
- ***Nat'l Federation of the Blind v. Scribd* (D. Vt. 2015)**
- ***Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D. N.Y. 2017)**

The Litigation Landscape

- In 2017, plaintiffs filed at least 814 federal lawsuits about allegedly inaccessible websites, including a number of putative class actions.
- New York and Florida led the way with more than 335 and 325 cases, respectively. California only had nine new website accessibility lawsuits in 2017, most likely because plaintiffs filed in state court.
- New York almost doubled its 543 lawsuits filed in 2016 to 1023 in 2017. The increase is likely due, at least in part, to recent federal court decisions that have likely emboldened plaintiffs' attorneys in that jurisdiction.
- These numbers are conservative estimates, and do not include demand letters or lawsuits filed only in state courts.

The Litigation Landscape



The First Website Accessibility Trial:
Gil v Winn-Dixie Stores, Inc.
257 F.Supp.3d 1340 (S.D. Florida 2017)

- Trial court found that grocer Winn Dixie had violated Title III of the ADA by maintaining a website that was inaccessible to visually impaired consumers.
- Found that the $250,000 cost to remediate Winn Dixie's website was not an "undue burden."
- Ordered Winn Dixie to make its website conform with the Web Content Accessibility Guidelines 2.0 AA (WCAG 2.0 AA).

Current Trends in ADA Website Compliance

- Increased (threats of) litigation on this issue
- Significant number of settlements and "cooperative agreements" between advocacy groups and/or state and/or federal government agencies and major companies regarding website accessibility
- DOJ has nixed all pending ADA rulemaking, including website access rules
- Movement to adopt the World Wide Web Consortium/Website Accessibility Initiative's Web Content Accessibility Guidelines 2.0

What Does the ADA Require?

- "Reasonable modifications" or "auxiliary aids or services" to ensure disabled individuals "full and equal enjoyment"
- "Public accommodations" do not discriminate
  - If the modifications needed are unreasonable or would "fundamentally alter the nature" of the good, service or accommodation, or
  - If the provision of auxiliary aids or services would be "unduly burdensome"

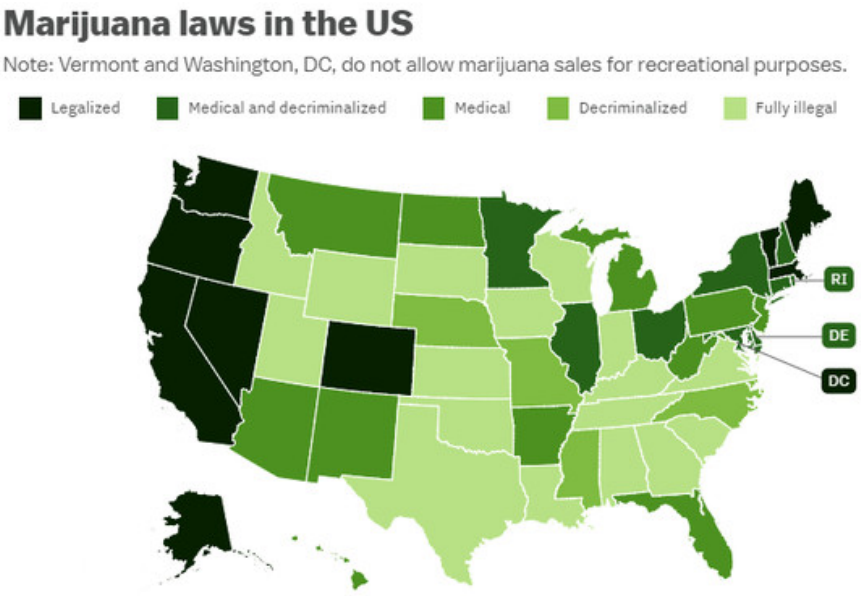
Common Website Accessibility Issues

Alt Attributes/Accurate Descriptions	Resizing Text
Skip Navigation/By-Pass Blocks	Contrast
Methods of Navigation	PDFs
Focus	Captioning/Narrative Description
Order of Content	Language
Forms/Tables	Control of Moving Content

Lessons Learned From Litigation

- If you have a physical location (store, hotel, restaurant), the ADA will apply to your website
- In certain jurisdictions, the ADA will apply to your website even if you do not have a brick and mortar equivalent
- Provide 24/7 toll-free telephone number serviced by live agents who can provide access to all information and functions of website [*Robles v. Dominos Pizza, LLC* (C.D. Cal. 2017)]
- State and local laws and regulations must be considered
- Apps also need to be compliant

Marijuana in the Workplace



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Statutory Overview

- Tension between state/federal law
- Is an employer required to accommodate medical marijuana use?

State Statutory Overview

3 main categories of state statutes

Categories	States
Statutes that do not provide employment rights OR state that employers have no duty to accommodate medical marijuana use whatsoever	AK, CO, MD, MO, MT, OH, VT, WA, WI
Statutes that prohibit discrimination against employees for using medical marijuana OR require reasonable accommodations	AR, AZ, CT, DE, IL, ME, MN, NV, NY, PA, RI, WV
Statutes that do not require the employer to accommodate use of medical marijuana **in the workplace**, but are silent as to whether there is a duty to accommodate **outside the workplace**	CA, FL, GA, HI, MA (but see *Barbuto* herein – suggests accommodation required for off-site use), MI, NH, NJ, NM, ND, OR

Common Exceptions in State Marijuana Statutes

- No requirement that employers allow use of marijuana on the job or impairment while working
- Accommodation not required if it would cause a loss of federal contract or other benefits
- No requirement that employers accommodate recreational use

Key Cases Discussing Whether an Employer Has a Duty to Accommodate Medical Marijuana Use

California

Ross v. Ragingwire Tele., Inc., 42 Cal.4th 920 (Cal. 2008)

- Employee was prescribed medical marijuana for strain and muscle spasms in his back; took drug test and failed.
- Alleged violation of California Fair Employment and Housing Act ("FEHA") and public policy under marijuana statute
- Holding:
  - (1) FEHA did not require employer to accommodate employee's use of medical marijuana
  - (2) no cause of action for termination in violation of public policy
- Dissenting opinion could shed light on future decisions

California

Shepherd v. Kohl's Department Stores, Inc., 14-cv-01901, 2016 WL 4126705 (E.D.Ca. Aug. 2, 2016)

- Same holding as *Ross* regarding the claim for discrimination under FEHA
- The court went further and held that the employer did not violate FEHA by failing to engage in the interactive process.
- HOWEVER, the court denied the employer's motion for summary judgment on the employee's claim for breach of the implied covenant of good faith and fair dealing.

Colorado

Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015)

- Employee who was quadriplegic tested positive for THC on a random drug test and was later fired
- Employee argued "Lawful activities statute"
- Holding:
  - (1) an activity such as medical marijuana use that is unlawful under federal law is not a "lawful" activity under lawful activities statute.
  - (2) employee could be terminated for his use of medical marijuana in accordance with state medical marijuana act.

New Mexico

Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225 (D.N.M. 2016)

- Employee applied for job; disclosed that he had HIV/AIDS & used med. marijuana.
- Employee was hired, but later discharged for a positive drug test result
- Issue: Whether the state marijuana act combined with the human rights act provided a cause of action to the employee
- Holding: Neither statute provided a cause of action for discrimination

New Jersey

Barrett v. Robert Half Corp., 15-6245, 2017 WL 4475980 (D.N.J. Feb. 21, 2017)

- Employee suffered from severe, chronic pain caused by herniated and bulging discs, for which he was issued a medical marijuana license
- Employee notified employer of his disability and marijuana use; terminated due to positive drug test
- Holding:
  - Employee failed to state a claim for discrimination under state human rights act based on his disability → employee failed to plead that he requested an accommodation
- Appeal currently pending

Rhode Island

Callaghan v. Darlington Fabrics Corp., PC-2014-5680, 2017 WL 2321181 (R.I.Super. May 23, 2017)

- Applicant disclosed that she used medical marijuana; she tested positive on drug test and employer refused to hire her.
- Holding:
  - (1) Summary judgment for employee granted on claim for violation of medical marijuana act → Implied private right of action
  - (2) Employer's motion to dismiss claim for violation of the state human rights act denied. Unlike in *Barrett*, it was sufficient that the employer knew that applicant used medical marijuana.
  - (3) federal law did not preempt the state marijuana act

Massachusetts

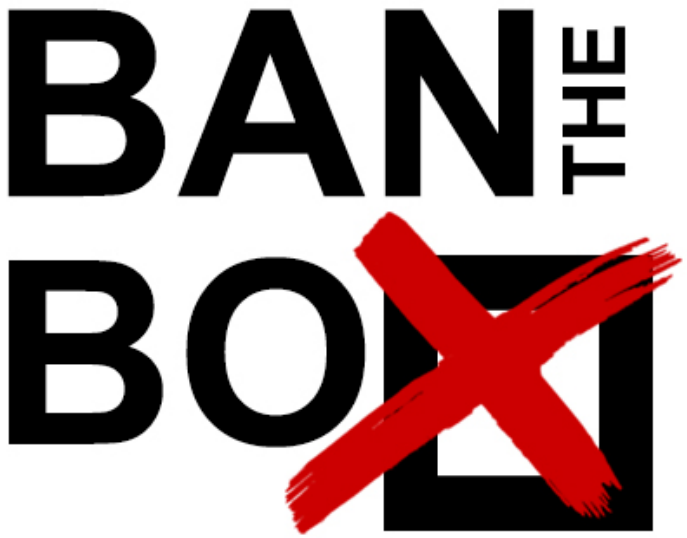
Barbuto v. Advantage Sales & Marketing, LLC, 477 Mass. 456 (Mass. 2017)

- Employee filed claims alleging disability discrimination and unlawful termination under state marijuana act and disability act
- Holding:
  - (1) reversed dismissal of employee's claim for disability discrimination under state disability discrimination statute → The employer had a duty to engage in the interactive process
  - (2) affirmed dismissal of employee's claim for discrimination in violation of the medical marijuana act because there is no implied private cause of action
  - (3) affirmed dismissal of employee's claim for wrongful termination in violation of public policy as there is no such implied statutory private right of action

Trends/Take Aways

- Strain between state/federal law
- State courts are generally more employee friendly
- 3 general types of state medical marijuana statutes
- Most medical marijuana statutes do not require an accommodation: (a) if the employer would be in violation of a federal contract; (b) if the employer would lose a federal grant; or (c) for safety sensitive jobs
- None of the state medical marijuana laws require an employer to permit an employee to use medical marijuana on the work site or during work hours
- State medical marijuana laws are not the only laws implicated in relation to an employee's right to use/an employer's duty to accommodate medical marijuana

Ban the Box/Fair Chance Laws



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Ban the Box/Fair Chance Laws

- Laws prohibiting prospective employers from asking job applicants to disclose criminal history on the job application
- In general, applicants cannot be asked about their criminal history until:
  - (i) after an interview; or
  - (ii) after a conditional offer has been made
- In general, cannot inquire into:
  - (i) arrest records that did not result in a conviction;
  - (ii) expunged criminal records; or
  - (iii) convictions more than 10 years old
- Exceptions for certain types of positions

10 States With "Ban the Box" Laws Applicable to Private Employers

California	Minnesota
Connecticut	New Jersey
Hawaii	Oregon
Illinois	Rhode Island
Massachusetts	Vermont

17 Municipalities With "Ban the Box" Laws Applicable to Private Employers

Austin	Kansas City (MO)	Prince George's City (MD)
Baltimore	Los Angeles	Rochester (NY)
Buffalo	Montgomery City (MO)	San Francisco
Chicago	New York City	Seattle
Columbia (MO)	Philadelphia	Spokane
D.C.	Portland	

*Note that several state counties also have ban the box laws

EEOC Enforcement Guidance (April 2012)

- Federal law does not prohibit employers from asking about applicant's/employee's criminal history
- BUT, EEO laws (such as Title VII) prohibit discrimination when using criminal history information
- How can criminal history information be used in a discriminatory way?
  - Disparate treatment
  - Disparate impact
- Policy must be "job related and consistent with business necessity"

Possible Repercussions for Failing to Comply

- Penalties
- Discrimination claims (See, e.g. *Williams v. Atlantic Health Sys.*, 15-cv-06366, 2017 WL 1900725 (D.N.J. May 8, 2017)

Best Practices to Avoid Employer Liability

- Eliminate policies or practices that exclude people from employment based on *any* criminal record
- Limit inquiries to records that are job related and consistent with business necessity
- Develop a narrowly tailored written policy and procedure for screening criminal conduct
- Train managers, hiring officials, decision makers about prohibition of employment discrimination
- Keep criminal records confidential

Questions?

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