



## From the Stairway to Cyberspace: Where We are Headed with the ADA

### HISTORY OF THE ADA

- ADA – Americans with Disabilities Act of 1990, 42 U.S. Code § 12101
- Nation's first comprehensive civil rights law addressing the needs of people with disabilities, prohibiting discrimination in employment, public services, public accommodations, and telecommunications



## Disability in the United States

- 43 million people considered to have a disability.
- 25 % of population who are hearing or visually impaired.
- 33% of college graduates ages 25 to 64 with a disability.



## Overview of the ADA

- Title I: Employment.
- Title II: Public Entity (and Transportation)
- Title III: Public Accommodation. This is our focus today.
- Title IV: Telecommunications. (Telephones, TV, etc. )
- Title V: Miscellaneous Provisions. Permits payment of attorney/expert witness fees, Prohibits coercion and retaliation



## Expansion of the ADA

The ADAAA broadens the definition of "disability" by modifying key terms of that definition

- expanding the definition of "major life activities";
- redefining who is "regarded as" having a disability;
- modifying the regulatory definition of "substantially limits";
- specifying that "disability" includes any impairment that is episodic or in remission if it would substantially limit a major life activity when active; and
- prohibiting consideration of the ameliorative effects of "mitigating measures" when assessing whether an impairment substantially limits a person's major life activities, with one exception.

• Source: <https://www.dol.gov/ofccp/regs/compliance/faqs/ADAFaqs.htm>



## Disability- A Changing Definition

OLD APPROACH	New Paradigm
<ul style="list-style-type: none"> <li>• A diagnosis</li> <li>• A medical "problem"</li> <li>• A person is limited and defined by the impairment or condition</li> </ul>	<ul style="list-style-type: none"> <li>• A social and environmental issue that deals with accessibility, accommodations, and equity</li> <li>• Individuals with temporary or permanent impairments require accommodations to live full and independent lives</li> </ul>



## What Is A Disability?

- **What is a disability?** AIDS, and its symptoms; Alcoholism; Asthma; Blindness or other visual impairments; Cancer; Cerebral palsy; Depression; Diabetes, Epilepsy; Hearing or speech impairments; Heart Disease; Migraine Headaches; Multiple sclerosis; Muscular dystrophy; Orthopedic impairments; Paralysis; complications from Pregnancy; Thyroid gland disorders; Tuberculosis; loss of body parts.
- **What is NOT a disability?** common cold or flu, a sprained joint, minor and non-chronic gastrointestinal disorders, broken bone expected to heal completely, compulsive gambling, pregnancy, old age, lack of education, poor judgment, or bisexuality or homosexuality

• Source: [http://www.illinoislegalaid.org/index.cfm?fuseaction=home.dsp\\_content&contentid=167](http://www.illinoislegalaid.org/index.cfm?fuseaction=home.dsp_content&contentid=167)



## Changing Terms:

- ADA originally defined "disability" as a physical or mental impairment that "substantially limited" a "major life activity," or a record of such impairment.
- As interpreted by courts, "substantial limitation" meant a significant limitation when compared to general population -required condition be both long-term and severe.
- To be substantially limited in the major life activity of working, individual had to be substantially limited in working, *plus* one additional major life activity.

• Source: <http://www.constangy.com/communications-331.html>



## Changing Terms: (Cont.)

Outside of major bodily functions, the new definition of “major life activities” limited by a disability **now** includes:

- walking, speaking, caring for oneself, performing manual tasks, seeing, hearing, breathing, learning, and working
- things outside of central importance to daily lives (for example: reading, learning, concentrating, communicating, engaging in sexual activities)

• Source: <https://www.law.georgetown.edu/archiveada/documents/ADAAAQandA.pdf>



## ADA Title I

- Title I prohibits private employers with 15 or more employees, State and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities.
- Regulated by Equal Employment Opportunity Commission (EEOC)
- Defenses: Undue Hardship, Direct Threat to Others.



## Title I: Employment

Requires accommodation to allow disabled individuals to perform a specific job, including:

- Making existing facilities accessible
- Job restructuring/reassignment
- Reduced/modified work schedules
- Assistive devices
- Modification of materials/policies
- Readers or interpreters



## Flexible Interactive Process – The Workplace

- An employee and an employer brainstorm what kinds of accommodations will be practical and effective.
- An employer must supply reasonable accommodations to disabled employee so long as it doesn't cause undue hardship (i.e. cost, financing, and residual effects)

Source: <http://www.nolo.com/legal-encyclopedia/reasonable-accommodations-people-with-disabilities-29492.html>



## ADA Claims - Protecting Your Business

- Many Commercial General Liability Policies, E&O, EPLI and umbrella policies cover employee ADA claims against employer.
- Some policies consider ADA violations “personal injury” and it is covered. The broad language, however, is up for interpretation.

Source: <http://www.hildinglaw.com/publications/ADA-lawsuits.pdf>



## Title II

- Title II prohibits disability discrimination by all public entities at the local level, *e.g.*, school district, municipal, city, or county, and at state level.
- Equal Access to all the services or benefits the entity provides.



## Title III: Public Accommodation

- Prohibits discrimination on basis of disability in activities of places of public accommodations
- Enforced by Department of Justice and Department of Transportation
- Court may award injunctive relief
- No punitive damages available



## WHAT IS A PUBLIC ACCOMMODATION?

- Under the ADA, a “**public accommodation**” is a private entity listed in one of twelve categories, including “sales or other retail establishment.”
- Federal courts split on whether a place of public accommodation must be, or have a connection or link with, a physical place.
- The Courts of Appeals are split on whether the term public accommodation refers to actual physical structure or whether it has a broader meaning encompassing facilities that exist in “electronic space”





## Examples: Public Accommodation

- Applies to:
  - ✓ Hotels and motels
  - ✓ Bars and restaurants
  - ✓ Theaters and museums
  - ✓ Stores and shopping centers
  - ✓ Hospitals and professional offices
  - ✓ Amusement parks and zoos
  - ✓ Nurseries and private schools
  - ✓ Day care centers and homeless shelters
  - ✓ Gyms and health clubs
- Private clubs, private residences, and religious entities are exempt



## Expansion of a Public Accommodation

- Previously, public accommodations were only brick-and-mortar establishments
- Requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with accessibility standards established in ADA
- Expansion of ADA – may apply to purely online enterprise that lacks a physical structure



## Recent Expansions of the ADA

- **U.S. v. Natural Epicurean Academy of Culinary Arts.** Student being discriminated against on account of needing a sign language interpreter. Settlement included school hiring an ADA coordinator.
- **U.S. v. 360 Federal Credit.** Plaintiff complained that The Credit Union did not accommodate phone calls for individuals deaf or hard of hearing (a violation of Title III).
- **U.S. v. YMCA.** Child denied access to YMCA summer day camp on the basis of his type 1 diabetes (a violation of title III).



## SERIAL ADA FILERS

- Recent uptick in disabled individuals filing ADA accessibility lawsuits against public accommodations
- These “testers” seek out places of public accommodation ( businesses), test accessibility for illegal barriers to access and immediately file lawsuits
- Santiago Abreau, Florida resident and known serial filer. Recent case against American Girl (*Abreau v. American Girl Retail, Inc.*, 16cv-00096)
- Abreau has filed other lawsuits against Doc B’s restaurant, Dublin Bar & Grille, McCormick & Schmick’s, Mercadito Kitchen, Office Depot, RA Sushi Chicago, and other local businesses



## DOES THE ADA EXIST IN CYBERSPACE?

Is a website a place of public accommodation?

- Law is unsettled- unsure if websites are places of public accommodation under the ADA
- Courts split on question of whether ADA applies to websites of businesses that have no physical place of business



## BATTLE OF THE COASTS

- **EAST COAST**: Massachusetts Dist. Ct held Netflix streaming website is place of public accommodation even if no brick & mortar business (Nat'l Ass'n of the Deaf v. Netflix, 869 F. Supp.2d 196)
- **WEST COAST**: California N. Dist. Ct held that Netflix and eBay's websites not covered by Title III of ADA because no connection to actual, physical place of business (Cullen v. Netflix, 2013 U.S. Dist. LEXUS 4246; Earl v. eBay, Inc., 599 Fed. Appx. 695)



## THE RULES IN CYBERSPACE: Are there any?

- Currently no regulations promulgated by Department of Justice (DOJ) to provide guidance for websites to comply with ADA
- DOJ has planned to issue new regulations for years and now postponed until 2018
- In 2010, DOJ issued Notice of Proposed Rule Making (ANPRM), taking position that many websites are places of public accommodation until Title III



## MAKING WEBSITES ACCESSIBLE

*If a website is a place of public accommodation, how do we make it accessible?*

- Standard for accessibility under ADA is unsettled
- Voluntary guidelines developed by W3C, an international consortium that develops web standards
- Most recent version: Web Content Accessibility Guidelines (WCAG) 2.0.
- Even within WCAG 2.0, there are degrees of accessibility: A, AA, and AAA.



## DISABLED INDIVIDUALS AND ACCESS

If Title III of ADA applies to websites to prohibit discrimination on the basis of disability, who is being protected?

- Blind and low vision
- Hearing-impaired
- Learning disabled
- Cognitive limitations



## BARRIERS TO ACCESS

- Photos
- Sound clips
- Navigating the mouse and keyboard
- Visual distractions
- Incompatibility with screen readers
- Lack of text equivalent

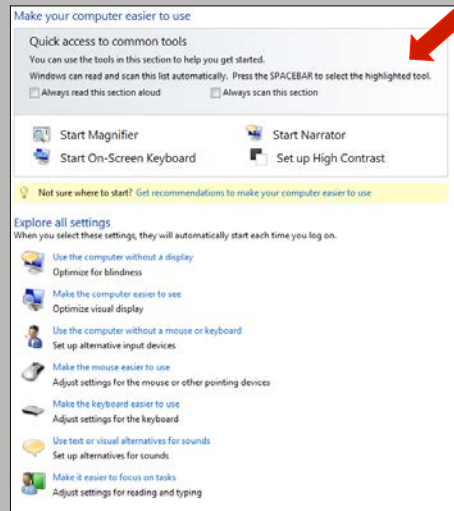
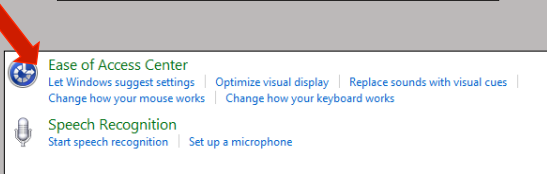


# Changing Approaches to Breaking Barriers

Old Approach	New Paradigm
<p>Fix the individual</p> <p>Correct the deficit within the individual</p> <p>Provide medical, vocational, or psychological rehabilitation services</p>	<p>Remove barriers: physical, intellectual, cultural and emotion</p> <p>Create access through accommodations, universal design, and inclusive learning environments</p>



## Enabling the Disabled to Access: Settings



## EASE OF ACCESS

- Modifications to computer may not be enough to achieve accessibility for disabled user
- Websites should strive to conform with WCAG 2.0 guidelines to be reasonably accessible ... but what does this mean?



## WEB CONTENT ACCESSIBILITY GUIDELINES

- WILD WILD WEST when it comes to rules and regulations that apply to websites
- Businesses can look to the WCAG (Web Content Accessibility Guidelines), widely-recognized set of web accessibility standards created by World Wide Web Consortium (W3C)
- WCAG 2.0 covers wide range of recommendations for making web content more accessible for individuals with disabilities



## Website Conformance – WCAG 2.0

- 1) Provide text alternatives for non-text content to change to large print, braille, symbols, simpler language
- 2) Separate foreground from background
- 3) Make all functionality accessible from keyboard
- 4) Information available w/ and w/o color
- 5) Titles to describe topic or purpose on web pages
- 6) Default human language can be programmatically determined



## Enabling the Disabled to Access: Screen Readers

- Screen readers = software programs that allow blind or visually impaired users to read the text that is displayed on computer screen with a speech synthesizer or braille display.
- Interface between computer's operating system, its applications, and the user.
- User sends commands by pressing different combinations of keys on computer keyboard or braille display to instruct speech synthesizer what to say and to speak automatically when changes occur on computer screen.





## Screen Reader –Website Not Accessible

- <https://www.youtube.com/watch?v=YhplqmgQbRo>



## Screen Reader with Accessible Website

- <https://www.youtube.com/watch?v=EnhJfaCHpUM>



## THE DOJ-PEAPOD SETTLEMENT- A LESSON

- November 17, 2014: DOJ reached settlement with Peapod, LLC, owner and operator of peapod.com, an online grocery retailer  
(DJ 202-63-169 - [https://www.ada.gov/peapod\\_sa.htm](https://www.ada.gov/peapod_sa.htm))
- Peapod settlement agreement requires that a website and apps with arguably *no nexus to a physical place* be made accessible to the disabled – this foreshadows what expected regulations may require



## THE SETTLEMENT SPECIFICS

- In **Peapod** case, DOJ included 3 specific provisions that are noteworthy:
  - 1) DOJ requires company to comply with WCAG 2.0 Level AA standards. May signal that the DOJ views the AA guidelines as the appropriate regulatory standard
  - 2) Notably, there is virtually no mention of smartphone apps and mobile devices in the proposed rulemaking
  - 3) Settlement requires company to take certain steps to ensure that 3<sup>rd</sup> party content providers comply with proposed accessibility standards—but excuses noncompliance if requiring 3<sup>rd</sup> party to comply with standards creates an "undue burden"



## ADA TROLLS: LAW FIRMS ARE CASHING IN

- Some law firms are taking advantage of the lack of DOJ rules or regulations for ADA website compliance and accessibility
- Law firms are preying on businesses of all sizes & types, trolling websites for any errors that could be perceived as a barrier to a disabled individual to get access to the business website
- Law firms sending aggressive demand letters and filing lawsuits against businesses claiming they have identified website “access barriers” to disabled persons



## The REWARD

Under the ADA, no actual damages available to disabled Plaintiffs

### WHAT DO THEY GET?

- Injunctive Relief – public accommodation must become ADA compliant and accessible to disabled individuals
- Attorney’s fees and costs- where the \$\$ is



## The “M.O.” OF TROLLING FIRMS: Carlson Lynch leads the way

- Carlson Lynch Sweet & Kilpela, a firm out of Pennsylvania, has taken advantage of the situation and in late 2015, began sending businesses aggressive demands couched in “settlement letters”
- This firm and others like it allege to represent disabled individuals who cannot access companies websites due to “access barriers” (sometimes without actually naming a client or Plaintiff)
- Trolling firms scans the website for “errors”, alerts the company and temps them to settle with the firm to avoid significant future costs of remediation and litigation



## BEWARE OF THE TROLLS ...

Some law firms:

- Promise businesses cost-savings and uses scare tactics to lure unsuspecting companies to settle
- Coerce companies to retain their “experts” at a premium cost to manage web accessibility testing, repair and maintenance
- Do not offer to defend settling companies against future litigation by other law firms
- Require payment of attorney’s fees and costs as part of settlement



## THE PATH TO COMPLIANCE

- “Full” compliance is a misnomer because the guidelines are gray and change constantly
- “Reasonable accessibility” is the goal
- Work toward removing access barriers, enhancing accessibility and optimizing features on business websites



## Insurance Coverage For Website Related Claims

- Most often Employment Practices Liability policies cover ADA website accessibility claims
- While most media policies exclude discrimination, some defense cost might be covered
- A cyber policy that covers “the wrongful collection of information and/or the failure to implement privacy policies and procedures” could cover the defense and settlement expenses
- Depends largely on the language of the policies

Source: [http://www.lockton.com/whitepapers/Boeck-Website\\_ADA\\_Claims-May16.pdf](http://www.lockton.com/whitepapers/Boeck-Website_ADA_Claims-May16.pdf)

