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A collaborative program between the
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Top ADA Cases of 2016
ADA Legal Webinar Series
January 18, 2017

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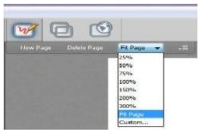

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Top ADA Cases of 2016

Presented by Equip for Equality
Barry C. Taylor, VP for Civil Rights and Systemic Litigation
Rachel M. Weisberg, Staff Attorney

January 18, 2017

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

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Outline of Today's Webinar

- Definition of Disability
- Title I (Employment)
- Questions
- Title II (State/Local Governments)
- Title III (Places of Public Accommodation)
- Questions

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Definition of Disability

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Reassessing "Substantially Limits" under the ADAAA

Cannon v. Jacobs Field Services
813 F.3d 586 (5th Cir. 2016)

- Employee with torn rotator cuff
  - Cannot raise right arm above shoulder; limited ability to push/pull
- Received conditional job offer and had pre-employment exam
- Doctor cleared employee with restrictions (no lifting/pulling over 10 lbs, no working with hands above shoulder level)
- Job offer was revoked
- **Dist. ct.:** Found for ER (granted summary judgment) – not disabled
  - Limitations did not substantially limit daily functioning
- **5th Cir:** Found for EE (reversed/remanded)
  - Decision "at odds" with ADAAA

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Reassessing "Substantially Limits" under the ADAAA

Court discussed important ADAAA principles

- Substantially limits no longer demands extensive analysis
- Must compare employee with general population
- Here, undisputed evidence that employee's shoulder impairment is substantially limiting
  - Employee and doctor said he cannot lift his right arm above shoulder level
  - Employee and doctor said he has considerable difficulty lifting, pushing, or pulling objects with right arm
- Also evidence that employee was *regarded as* disabled
  - Report from employee's physical demonstrates that his shoulder injury was perceived to be an impairment

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"Regarded As" Under the ADAAA

Alexander v. Wash. Metro. Area Transit Authority
826 F.3d 544 (D.C. Cir. 2016)

- Employee with alcoholism
- Under the influence of alcohol at work; suspended; referred to EAP
- Returned subject to periodic alcohol tests but failed and was fired
- Told he could reapply in one year if he completed an intensive alcohol dependency treatment program
- Employee completed program but was not rehired
- Alleges it was because he failed EAP, violated alcohol policy
- **Dist. ct.:** Found for ER (granted summary judgment)
  - Alcoholism did not substantially limit 1+ major life activity
- **D.C. Cir.:** Found for EE (reversed and remanded)

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Definition of Disability: Three Prongs

- Important language about the *regarded as* prong under the ADAAA
  - The "regarded-as-prong has become the primary avenue for bringing the type of discrimination claim that Alexander asserts."
  - It is now unnecessary in most cases to proceed under the "actual disability" or "record of" prong
  - Here, only needs to show that ER took a prohibited action against EE because of an actual or perceived *impairment*
  - No dispute that alcoholism is an impairment – meets standard
- Court also concluded that the EE met the definition of disability under "actual disability" and "record of"
  - Alcoholism substantially limited sleep, daily care activities, caring for himself, walking, concentrating and communicating

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Is Obesity a Disability?

Morriss v. BNSF Railway Co.
817 F.3d 1104 (8th Cir. 2016)

- Plaintiff given a conditional job offer for machinist position
- BNSF = Applicants for safety sensitive jobs must have BMI under 40
- Plaintiff's BMI was 40.9 at 5'10" and 270lbs (no medical condition)
- Plaintiff's job offer was revoked
- **Question on appeal:** Is obesity a disability under the ADA?
- **8th Cir.:** Obesity must be due to underlying physiological disorder
  - ADA statute = Does not define "physical impairment"
  - EEOC regs = Defines impairment
    - "any physiological disorder or condition . . . affecting one or more body systems"

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Obesity as a Disability

- *But see* EEOC interpretive guidance: "'impairment' does not include physical characteristics such as . . . weight . . . that are within "normal" range and are not the result of a physiological disorder."
  - **8th Cir.:** Interprets this to require physiological disorder
- *But see* EEOC Compliance Manual: "severe obesity" or "body weight more than 100% over the norm" is a disability
  - **8th Cir.:** Manual contradicts plain language of Act and regs
- BNSF cited pre-ADAAA cases finding obesity not to be a disability
  - **8th Cir.:** Pre-ADAAA case law relevant for this holding
    - The EEOC revised regulatory definitions of "substantially limit" and "major life activity" but no changes to "impairment"
- Regarded as? No based on the same reasoning (no impairment)

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Circuit Split?

Obesity without a physiological condition is not an impairment

- ***EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006)** ("consistent with the EEOC's own definition, . . . to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition.")
- ***Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997)**

Can be impairment (outside "normal" range or "morbid obesity")

- ***EEOC v. Res. For Human Dev., Inc.*, 827 F.Supp.2d 688 (E.D. La. 2011)** (a physiological cause for obesity is required only when an individual's weight is within normal range)
- ***Whittaker v. Am.'s Car-Mart, Inc.*, 2014 WL 1648816 (E.D. Mo. Apr. 24, 2014)** (emphasizing ADAAA)

Oct. 3, 2016: Supreme Court denied request for review in ***Morriss***

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"Employee" Under the ADA and Section 504

Flynn v. Distinctive Home Care, Inc.
812 F.3d 422 (5th Cir. 2016)

- Plaintiff is an independent contractor, not employee
- ADA Title I = Protects rights of "employees"
- 504 = "disabled persons in federally assisted programs or activities"
  - Incorporates certain Title I protections
- **Dist. ct.:** Found for ER - contractors cannot sue under Sec. 504
- **5th Cir.:** Reversed: Contractors can sue under Section 504
  - Rehab Act is broad - covers all programs and activities
  - Rehab Act does not incorporate Title I's def. of employer
    - Adopts the *substantive standards* for determining *what* conduct violates the law, not who is covered

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Circuit Split

Independent contractors can sue under Section 504

- ***Schrader v. Fred A. Ray, M.D., P.C.*, 296 F.3d 968 (10th Cir. 2002)** (holding that Section 504 does not incorporate the ADA's requirement that the employer have "fifteen or more employees")
- ***Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009)** ("[T]he Rehabilitation Act covers discrimination claims by an independent contractor.")
  - Supreme Court denied cert. **561 U.S. 1006 (2010)**

Independent contractors cannot sue under Section 504

- ***Wojewski v. Rapid City Reg'l Hosp.*, 450 F.3d 338 (8th Cir. 2006)** ("[W]e affirm … summary judgment to the defendants because [plaintiff] was not an employee of the hospital.")

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Reassignment as a Reasonable Accommodation

Legal question: Does reassignment require employers to place an employee in a vacant position OR permit employees to compete?

Majority Rule: Reassignment to a vacant position w/o competition is reasonable absent undue hardship or seniority system

- 7th Cir.: ***EEOC v. United Airlines,*** 693 F.3d 760 (7th Cir. 2012)
- 10th Cir. ***Smith v. Midland Brake, Inc.***, 180 F.3d 1154 (10th Cir. 1999)
- D.C. Cir: ***Aka v. Wash. Hosp. Ctr.,*** 156 F.3d 1284 (D.C. Cir. 1998)

Minority Rule: Employers can make reassignment competitive

- 8th Cir.: ***Huber v. Wal-Mart,*** 486 F.3d 480 (8th Cir. 2007)
  - **Note:** Adopted reasoning in a now-reversed (pre-*United Airlines*) case "wholesale" and "without analysis"
  - Supreme Court agreed to review *Huber*, but dismissed the case before ruling after the parties settled

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Update on Reassignment as a Reasonable Accommodation

EEOC v. St. Joseph's Hospital, Inc.
842 F.3d 1333 (11th Cir. 2016)

- Plaintiff worked as a nurse in a psychiatric ward
- Developed spinal stenosis, arthritis and started using a cane
- Hospital said cane could be used as a weapon – gave her 30 days to try to find alternate position but she had to compete for new job
- **EEOC:** ER violated ADA b/c required competition for vacant position
- **Hosp./Dist. Ct.:** ADA doesn't mandate reassignment w/o competition
- **11th Cir:** Found for ER: ADA does not require reassignment w/o competition – "preferential treatment"
  - Relied on ADA statutory language: reasonable accommodation *may* include reassignment to vacant position
  - Cited 8th Circuit's decision in *Huber v. Wal-Mart*

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11th Circuit Decision re: Reassignment as a Reasonable Accommodation

- Cited Supreme Court case, *Barnett v. U.S. Airways*
  - Held that it is not reasonable to violate a best-qualified hiring policy or a transfer policy "in the run of cases"
  - Noted this was especially true in hospitals – need best personnel
- However:
  - Court emphasizes that there could be cases where reassignment would supersede a best-qualified hiring policy, if there are special circumstances that warrant it
  - Court affirmed jury's pro-employee holdings (not relevant to ultimate legal conclusion re reassignment)
    - Disability, qualified for vacant positions, not accommodated

QUERY: Impact of this decision?

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Update on 2015 Case
Reassignment & Undue Hardship

Reyazuddin v. Montgomery County, Maryland
789 F.3d 407 (4th Cir. 2015)

- Plaintiff who is blind worked as an information and referral aide
- County opened a consolidated call center with inaccessible software
- Plaintiff was not transferred to new center
- Instead, she kept same salary, grade and benefits but supervisors struggled to find work for her
- **4th Cir.:** Q of fact whether county accommodated Plaintiff
  - County cobbled together "make-work" tasks w/ same salary
  - An employer may provide an alternate accommodation, but accommodation must be "meaningful employment opportunity"
- Case remanded for trial

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2016 Update

- Two-week trial; five-days of jury deliberations
- **2/26/2016:** Jury found for Plaintiff
  - Country discriminated by refusing to transfer Plaintiff to a call center because of the inaccessible software
  - County could have provided a reasonable accommodation to make the call center software accessible
  - Not an undue hardship to make the software accessible
- **Status:**
  - Court to decide injunctive relief and attorneys' fees
  - County asked to dismiss stating that as of 10/27/16, Plaintiff has been transferred with accommodations and with full-time meaningful work

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Qualified: Overreliance on Job Descriptions

Camp v. Bi-Lo, LLC
2016 WL 6134855 (6th Cir. Oct. 21, 2016)

- Individual with a back impairment worked as a stock clerk for 38 yrs
- Job description required "lifting" 20-60 pounds frequently
- Plaintiff's doctor restricted him from lifting over 35 pounds
- Informal arrangement where co-workers lifted very heavy items
- **Dist. ct.:** Found for ER (granted MSJ) due to job description
- **6th Cir.:** Lifting over 35 pounds was not an essential function (reversed and remanded)
  - Three-man team had been able to shelve product
  - Plaintiff fulfilled duties of the job for years with these co-workers
  - Testimony from immediate supervisor and colleagues

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Reasonable Accommodation: Full-time ASL Interpreter

Searls v. Johns Hopkins Hospital
158 F.Supp.3d 427 (D. Md. 2016)

- Recent nursing graduate is deaf
  - Had two clinical rotations at JHH with ASL interpreters
- Voices for herself and reads lip, but understands better with ASL
- Applied for nursing position at JHH that required "highly effective verbal communication and interpersonal skills"
- Given offer contingent on health screening
- Requested full-time ASL interpreter and offer was rescinded
- Undue hardship? Nurse made $40k-$60k; interpreter cost $120k
- Nurse found other job and works successfully with interpreter
- **Court:** Found for EE (granted summary judgment to nurse)

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Reasonable Accommodation: Full-time ASL Interpreter

- **Court:** Interpreter request was reasonable
  - Current/prior use of terp; ADA lists terp as accommodation
  - Current experience and clinical experience at JHH
- **Court:** Interpreter did not reallocate essential functions
  - EE could still communicate with patients, family and personnel and monitoring alarms – terp could not act independently
  - Note: Nurse would retain "substantial portion" of duties?
- **Court:** No undue hardship
  - Examine overall budget—not nurse's salary or dept. resources
  - Terp might be 2x nurse's salary but 0.007% of overall budget
- **Court:** No direct threat due to auditory alarms
  - Post-hoc rationalization w/o an individualized assessment

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Issue/Cases to Watch: Wellness Plans

Background on Issue

- Employer wellness plans often require medical exams and inquiries
- Some plans are tied to health insurance; others are not
- Some employers provide "incentives" for participation
  - Including greatly reduced healthcare costs
- **Issue:** ADA restricts certain medical exams and inquiries
  - Two exceptions: Safe harbor provision & "voluntary" disclosure
- EEOC has recently litigated cases about wellness programs

2016: EEOC released final rules about wellness programs addressing both exceptions

- **Regs:** www.gpo.gov/fdsys/pkg/FR-2016-05-17/pdf/2016-11558.pdf
- **Q&A:** www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm

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Issue/Cases to Watch: Wellness Plans

AARP v. EEOC, 16-cv-02113 (D.C. 2016)

- **10/24/2016:** AARP filed lawsuit, seek injunction against EEOC regs
  - Argues that the EEOC's regs conflict with ADA/GINA--employers can impose heavy financial penalties on employees who decline to share medical/genetic information (ex: charge up to 30%)
- **12/29/2016:** Court denied AARP's request for preliminary injunction
  - Failed to demonstrate irreparable harm & likelihood of success
  - Final decision after review of admin record and add'l briefing

EEOC v. Flambeau, 131 F.Supp.3d 849 (W.D. Wis. Dec. 31, 2015)

- **Issue:** Whether wellness plans fall within ADA safe harbor provision if part of employer's health insurance plan (dist. ct. found it was)
- Seventh Circuit decision expected in 2017

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Wellness Plans
Safe Harbor Provision & Voluntary Nature

EEOC v. Orion Energy Systems, Inc.
2016 WL 5107019 (E.D. Wis. Sept. 19, 2016)

- Employees who opted out of wellness plan had to pay entire monthly health insurance premium ($413.43 - $1,130.83 per month)
- Employer argued: Safe Harbor & Voluntary
- **Court:** Agreed partially with employer and partially with EEOC
  - Safe Harbor did not apply – this is a very limited exception
    - Found new EEOC reg re safe harbor to be retroactive (Safe harbor provisions not applicable to wellness programs)
    - Even w/o relying on new reg, plans generally unrelated to basic underwriting, risk classification
  - However, participation in wellness plan was "voluntary"
    - Not mandatory – just a "strong incentive"
    - No claim that reg re: 30% cap was retroactive

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Applying *Olmstead* to Education DOJ Complaint

United States v. Georgia
16-cv-03088 (N.D. Ga. 2016)

- At issue = Georgia's Network for Educational and Therapeutic Support Program (GNETS Program)
- State administers mental health and therapeutic educational services and supports almost exclusively through GNETS
  - Segregated programs in self-contained buildings, separate wings
  - Inferior education: some only receive computer-based instruction
  - Lack access to electives, facilities and extracurricular activities
  - Inferior facilities in various states of disrepair
- **July 5, 2016:** DOJ issued letter of findings—program violates ADA
  - www.ada.gov/olmstead/documents/gnets_lof.pdf

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Applying *Olmstead* to Education

- **August 23, 2016:** DOJ filed lawsuit alleging the State:
  - Fails to serve students in the most integrated setting appropriate to their needs
  - Places other students at risk of segregation
  - Provides unequal educational opportunities
  - Fails to modify policies, practices procedures to avoid discrimination
- **Status:** State filed motion to dismiss arguing that DOJ lacks standing to sue – currently pending
  - Amicus filed by many orgs, including AAPD, Leadership Conf. on Civil Rights, NFB, NAMI, Autistic Self-Advocacy Network

www.ada.gov/olmstead/documents/gnets_complaint.html

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Emergency Preparedness in the School Setting

Jagielski-Bazzell, et al. v. Los Angeles Unified School District et al
15-cv-2921 (C.D. Cal. filed April 20, 2015)

- Complaint against the Marlton School = School for Deaf and Hard of Hearing students
- Emergency information announced over a standard PA system so deaf and hard of hearing teachers and staff:
  - Had no accessible information during some lockdowns/drills
  - Were left unaware of some emergencies
- **Sept. 2016: Settlement Agreement (select terms)**
  - New visual PA system w/ large HD screens, scrolling LCD display, and video phones added to classrooms and common areas to communicate emergency messages and are capable of two-way communication with the front office

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Emergency Preparedness in the School Setting

- Flashing alarm system to differentiate between evacuations and shelter-in-place situations
- Flashing doorbells on classroom doors along with peepholes or windows in the doors
- ASL interpreter in the command center during emergencies
- Video in ASL describing emergency procedures at the school
- Meeting with first responders re: new procedures and equipment
- Two-way video camera at the entrance gate to the school allowing Deaf staff to communicate from gate
- Monetary relief of $30,000 per plaintiff - total of $150,000

www.equipforequality.org/news-item/settlement-agreement-addresses-emergency-preparedness-people-disabilities-school-setting/

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Accessibility of Absentee Voting

Nat'l Fed'n of Blind v. Lamone
813 F.3d 494 (4th Cir. 2016)

- MD voters can obtain absentee ballot by mail, fax or download
- If download, voters must print ballot, mark choices, sign and return
- As a result, voters with disabilities need assistance
  - MD developed an online ballot tool to mark choices electronically
- Plaintiffs file lawsuit = MD absentee voting program violates ADA
  - While pending, Board of Elections voted to use accessible electronic tool but lacked supermajority required by state law
- 2014: Three-day bench trial
  - Judge found for plaintiffs - granted preliminary injunction
- **4th Cir.:** Affirmed decision for Plaintiffs

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Accessibility of Absentee Voting

- Need "meaningful access" to *absentee* voting – not just voting
- Important conclusion as polling places had accessible equipment
  - Noted "sharp disparity" between experience of voters with and w/o disabilities regarding private and independent voting
  - Voting is a "quintessential public activity" that helps ensure that people with disabilities "are never relegated to a position of political powerlessness"
- Online ballot program = reasonable modification
  - No fundamental alteration
  - Rejected argument regarding state law "supermajority"

***See also Hindel v. Husted*, 2016 WL 2735935 (S.D. Ohio May 11, 2016)** (concluding plaintiffs are denied meaningful access to Ohio's absentee voting system, but finding proposed tool would be a fundamental alteration as it lacks certification – encouraged parties to work on issue to implement software before future elections)

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Law Enforcement
Modification of Policies

Estate of Saylor v. Regal Cinemas, Inc.
2016 WL 4721254 (D. Md. Sept. 9, 2016)

- Ethan Saylor was a 26-year-old man with Down Syndrome
- After seeing movie, he entered the theater again w/o paying
- Three off-duty county sheriffs were working as security guards
- Aide explained Saylor's disability
  - Explained if touched, may become angry
  - Said Saylor's mother was on her way and would either pay for another ticket or get him to leave the theater
- Officers disregarded aide's request
  - Approached Saylor, told him he needed to leave the theater
  - Saylor refused. Officers grabbed his arms, dragged him from the theater while yelling that he would go to jail

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Estate of Saylor v. Regal Cinemas, Inc.

- Officers handcuffed Saylor, with one on top of him, fracturing his larynx, and making it difficult to breathe
- Saylor died from affixation
- **Claims in lawsuit:**
  - Section 1983: Excessive force and various state law claims (wrongful death, gross negligence, battery)
  - ADA: Failure to train & failure to modify policies
- **2014:** Court denied Defendant's Motion to Dismiss
  - Recognized both claims under the ADA
  - Rejected Defendant's argument that Title II could not put them on notice of all possible accommodations for all disabilities
- **2016:** Split decision on ADA, allowing case to move forward

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Estate of Saylor v. Regal Cinemas, Inc.

Failure to accommodate (found for estate – denied MSJ)

- Title II requires public entities to make reasonable accommodations
  - Following advice of aide of clearly disabled individual and simply waiting would have been "the most logical accommodation"
- Credited expert testimony re: model policy about encounters with individuals with developmental disabilities suggesting:
  - Avoid taking custody as it will initiate a severe anxiety response and escalate the situation
  - For minor offenses, explain the situation, suggest alternative means such as release of person to authorized caregiver
- Rejected State's arguments that:
  - They were told Saylor could become violent
  - Officers had no discretion b/c manager said to remove him

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Estate of Saylor v. Regal Cinemas, Inc.

Failure to train (found for State – granted MSJ)

- Must show that the failure to train amounted to "deliberate indifference" which is a stringent standard requiring State to disregard a known risk
- Here, State was not aware of a need for such training
  - No pattern of similar violations
  - Never received a request to generate a policy for encounters with individuals with developmental disabilities

Status:

- Appeal pending on issues unrelated to the ADA
- Settlement conference scheduled for 2017

New DOJ guidance document: www.ada.gov/cjta.html

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Policing: Effective Communication DOJ Settlement Agreements

City of Columbia, South Carolina Police Department

- Complainant said he was not provided with an ASL interpreter for police questioning over a 3-month period, including at his arrest
- Comprehensive settlement agreement – good template for law enforcement agencies evaluating their own practices
  www.ada.gov/columbia_pd/columbia_pd_sa.html (May 3, 2016)

Highlights:

- Designate at least one employee as the ADA coordinator
- Revise policies and training requirements
- Provide auxiliary aids & services / qualified sign language interpreters
- Modify handcuffing policy by handcuffing an individual in front of his body to enable sign language or writing

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DOJ Settlement

- At least 1 working TTYs and videophones at each station
- Signage to inform the community about TTY/VP availability
- Relationships with 1+ qualified oral/sign language interpreter agencies to ensure interpreter availability on a priority basis 24/7
- Details about requirements in light of exigent circumstances
  - OK to use what is available consistent with an appropriate law enforcement response during immediate threat
    - Written notes or non-qualified terp
- Non-exigent circumstances
  - Pictogram (Exhibit A)
  - Communication assessment (Exhibit C)

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DOJ Settlement

- Routine encounters in field =
  - Communication cards
  - Exhibit B

See also **DOJ Settlement Agreement with Arlington County Sheriff**

- $250,000 monetary relief to complainant
- Substantial injunctive relief (ADA coordinator; training; specific policies to provide auxiliary aids/services promptly; video phones; hearing aid/cochlear implant batteries)
- www.ada.gov/arlington_co_sheriff_sa.html

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Jails/Prisons
Trend: Ensuring Independence

Wright v. New York State Department of Corrections
831 F.3d 64 (2nd Cir. 2016)

- NY DOC banned motorized wheelchairs due to safety concerns
- Inmate with cerebral palsy and scoliosis who could operate a motorized wheelchair challenged this ban
- **Court:** Policy prevented plaintiff from accessing prison services
  - Rejected option of "inmate mobility aids" as "in tension" with ADA's emphasis on independent living
  - Also said inmate mobility assistant program was ineffective in practice b/c it required advanced scheduling

See also Clemons v. Dart, 168 F.Supp.3d 1060 (N.D. Ill. 2016) (finding on-demand nursing support not the same as providing accessible cell as it reduced plaintiff's ability for independent living; jury verdict of $95,000)

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Title III (Places of Public Accommodation)

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What is a Place of Public Accommodation – Vending Machine?

Magee v. Coca-Cola Refreshments USA

833 F.3d 530 (5th Cir. 2016)

- Plaintiff, who is blind, filed lawsuit against Coca-Cola because its vending machines are not accessible (no tactile or oral indicators)
- Machines at hospital and bus station – suit only against Coca-Cola
- **MTD:** Machine not place of public accommodation (PPA)
- **Dist. ct.:** Found for Coca-Cola (granted motion to dismiss)
- **5th Cir:** Affirmed - Vending machine is not a PPA
  - ADA definition of PPA = Must fall in 1 of 12 categories
  - (E)—a bakery, grocery store, clothing store, hardware store, shopping center, or *other sales* or rental *establishment*."
  - Plaintiff argues: Machine is a "sales establishment"

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What is a Place of Public Accommodation

- Analyzes language in ADA
  - Sales establishment follows list of retailers occupying physical stores - vending machine is not akin to any listed examples
  - Instead, vending machines are found *inside* listed entities
- Looks to ADA legislative history and DOJ guidance:
  - Must construe liberally, but gives examples of other stores
- "Vending machines may very well be subject to various requirements under the ADA by virtue of their being located in a hospital or a bus station, both of which are indisputably places of public accommodation."
- However, Coca-Cola does not own, lease (or lease to), or operate a place of public accommodation
- **11/21/16:** Petition for Supreme Court review

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What is a Place of Public Accommodation – Plasma Donation Center?

Levorsen v. Octapharma Plasma, Inc.

828 F.3d 1227 (10th Cir. 2016)

- Octapharma is a plasma-donation center
  - Collects donors' plasma by drawing and processing blood, separating and reserving plasma, and returning blood to donor
  - Pays donors and sells plasma to pharmaceutical companies
- Plaintiff with borderline schizophrenia was barred from donation
- **Dist. ct.:** Plasma donation center is not a PPA
- **10th Cir:** Found for plaintiff (reversed and remanded)
  - (F)-laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service…other *service establishment*.
  - Center is place of public accommodation – service establishment

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What is a Place of Public Accommodation

- Reviews ADA's language and defines "service" & "establishment"
  - Together – a "service" "establishment" is a place of business or public or private institution that, by its conduct or performance, assists or benefits someone or something or provides useful labor without producing a tangible good for a customer or client
  - Ordinary meaning yields broad definition consistent with Title III
- Rejects Octapharma argument that service establishments must receive some form of payment *from* customers
  - Nothing in the language to suggest this limitation
- Legislative history – dropped word "similar" service establishment
- Here, Octapharma meets definition: Assist/benefit those who wish to provide plasma & does not produce tangible good for individuals
- Dissenting opinion

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Assistive Technology Audio Descriptions

Settlement Agreement (April 2016)

American Council of the Blind, Bay State Council of the Blind, Robert Baran and Netflix

- Agreement re: Audio Descriptions
  - "Netflix Original" content = Netflix will provide audio description
    - Unless Netflix does not control rights → then will make commercially reasonable efforts to secure and offer AD
  - Third-party streaming content
    - New content = Netflix will request audio description assets in all new contracts with streaming content providers
    - Existing content = Netflix will make reasonable efforts to obtain existing audio description assets

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Assistive Technology Audio Descriptions

- Agreement re: Audio Descriptions (continued)
  - DVDs = Netflix will make "commercially reasonable efforts" to offer discs with audio description
  - Provide capability to search and browse content for audio descriptions
- Agreement re: Website and Mobile Application
  - WCAG 2.0 AA accessibility standard for its website
  - BBC Standard for accessibility of its mobile application

Learn more: www.acb.org/adp/netflix.html

Settlement agreement: http://dralegal.org/wp-content/uploads/2016/04/Settlement_Agreement_FOR_WEBSITEv2.docx

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Accessible Information Technology

Dudley, U.S.A. v. Univ. of Miami
www.ada.gov/miami_university_cd.html

- Broad and detailed consent decree reached ensuring that technology is accessible to students who are blind
- Addresses issues ranging from web content to textbooks and course material to IT procurement policy

NAD v. Harvard University, 15-cv-30023 (D. Mass.)
NAD v. Mass. Inst. of Tech., 15-cv-30024 (D. Mass.)

- Universities must have captioning for online materials provided free to the public, incl. recordings of speeches and educational materials
- **Universities:** Title III doesn't apply to the accessibility of online content & captioning is a fundamental alteration of content
- **Ct:** Denied MTD www.ada.gov/briefs/harvard_soi.pdf; www.ada.gov/briefs/mit_soi.pdf

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Mental Health on College Campuses

DOJ Agreement with Princeton University

- Review prompted by private lawsuit
  - *W.P. v. Princeton University, et al.*, 3:14-cv-01893 (D. N.J., filed Mar. 26, 2014)
  - W.P. ingested 20 pills (antidepressants)
  - Checked himself into the hospital
  - After 3 days, barred from dorm and classes
  - www.newyorker.com/news/news-desk/suicidal-students-allowed-campus
- United States conducted a compliance review
  - Reviewed policies/practices re: reasonable accommodation, withdrawal, and leave for students with mental health disabilities
- Agreement resolved compliance review; lawsuit still pending

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Mental Health on College Campuses

- Revise policies to explicitly describe possible accommodations
  - Include changes to university policies, rules and regulations
  - Specify requests can be for academics, housing/dining; etc
  - Note where students submit requests / how Princeton will review
- Revise websites for Office of Disability Services and Office of the Dean of Undergraduate Students to better direct info to students
- Revise leave policy and practices to be consistent w/ Title III regs
- Provide annual training on Title III, including references to updated policies, with a focus on mental health disability discrimination
  - Training for all faculty and staff with responsibilities for evaluating/deciding reasonable accommodation requests

www.ada.gov/princeton_sa.html (12/19/2016)

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Children with Diabetes & YMCAs

DOJ Settlement Agreements

- **2016 Trend:** Childcare providers entered into settlement agreements to provide assistance to children with Type 1 Diabetes
- Needs differ, but children need assistance with blood glucose monitoring, administration of insulin and emergency medication
  - **Arlington-Mansfield YMCA (TX)**
    - www.ada.gov/arlington_ymca.html (2/24/2016)
  - **Philadelphia Freedom Valley YMCA (PA)**
    - www.ada.gov/rocky_run_sa.html (5/19/2016)
  - **YMCA of the Triangle (NC)**
    - www.ada.gov/ymca_triangle_sa.html (7/27/16)
  - **YMCA of Metro Chicago (IL)**
    - www.justice.gov/usao-ndil/pr/united-states-announces-settlement-ymca-metro-chicago-ensure-compliance-americans (12/21/16)

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Children with Diabetes & YMCAs
Terms of Settlement Agreements

Settlement agreements generally include:

- Nondiscrimination provisions
- Requirement to modify policies, including the adoption of Diabetes Medical Management Plan (DMMP)
- Some specify that the DMMP should be in the style of the National Diabetes Education Program's sample plan
  - Includes instruction on monitoring blood glucose levels, administration of insulin and emergency medication (Glucagon)
- Procedures for fielding and responding to requests for modification
- Adoption of an ADA compliance officer
- Title III nondiscrimination training
- Oversight by DOJ
- Arlington agreement includes $10,000 payment to complainants

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Ride Sharing Litigation Case/Issue Update

Nat'l Fed. of the Blind of California v. Uber

103 F.Supp.3d 1073 (N.D. Cal. 2015)

- Plaintiffs allege that Uber refuses to transport guide dogs
  - Examples: Driver shouted "no dogs" and left; driver refused to accept passenger with service animal
- **2015:** Court denied motion to dismiss – Plaintiffs' claim can proceed
- **4/30/2016:** Parties announced they had reached a settlement
  - **7/13/16:** Court granted preliminary approval
  - **12/6/16:** Court granted final approval and attorneys' fees

http://dralegal.org/case/national-federation-of-the-blind-of-california-et-al-v-uber-technologies-inc-et-al/

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Ride Sharing Litigation Case/Issue Update

Select Settlement Terms

- Drivers will expressly confirm that they understand their legal obligations to transport rides with service animals
- Revised enforcement policies:
  - Remove drivers after a single complaint if Uber finds the driver knowingly denied a person a ride due to a service animal
  - Remove drivers after two complaints, regardless of intent
- Enhance response system for complaints and to track data
- NFB and Cal. affiliate will deploy testers to evaluate compliance

Case to Watch: ***Access Living of Metropolitan Chicago, et al v. Uber Technologies, et al,*** 16-cv-09690 (N.D. Illinois) (10/13/16)

- Re: failure to provide equivalent service, including WAVs

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- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
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(877) 232 – 1990 (V/TTY)
http: //www.ada-audio.org

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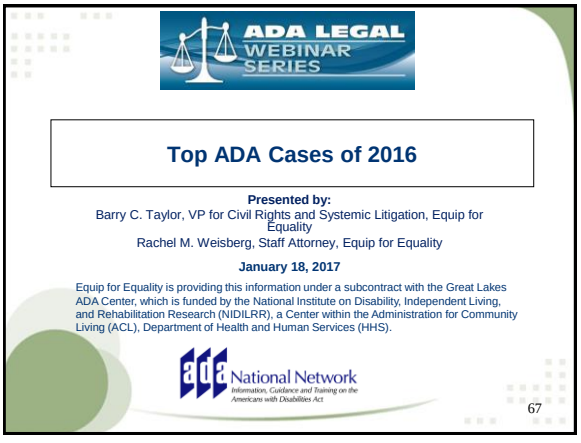
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