

The **LEXIS PRACTICE ADVISOR** Journal™

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AMERICANS WITH DISABILITIES ACT: GUIDANCE FOR EMPLOYERS

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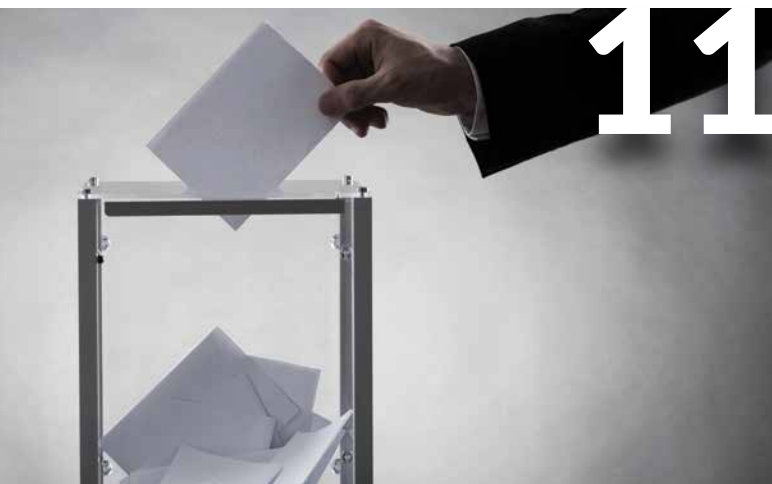
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Cenveo Publisher Services
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Send address changes to: The Lexis Practice Advisor Journal, 230 Park Avenue, 7th Floor, New York, NY 10169. Periodical Postage Paid at New York, New York, and additional mailing offices.

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Eric Bourget, Editor-in-Chief

NEWS OF DATA BREACHES AND THEFT

of corporate and consumer information is becoming all too frequent. Threats posed by hackers and cyber-criminals are problematic for more than legal, compliance, and IT personnel. Officers and directors may face claims arising from data breaches with potential exposure to individual liability. Regulatory guidance emphasizes that executives and boards of directors should take the lead in forming and overseeing cybersecurity programs. Learn about some of the best practices and steps that officers and directors should take to minimize cybersecurity-related risks for their organizations.

Proxy season is upon us and two prominent proxy advisory services companies released revisions to their respective proxy voting guidelines for the 2020 season. This edition of the Lexis Practice Advisor Journal includes details of the new guidelines related to governance committee and compensation committee recommendations as well as say-on-pay proposals, gender diversity timing, and equal pay guidelines.

Both employers and landlords must be cognizant of the requirements of the Americans with Disabilities Act (ADA). Under certain circumstances, employers must make reasonable accommodations for employees' or applicants' known limitations. Commercial real estate owners must also make accommodations to ensure that commercial and public facilities are accessible to persons with disabilities. Owners must be aware of these requirements in the design and construction of new facilities as well as during renovation of existing buildings. This edition of the Lexis Practice Advisor Journal reviews ADA requirements impacting employers, real estate developers, and landlords.

The pharmaceutical industry is seeing a rise in the number of antibody-related treatments due to technological advances over the past few decades that are enabling the industrial-scale production of certain antibodies. This increase is resulting in patent law developments that may limit intellectual property protections for those

treatments. The changes impact basic patent eligibility requirements as well as written description and enablement requirements. This edition of the Lexis Practice Advisor Journal summarizes both sets of developments and provides some practical advice designed to assist antibody patentees in addressing these recent changes.

Our practice tips section features advice for Intellectual Property attorneys in avoiding IP malpractice claims. These best practices from a 40-year veteran IP practitioner serve as a checklist of steps to consider to better serve your clients and protect yourself and your firm as you work through any IP representation and litigation.

We hope the Lexis Practice Advisor Journal continues to provide you with insightful guidance on how to complete tasks that cross your desk, and help you save time as you tackle each day's challenges.

Our mission

The Lexis Practice Advisor Journal™ is designed to help attorneys start on point. This supplement to our online practical guidance resource, Lexis Practice Advisor®, brings you a sophisticated collection of practice insights, trends, and forward-thinking articles. Grounded in the real-world experience of our 850+ seasoned attorney authors, the Lexis Practice Advisor Journal offers fresh, contemporary perspectives and compelling insights on matters impacting your practice.

CORONAVIRUS SPREAD CREATES UNCERTAINTY FOR BUSINESSES AND THEIR COUNSEL

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AS THE CORONAVIRUS CONTINUES ITS SPREAD FROM

China to Europe and the United States, the World Health Organization (WHO) is calling for action. “Now it’s the time to prepare,” Dr. Mike Ryan, director of emergencies program at WHO said at a February 24 press conference. “We’re in a phase of preparedness for a potential pandemic.”

While public health officials work on a medical response, businesses and their counsel in the United States are concerned about the legal implications of the outbreak.

Employers are concerned about implementing preventive measures to protect employees—and their output. Restrictions on international travel—especially to China—and quarantine periods for those returning from abroad are among the measures being considered by employers, along with increased availability of telecommuting, where possible. The issue of employees with underlying conditions is also a concern, and counsel should be consulted about the applicability of the Americans with Disabilities Act and other statutes.

Businesses also need to consider the impact of the virus on their stock and inventory. The availability of materials and labor could be restricted, and capacity and availability of established hubs and supply networks could be limited. Counsel should prepare for the possibility that contractual obligations will not be able to be met.

The question of whether a global outbreak constitutes a force majeure event is an open issue.

The spread of the virus also has implications in the area of corporate governance, including SEC disclosure requirements, which can be complicated by the uncertainties surrounding the impact of the virus on earnings. Various policies, such as cybersecurity and data privacy policies, should be reviewed if employees are permitted increased remote access because of loosening of telecommuting rules. Corporate directors and officers should consult counsel to ensure that they are aware of enhanced governance obligations resulting from the spread of the virus.

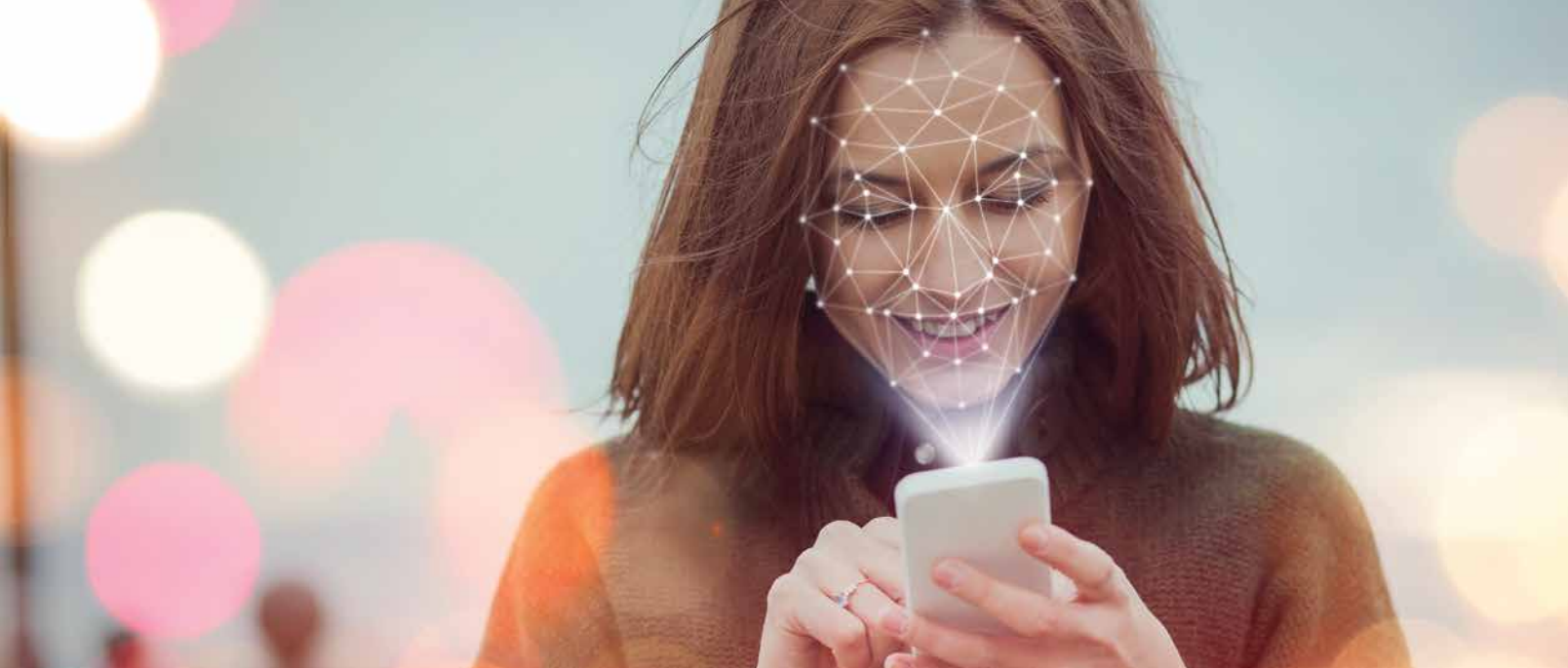
The impact of the virus on the insurance industry could also be significant. Questions remain about business interruption coverage for policyholders forced to close because of the spread of the virus, liability for directors and officers, third-party bodily injury claims stemming from negligent exposure to the virus, and other issues.

School districts, colleges and universities, state and local governments, and even professional sports organizations are also likely to face legal issues related to the outbreak, particularly if public health professionals recommend restrictions on large gatherings.



RESEARCH PATH: [Corporate Counsel > Business Skills for Corporate Counsel > Strategic Management > Articles](#)





SUPREME COURT DENIES REVIEW OF RULING ALLOWING BIPA SUIT AGAINST FACEBOOK

THE U.S. SUPREME COURT HAS DENIED A PETITION BY Facebook, Inc. for review of a ruling allowing Facebook users to proceed with claims that its use of face-scanning technology constitutes a violation of an Illinois biometric privacy law. [Facebook, Inc. v. Nimesh Patel, 2020 U.S. LEXIS 538 \(Jan. 21, 2020\)](#).

The justices' Jan. 21 order let stand an August ruling by the U.S. Court of Appeals for the Ninth Circuit, [Patel v. Facebook, Inc., 932 F.3d 1264 \(9th Cir. 2019\)](#), finding that a proposed class of Facebook users has alleged concrete injury sufficient to establish standing to assert claims for violation of the Illinois Biometric Information Privacy Act (BIPA) ([740 Ill. Comp. Stat. Ann. 14/1, et seq.](#))

The BIPA, enacted in 2008, requires private entities to develop and make available to the public written policies establishing a retention schedule and guidelines for destruction of biometric identifiers. Collectors of biometric data must inform subjects that the data is being collected and stored, disclose the purpose and length of time for which the information is being collected and stored, and receive written consent for collection of the information. The statute created a private cause of action for "any person aggrieved by a violation" of the Act, but the term "aggrieved" is not defined in the statute. In January 2019, the Illinois Supreme Court held that a plaintiff need not show actual harm in order to maintain a cause of action under the statute. [Rosenberg v. Six Flags Entm't Corp., 129 N.E.3d 1197 \(Ill. 2019\)](#).

The plaintiffs alleged in a suit filed in the U.S. District Court for the Northern District of California that Facebook violated the BIPA through its collection, use, and storage of biometric identifiers from

their photos without their consent to facilitate its deployment of technology that allows users to tag one another in photos appearing on the Facebook site. The plaintiffs moved for class certification; the district court granted the motion and denied a motion by Facebook for dismissal, rejecting Facebook's contention that the plaintiffs failed to allege a concrete injury and therefore lack standing under Article III of the U.S. Constitution. Facebook appealed.

Affirming the lower court, the Ninth Circuit held first that the class plaintiffs have alleged a concrete harm.

"Facebook's alleged collection, use, and storage of plaintiffs' face templates here is the very substantive harm targeted by BIPA," the panel said. "Because we conclude that BIPA protects the plaintiffs' concrete privacy interests and violations of the procedures in BIPA actually harm or pose a material risk of harm to those privacy interests, the plaintiffs have alleged a concrete and particularized harm, sufficient to confer Article III standing."

Nor did the lower court err in certifying the plaintiff class, the Ninth Circuit panel said, rejecting Facebook's contention that the Illinois legislature did not intend that the BIPA have extraterritorial effect and that therefore, class certification is improper. The issue of extraterritoriality can be addressed on a class-wide basis at the outset, the panel said, and if future circumstances "lead to the conclusion that extraterritoriality must be evaluated on an individual basis, the district court can decertify the class."



RESEARCH PATH: [Data Security & Privacy > State Law](#)
[Surveys and Guidance > State Guidance > Articles](#)

SUPREME COURT TAKES ON ISSUE OF CAUSATION IN AGE DISCRIMINATION CASES

AFTER HEARING ARGUMENTS IN A CASE ALLEGING AGE discrimination under the federal Age Discrimination in Employment Act (ADEA), the U.S. Supreme Court has taken the relatively rare step of ordering additional briefing by the parties on the issue of causation. [Babb v. Wilkie, 139 S. Ct. 2775 \(2019\)](#).

Plaintiff Noris Babb, a clinical pharmacist at the U.S. Veterans Administration (VA), alleged that she was denied training and transfer opportunities, was stripped of a special designation, and received reduced holiday pay on the basis of her age and gender. She filed suit in the U.S. District Court for the Southern District of Florida, asserting causes of action under the ADEA and Title VII of the Civil Rights Act of 1964.

The trial court entered summary judgment for the VA. [Babb v. McDonald, 2016 U.S. Dist. LEXIS 111895 \(M.D. Fla. Aug. 23, 2016\)](#).

On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed as to all but one Title VII claim, citing its own precedent in finding that Babb failed to show that but for her age and gender, the discrimination would not have occurred. [Babb v. Sec'y, Dep't of Veterans Affairs, 743 Fed. Appx. 280 \(11th Cir. 2018\)](#).

The Supreme Court granted Babb's petition for review in June 2019, limiting its consideration to whether a plaintiff seeking relief under the ADEA must prove that age was a but-for cause of the challenged

action. After hearing arguments, the justices gave the parties six days to brief the question of what, if any, relief a federal employee can obtain under laws other than the ADEA in the absence of but-for causation.

In her supplemental brief, Babb told the court that to adopt the but-for causation test "would undermine federal-sector protections against age discrimination, leaving victims without prospective judicial or administrative relief unless they can prove that the outcome of the challenged personnel action would necessarily have been different but for their age."

In its brief, the VA cited "a web of mechanisms for identifying and redressing age-related policies, practices, actions, or statements, regardless of whether a particular federal employee or applicant can show a but-for relationship between that conduct and an adverse personnel action."

The Supreme Court is expected to issue a decision in the case by the end of its current term.



RESEARCH PATH: [Labor & Employment > Employment Litigation > Discrimination, Harassment, and Retaliation > Articles](#)





SUPREME COURT AGREES TO REVIEW ACA CONTRACEPTION EXEMPTION ISSUE

THE U.S. SUPREME COURT WILL HEAR ARGUMENTS LATER

this year on the constitutionality of proposed regulations that would expand the category of employers who can refuse to offer contraceptive coverage to employees under the Affordable Care Act (ACA) on religious or moral grounds. [Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania](#), 205 L. Ed. 2d 519 (Jan. 17, 2020) and [Trump v. Pennsylvania](#), 205 L. Ed. 2d 519 (Jan. 17, 2020).

The justices granted petitions by the Little Sisters of the Poor and the Trump Administration for review of a ruling by the U.S. Court of Appeals for the Third Circuit upholding a nationwide injunction against enforcement of the two regulations. [Pennsylvania v. President United States](#), 930 F.3d 453 (3rd Cir. 2019).

The regulations, issued by the U.S. Departments of Health and Human Services, Labor, and the Treasury, and finalized in November 2018, stem from an executive order issued in May 2017 by President Donald J. Trump directing federal agencies to consider issuing amended regulations to address “conscience-based objections” to a provision in the Patient Protection and Affordable Care Act (ACA) ([Pub. L. No. 111-148](#), 124 Stat. 119 (Mar. 23, 2010))

requiring employers to provide no-cost birth control coverage to employees. “[Promoting Free Speech and Religious Liberty](#),” Exec. Order No. 13798, 82 Fed. Reg. 21,675 (May 4, 2017).

The Commonwealth of Pennsylvania and the State of New Jersey challenged the rules and moved for preliminary injunctive relief. U.S. Judge Wendy Beetlestone of the Eastern District of Pennsylvania granted the motion. On appeal, the Third Circuit affirmed.

In a similar case, the U.S. Court of Appeals for the Ninth Circuit in October upheld a January 2019 ruling by a federal judge in Oakland, California, enjoining enforcement of the same regulations in 13 plaintiff states (California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota, New York, North Carolina, Rhode Island, Vermont, Virginia, and Washington) and the District of Columbia. [California v. U.S. HHS](#), 941 F.3d 410 (9th Cir. 2019).



RESEARCH PATH: [Employee Benefits & Executive Compensation > Health and Welfare Plans > Health Plans and Affordable Care Act > Articles](#)

Return of *Yellowstone*: The New York State Legislature Revives the *Yellowstone* Injunction

Ronald S. Greenberg, Natan Hamerman, Daniel Lennard, and Zachary C. Naidich

KRAMER LEVIN NAFTALIS & FRANKEL LLP



FOR MORE THAN 50 YEARS, A COMMERCIAL TENANT IN New York that was threatened with eviction could count on obtaining a *Yellowstone* injunction tolling its time to cure alleged lease defaults while challenging the legitimacy of those defaults. The result was that a commercial tenant could bring such a challenge without risking its lease should it be found in default. That all changed in May 2019, when the New York Court of Appeals ruled that commercial leases waiving the right to seek *Yellowstone* injunctions did not violate public policy. Seven months after that decision, the status quo ante has been restored, with the New York State Legislature enacting a law stating that such waivers are “null and void as against public policy.”¹ This article discusses the importance of *Yellowstone* injunctions to commercial tenants in New York and the significance of the Legislature’s decision to revive them.

A *Yellowstone* injunction—named after the Court of Appeals decision in *First Nat. Stores, Inc. v. Yellowstone Shopping Ctr., Inc.*²—is available to a commercial tenant that has been issued a notice of default and disputes that it is in default during the cure period, but is willing and able to cure if the default is found to exist. A *Yellowstone* injunction stops the running of the cure period during the litigation. Without an injunction, a commercial tenant must choose between challenging the default and trying to cure it. There is rarely time to do both. With the injunction, a tenant can challenge the default while preserving the opportunity to cure if the court ultimately finds in favor of the landlord. Moreover, a tenant seeking a *Yellowstone* injunction does not need to satisfy the typical elements required for a preliminary injunction, such as likelihood of success on the merits and irreparable harm.³

1. N.Y. top. Law § 235-h. 2. 21 N.Y.2d 630 (1968). 3. See *Ameurasia Int’l Co. v. Finch Realty Co.*, 90 A.D.2d 760 (1st Dept. 1982).



Related Content


For a discussion on the New York Court of Appeals ruling that a commercial tenant could waive its right to seek a *Yellowstone* injunction, see

> [NEW YORK COURT OF APPEALS UPHOLDS WAIVER OF TENANT'S RIGHT TO SEEK YELLOWSTONE INJUNCTION: CLIENT ALERT DIGEST](#)

 **RESEARCH PATH:** [Real Estate > Commercial Leasing > Landlord-Tenant Litigation > Articles](#)


For guidance on the office leasing process in New York, see

> [OFFICE LEASING RESOURCE KIT \(NY\)](#)

 **RESEARCH PATH:** [Real Estate > Commercial Leasing > Lease Agreement > Practice Notes](#)

For assistance in drafting a lease for a mixed-use building, shopping center, or stand-alone property in New York, see

> [RETAIL LEASE AGREEMENT \(LONG FORM\) \(NY\)](#)

 **RESEARCH PATH:** [Real Estate > Commercial Leasing > Lease Agreement > Forms](#)

The court's decision in *Redbridge* turned *Yellowstone* injunctions into a hotly contested point of lease negotiations. Commercial tenants attempted to retain their ability to obtain *Yellowstone* injunctions, giving them an important tool to dispute the merits of alleged defaults while mitigating the risk of eviction. Landlords, for obvious reasons, negotiated to have their leases contain *Yellowstone* waivers. As a practical matter, inclusion of *Yellowstone* waivers in commercial leases became a matter of negotiating leverage.

However, just seven months after the *Redbridge* decision, *Yellowstone* waivers have been rendered null and void. On December 20, 2019, the New York State Legislature enacted [N.Y. Real Prop. Law § 235-h](#), dictating: "No commercial lease shall contain any provision waiving or prohibiting the right of any tenant to bring a declaratory judgment action with respect to any provision, term or condition of such commercial lease." The Legislature enacted the new law as a direct response to *Redbridge*. In explaining its justification for Section 235-h, the Legislature cited the Appellate Division, Second Department's decision in *Redbridge*, which the Court of Appeals later affirmed, and noted that the Second Department "found that the legislature 'has not enacted any specific or blanket statutory provision prohibiting as void or unenforceable a tenant's waiver of declaratory judgment remedies.'"⁶ The Legislature

A *Yellowstone* injunction is typically sought in support of a declaratory judgment action, brought in New York State Supreme Court, which asks the court to declare that the tenant is not in default. New York courts have been issuing *Yellowstone* injunctions with regularity for decades, and they have become a generally accepted part of New York's commercial real estate practice. That all changed last May, when the New York Court of Appeals, in *159 MP Corp. v. Redbridge Bedford, LLC*,⁴ enforced a lease provision waiving a tenant's right to bring a declaratory judgment action, which necessarily prevented the tenant from obtaining a *Yellowstone* injunction. The court justified its decision by noting that "the Legislature has made certain rights nonwaivable in the context of landlord-tenant law . . . but has not precluded a commercial tenant's waiver of interim *Yellowstone* relief."⁵

4. 33 N.Y.3d 353 (2019). 5. *Id.* at 367. 6. 2019 Legis. Bill Hist. NY A.B. 2554 quoting *159 MP Corp. v. Redbridge Bedford, LLC*, 160 A.D.3d 176 (2d Dept. 2018).



explained that “[t]his legislation seeks to enact such a provision as a matter of public policy and restore the right of commercial tenants to cure under a declaratory judgment action as has been the practice since 1968.”⁷

Some might argue that the wording of the statute—which only explicitly addresses “declaratory judgment action[s],” not *Yellowstone* injunctions—leaves the door open for lease provisions that continue to restrict *Yellowstone* rights. For example, we expect at some point an enterprising landlord will attempt to enforce a lease provision that either bars injunctive relief altogether or makes injunctions only obtainable under the more rigorous standards applicable to ordinary injunctions, rather than the easier-to-satisfy *Yellowstone* requirements. However, given the Legislature’s clear desire to resurrect *Yellowstone*, as reflected in Section 235-h’s legislative history, we expect the courts will reject any landlord-imposed hurdles making *Yellowstone* relief effectively impossible for a tenant to obtain. **L**

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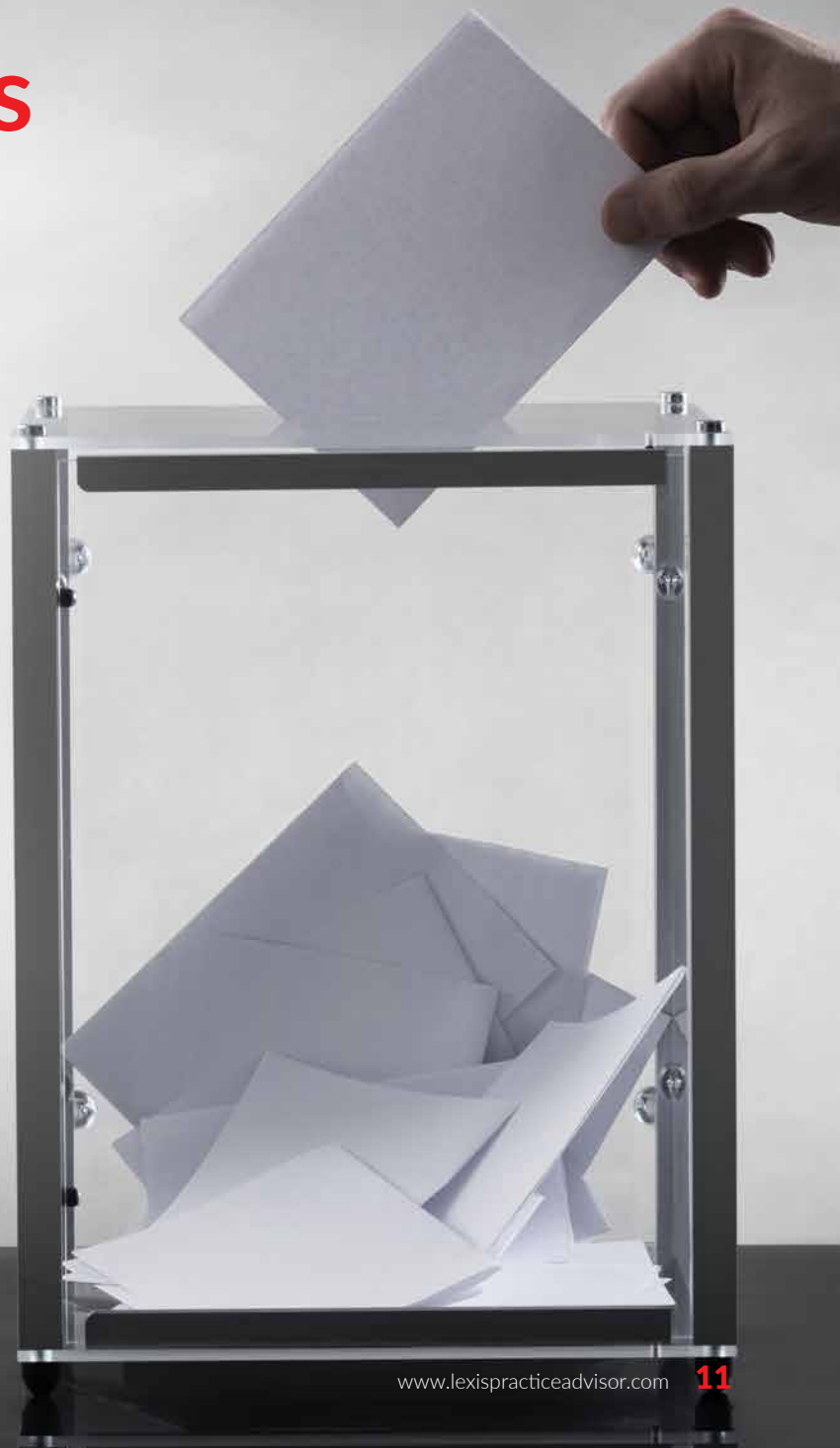
RESEARCH PATH: [Real Estate > Commercial Leasing > Landlord-Tenant Litigation > Articles](#)

⁷ 2019 Legis. Bill Hist. NY A.B. 2554 quoting *159 MP Corp. v. Redbridge Bedford, LLC*, 160 A.D.3d 176 (2d Dept. 2018).



David A. Bell, Ran Ben-Tzur, James D. Evans, Robert A. Freedman and Amanda L. Rose
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Policy Updates for the 2020 Proxy Season



This article discusses the updates issued by Institutional Shareholder Services (ISS) and Glass Lewis to their voting policies for the upcoming 2020 proxy season. Recently, [ISS](#) and [Glass Lewis](#) released revisions to their respective proxy voting guidelines for 2020. The ISS and Glass Lewis updates applicable to U.S. companies are discussed separately below.

Initial Guidance

ISS Updates

Problematic Governance/Capital Structure

Under its prior guidelines, for newly public companies, ISS generally recommended a vote against directors if prior to the initial public offering (IPO) the company adopted charter or bylaw provisions that (1) were materially adverse to shareholder rights or (2) implemented a multi-class voting structure in which the classes had unequal voting rights. The prior guidelines listed several factors relating to these provisions (e.g., the level of impairment, the disclosed rationale, the ability of shareholders to change these provisions or to change directors annually, and sunset provisions) that ISS would consider in the specific case.

The new guidelines provide separate provisions for ISS recommendations for problematic governance provisions and for multi-class structures. ISS will generally recommend a vote against pre-IPO directors of newly public companies if prior to the IPO the company adopted bylaw or charter provisions that are materially adverse to shareholder rights, considering the following factors:

- Supermajority vote required to amend charter or bylaws
- A classified board structure
- Other egregious provisions

A reasonable sunset provision will be considered a mitigating factor. This section of the guidelines does not comment upon what is a reasonable sunset period. If an adverse provision was included in the IPO charter or bylaws and has not been reversed or removed, ISS will make case-by-case recommendations on nominees in subsequent years.

With regard to multi-class capital structures, which have been popular with recent IPO technology companies, ISS will generally recommend a vote against pre-IPO directors if prior to the IPO the company adopted a multi-class structure featuring unequal voting rights without subjecting this provision to a reasonable time-based sunset provision. No sunset provision of more than seven years will be considered reasonable. In assessing the reasonableness of the time-based sunset provision, ISS will consider the company's lifespan, its post-IPO ownership structure, and the rationale provided for the length of the sunset provision. If a pre-IPO multi-class structure has not been removed, ISS will continue to recommend a vote against incumbent directors in subsequent years.

ISS stated in the proposing release for this change that it is likely to have a minimal impact. ISS notes that if companies go public with multi-class structures with reasonable sunsets, but still have classified boards and supermajority requirements to amend charters and bylaws, an adverse recommendation will still be issued. This would also be the case under the prior policy.

Shareholder Proposal for Independent Board Chair

Under its prior guidelines, ISS generally recommended a vote for shareholder proposals requiring that the board chair position be filled by an independent director, taking into consideration the following factors:

- The scope of the proposal
- The company's board leadership structure
- The company's governance structure and practices
- Company performance
- Other relevant factors

The prior guidelines also included an overview of how ISS would evaluate each of these factors.

The new guidelines add the rationale for the proposal as part of the first factor that ISS will take into consideration. The new guidelines dispense with the explanation of how ISS will evaluate the listed factors, but add the following as factors that will increase the likelihood of its support for the shareholder proposal:

- A majority non-independent board and/or the presence of non-independent directors on key committees
- A weak or poorly defined independent director role
- The presence of an executive or non-independent chair in addition to the CEO; a recent recombination of the role of CEO and chair; and/or departure from a structure with an independent chair
- Evidence that the board has failed to oversee and address material risks facing the company
- A material governance failure
- The board's failure to intervene when management's interests are contrary to shareholder interests

ISS stated that the new guideline largely codifies its existing application of the prior policy.



Share Repurchase Shareholder Proposals

Under its prior guidelines, ISS would generally recommend a vote for management proposals to institute open-market share repurchase plans in which all shareholders may participate on equal terms. The new guidelines include within the scope of proposals that ISS will support those that grant the board authority to conduct open market repurchases. In each case, ISS support will be contingent on the absence of company-specific concerns regarding greenmail, use of buybacks to inappropriately manipulate incentive compensation metrics, threats to the company's long-term viability, or other company-specific factors.

In proposing the new guideline, ISS noted that most U.S. companies can and do implement buyback programs through board resolutions without shareholder votes. As such, and in light of the minimal change to the verbiage of the existing guidelines, this change seems likely to have a very limited impact. ISS noted that while some critics assert that buybacks may come at the expense of research and development, capital expenditures, or worker pay, shareholders

generally support the use of buybacks as a way to return cash to shareholders.

Restrictions on Shareholders' Rights

The prior guidelines indicated that ISS would generally recommend a vote against members of the governance committee if the company's charter or bylaws imposed undue restrictions on shareholder ability to amend the bylaws. Such restrictions included share ownership and time-holding requirements in excess of those included in proxy Rule 14a-8. The new guidelines now add restrictions on the subject matter of shareholder proposals in excess of those contained in Rule 14a-8 as an under restriction. In addition, ISS has added a provision to the effect that prior shareholder approval of a management proposal to insert requirements more stringent than those contained in Rule 14a-8 will not be regarded as a mitigating factor unless a proposal for an unfettered right (i.e., not containing restrictions beyond those in Rule 14a-8) to submit proposals has been submitted to and rejected by shareholders.

...ISS would recommend on a case-by-case basis on shareholder proposals for reports on pay data by gender, and. . .would consider whether the company has been involved in. . . action(s) related to gender pay gap. Each of these references to gender pay has now been expanded to include race and ethnicity in pay gap matters.

Equity Compensation Plans

ISS has previously provided that it would generally recommend a vote against shareholder approval of equity plans that contain egregious factors. So-called evergreen (i.e., automatic share replenishment) terms have been added to the list of egregious factors.

Diversity Timing

The prior guidelines contained timing provisions for negative recommendations for boards of Russell 3000 or S&P 1500 companies lacking gender diversity, noting that they would first be applied for meetings after Feb. 1, 2020. Mitigating factors included both a commitment to add a female director in the near term and the presence of a female director at the time of the preceding meeting. The new guidelines eliminate the now irrelevant phase-in timing and require for both mitigating factors a commitment to appoint a woman director within a year. In this guideline, the references to female directors were changed to woman directors.

Diversity – Gender Pay

The prior guidelines indicated that ISS would recommend on a case-by-case basis on shareholder proposals for reports on pay data by gender, and in evaluating such reports would consider whether the company has been involved in controversy, litigation, or regulatory action related to gender pay gap. Each of these references to gender pay has now been expanded to include race and ethnicity in pay gap matters.

New Nominees

Under the prior guidelines, ISS would recommend votes against some or all incumbent directors due to specified accountability shortcomings. However, it provided an exception for new nominees and noted that they would be evaluated on a case-by-case basis. The definition of new nominees (essentially directors who have not been previously elected by shareholders) has been revised to provide greater flexibility to ISS in the case of directors on staggered boards, who of course may have served for more than one year prior to their upcoming election.

Board Attendance

ISS will also generally recommend a vote against directors who attended fewer than 75% of board and relevant committee

meetings. The prior guidelines excepted from this provision incumbent nominees who had not previously been elected by shareholders. These nominees would be evaluated on a case-by-case basis. Once again reflecting concern over directors up for election for the first time who were appointed to the board more than one year prior to the upcoming election, the 2020 guidelines simply except nominees who served for only part of the preceding year.

Glass Lewis Updates

Governance Committee

By way of background, on Sept. 6, 2019, the U.S. Securities and Exchange Commission (SEC) announced two significant revisions to its practices relating to its no-action guidance for the exclusion of a shareholder proposal from company proxy statements. In the past, the staff of the SEC would either agree or disagree, in writing, with the company on the excludability of the proposal. Under its revised approach, the SEC may either agree with the company, disagree, or decline to state a view. In addition, the staff of the SEC may now respond orally to no-action requests related to the exclusion of shareholder proposals.

Glass Lewis is now likely to recommend against all members of the governance committee if the company excludes a shareholder proposal on which the SEC has declined to take a position regarding excludability. Further, Glass Lewis will generally recommend a vote against all members of the governance committee if the SEC has orally advised the company of its concurrence with the company's position if the company does not provide some disclosure concerning this no-action relief. We note that in the past where a company has excluded a shareholder proposal due to the SEC's written no-action letter concurring with the company's position, no disclosure of the receipt and omission of the proposal would typically have been provided.

Under its new guidelines, Glass Lewis will recommend a vote against the governance committee chair (1) if directors' records for board and committee meeting attendance are not disclosed or (2) when it is indicated that a director attended fewer than 75% of board and relevant committee meetings, but the disclosure is sufficiently vague that it is not possible to determine which director has failed to attend. SEC rules require the disclosure of any director who

has failed to attend at least 75% of the board and any relevant committee meetings held in the past year.

Glass Lewis has previously indicated in its guidelines that it would consider recommending a vote against the chair of the governance committee if the board adopted a forum-selection clause without shareholder approval or is seeking shareholder approval of a forum-selection clause as part of a bundled bylaw amendment rather than as a separate proposal. The new guidelines include a footnote that explains Glass Lewis may make an exception to its policy where it can be determined that a forum-selection clause is narrowly crafted to suit the particular circumstances of the company, and a reasonable sunset is included.

Compensation Committee

The new guidelines provide that Glass Lewis will generally recommend a vote against all members of the compensation committee if the board adopts a frequency for the say-on-pay advisory vote that is different from the frequency approved by a plurality of the shareholders. Public companies are required to submit to shareholders every six years the question of how frequently to hold the say-on-pay advisory vote.

Say-on-Pay

The new guidelines address a number of matters that may impact Glass Lewis' recommendation regarding a company's say-on-pay proposal. These are:

- **Contractual Payments and Arrangements.** The new guidelines include a slightly revised list of unfavorable contractual provisions that would make it more likely that Glass Lewis would recommend against the say-on-pay proposal, including excessively broad change in control triggers, inappropriate severance entitlements, inadequately explained or excessive sign-on arrangements, guaranteed bonuses (especially as a multiyear occurrence), and failure to address any concerning practices in amended employment agreements.
- **Company Responsiveness.** The new guidelines add "insufficient response to low shareholder support" as a reason for which Glass Lewis may recommend against a say-on-pay proposal. Low shareholder support continues to be defined as 20% or more of the shareholders opposing the company's say-on-pay proposal at the previous meeting. The new guidelines expand the discussion of what Glass Lewis considers to be an appropriate response following low shareholder support, with a focus on shareholder engagement and disclosure regarding such engagement.
- **Clarifying Amendments.** The new guidelines contain clarifying amendments, including defining situations where Glass Lewis will report on post-fiscal year end compensation decisions, setting expectations for disclosure of mid-year adjustment of short-term incentive plans, and enhancing its discussion of excessively broad definitions of change in control in employment agreements.





Audit Committee

Glass Lewis will consider recommending a vote against the chair of the audit committee when fees paid to a company's independent auditor are not disclosed. If the chair is not up for election because the company has a staggered board, Glass Lewis will not recommend voting against other members of the audit committee who are up for election, but will note its concern regarding the audit committee chair. SEC regulations require the publication in the annual meeting proxy statement of the fees paid to the company's independent auditor for the two most recent fiscal years.

Shareholder Proposals Regarding Supermajority Voting and Equal Pay

Glass Lewis has codified its approach to shareholder proposals requesting that companies eliminate any supermajority vote


standard. In instances where such proposals are submitted to controlled companies, Glass Lewis will generally recommend a vote against, as the supermajority vote requirements may serve to protect minority holders.

With regard to shareholder proposals requesting that companies provide more disclosure on equal pay, Glass Lewis has clarified that it will review on a case-by-case basis proposals that request disclosure of median gender pay ratios (as opposed to proposals asking that such information be adjusted based on factors such as job title, tenure and geography). In cases where companies have provided sufficient information concerning their diversity initiatives as well as information concerning how they are ensuring that women and men are paid equally for equal work, Glass Lewis will recommend against such proposals. **L**

Related Content

For an overview of proxy statements and annual meetings, see

> [PROXY STATEMENT AND ANNUAL MEETING RESOURCE KIT](#)

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For guidance on locating practice notes, forms, and checklists that provide in detail the requirements for an audit committee, see

> [AUDIT COMMITTEE RESOURCE KIT](#)

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For more information on the roles and responsibilities of a compensation committee of a board of directors, see

> [COMPENSATION COMMITTEE RESOURCE KIT](#)

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For a discussion of the interpretative release and new guidance relating to the proxy voting process that has been issued by the Securities and Exchange Commission, see

> [SEC'S HIGHLY ANTICIPATED GUIDANCE ON PROXY ADVISORY FIRMS: FIRST ANALYSIS](#)

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Matthew D. Dunn and Melissa J. Erwin CARTER LEDYARD & MILBURN LLP

Cybersecurity Starts at the Top: Risks and Concerns for Directors and Officers

While many are no doubt tired of hearing about cybersecurity, hackers and cyber-criminals continue to employ sophisticated and evolving strategies to access data and disrupt organizations, and, unfortunately, this issue is not going away.

CYBERSECURITY, HOWEVER, IS NOT ONLY A PROBLEM FOR legal, compliance, and information technology personnel. While many executives and boardrooms have been proactive in embracing cybersecurity best practices, for many this remains an area for improvement. Recent developments in data breach litigation cases have demonstrated that officers and directors may increasingly be in the crosshairs of claims arising from data breaches and may be exposed to individual liability. In addition, regulatory guidance has increasingly emphasized that formation and oversight of cybersecurity programs and policies should start at the top—with executives and boards of directors.

Several key best practices for officers and directors can be distilled from the recent cases and regulatory developments. These are set forth below followed by a summary of the cases and regulatory guidance.

Best Practices for Officers and Directors

The following are best practices and steps that officers and directors should take to minimize cybersecurity-related risks for their organizations:

- Understand the applicable laws, regulations, and guidance relating to data protection and cybersecurity by consulting with legal advisors or otherwise. Executives and boards should have general knowledge of these matters and access to experts within or outside the organization.
- Ensure that an organizational risk assessment has been conducted and is periodically updated. Identify and address the company's specific cyber and data protection risks to avoid the consequences and costs associated with a data breach. Officers and directors should know what types of data the organization has and how it is protected.
- Ensure that the organization has robust cybersecurity and data protection and privacy policies that are tailored to the organization's specific risk profile and are implemented and followed. Officers and directors should be familiar with these policies. Management should educate board members on cybersecurity policies and guidelines that demonstrate reasonable information security procedures and implementation of data protection standards.
- Build compliance into the governance structure. Consider whether the board should have a committee that oversees cybersecurity and data protection issues. Consider appointing a chief information security officer. Ensure that the organization has personnel charged with implementing and enforcing cybersecurity policies and procedures.

- Review the technology infrastructure for data security and information management and ensure that it is current and updated regularly (anti-virus and anti-malware software, encryption, etc.). Obtain a report from the chief information officer or IT director. Consider requiring cybersecurity updates as part of the agenda at board meetings.
- Ensure that the organization has an adequate cyber incident response plan, and that it is updated and practiced. Organizations should conduct cyber breach exercises and penetration tests.
- For public companies, ensure that there are effective disclosure controls and procedures that enable the organization to make accurate and timely disclosures relating to cybersecurity. Ensure that public filings adequately address cybersecurity risks, policies, oversight, and incidents.
- Ensure that there is employee training and education on cyber and data protection policies and the identification of red flags.
- Conduct risk assessment of third-party vendors. Ensure that vendors with access to the organization's data have adequate cybersecurity and privacy policies to protect such data.
- Review and assess insurance coverage for data breaches and cyber-related incidents and consider separate cybersecurity insurance. Review and assess whether directors and officers insurance covers cybersecurity-related liability.





Data Breach Cases: Claims Against Directors and Officers

Officers and boards of directors owe two primary fiduciary duties to their organizations—the duty of care and the duty of loyalty. The duty of care requires directors and officers to exercise the level of care that a prudent person would use under similar circumstances, which includes not consciously disregarding red flags when there is a duty to take action. There is generally no liability for decisions reasonably made by officers and directors in good faith. The duty of loyalty requires directors and officers to refrain from benefiting themselves at the expense of the corporation that they serve and to refrain from conduct that injures the corporation. In the seminal case on the subject, *In re Caremark International*, the Delaware Chancery Court stated that a director’s duty of care “includes a duty to attempt in good faith to assure that a corporate information and

reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.”¹

In the early data breach cases, claims against officers and directors were typically dismissed during motion stages. For example, in, *Palkon v. Holmes*, a New Jersey federal court dismissed a shareholder derivative suit against Wyndham Worldwide Corporation and its officers and directors arising out of three data breaches between 2008 and 2010 that resulted in hackers obtaining personal and financial data of more than 600,000 customers, holding that the board’s actions were a proper exercise of its business judgment because the board had acted reasonably and had addressed cybersecurity concerns numerous times.² In another case, *In re Home Depot Shareholder Derivative Litigation*, a Georgia federal court

1. 698 A.2d 959, 970 (Del. Ch. 1996). 2. 2014 U.S. Dist. LEXIS 148799 (D.N.J. Oct. 20, 2014).

Courts will likely be less understanding over time as the hacks keep coming, and the business judgment rule will not protect a board that does not have its eyes on cybersecurity.

dismissed a case brought by shareholders in response to a 2014 data breach that resulted in the theft of personal financial data of 56 million Home Depot customers, holding that plaintiffs failed to set forth facts showing that the board “consciously failed to act in the face of a known duty to act,” and that “[d]irectors’ decisions must be reasonable, not perfect.”³

In early 2019, a court-approved settlement in *In re Yahoo! Shareholder Litigation*⁴ shook the sense of security (no pun intended) officers and directors may have been feeling after earlier data breach decisions. In January 2019, a California state court approved a \$29 million settlement of three shareholder derivative suits against Yahoo and former officers and directors, including the former CEO, which was the first instance of monetary recovery in a data breach shareholder derivative suit that targeted officers and directors for breach of fiduciary duty.

The *Yahoo* case arose from allegations that the former officers and directors breached their fiduciary duties by engaging in a years-long plot and sham investigation to conceal multiple cyberattacks dating from 2013 to 2016. This active concealment included a 2014 cyberattack that resulted in Russian hackers stealing user information associated with at least 500 million user accounts, which was not disclosed until 2016 after Yahoo and Verizon entered into a stock purchase agreement, as well as additional breaches impacting billions of Yahoo user accounts which were also discovered to have been concealed by Yahoo’s directors and officers. As a result of Yahoo’s disclosure of the 2014 cyberattack in 2016, the purchase price for Yahoo was ultimately reduced by \$350 million and Yahoo agreed to retain 50% of the liabilities associated with the data breach and 100% of the liabilities from shareholder lawsuits arising from the breach. In addition, as described below, in April 2018, Yahoo’s successor, Altaba, agreed to a \$35 million settlement with the Securities and Exchange Commission (SEC) for its failure to timely disclose the data breach. Given the egregious allegations and the SEC settlement, Yahoo agreed to pay \$29 million to settle the consolidated cases. It is likely that this case will provide a roadmap for future

shareholder suits against officers and directors in the data breach context.

In the same month, in *In re Equifax Inc. Securities Litigation*, a data breach class action case against the credit-rating firm Equifax and certain officers and directors arising out of a cyberattack in which criminal hackers breached Equifax’s computer network and obtained personally identifiable information of more than 148 million American Equifax customers, a Georgia federal court granted in part and denied in part a motion to dismiss.⁵ The lead plaintiff, representing a class of shareholders, alleged violations of the securities laws by officers and directors, who made false and misleading statements about the vulnerability of the company’s computer systems to cyberattack and its compliance with data protection laws and best practices and failed to take basic steps to protect its computer systems. The court granted the motion to dismiss with respect to the claims against most of the officers and directors; however, it denied the motion as to Equifax’s former CEO and chairman of the board, who was alleged to have had personal knowledge that Equifax’s data protection systems were grossly inadequate and yet knowingly or recklessly made false and misleading statements about the company’s data security, and had the power to control cybersecurity policies and the statements made about such policies that resulted in securities law violations.⁶

Also in 2019, the Delaware Supreme Court reinforced that directors may be individually liable for a breach of their duty of loyalty if they fail to make a good faith effort to implement “a reasonable board-level system of [compliance] monitoring and reporting.”⁷ While this case involved a food and beverage company’s listeria outbreak, the lesson is applicable when considering a board’s cybersecurity oversight obligations.

Courts will likely be less understanding over time as the hacks keep coming, and the business judgment rule will not protect a board that does not have its eyes on cybersecurity.

³. 223 F. Supp. 3d 1317 (N.D. Ga. 2016). ⁴. Case No. 17-CV-307054 (Cal. Sup. Ct., Santa Clara Co. Jan. 4, 2019). ⁵. 357 F. Supp. 3d 1189 (N.D. Ga. 2019). ⁶. *Id.* at 1240-52. ⁷. *Marchand v. Barnhill*, 212 A.3d 805, 821 (Del. 2019).

SEC and Other Regulatory Guidance and Enforcement

While the SEC has for years warned companies about cybersecurity risks and related reporting obligations, in 2018 it issued new interpretative guidance concerning the obligations of publicly traded companies to disclose cybersecurity incidents and issues.⁸

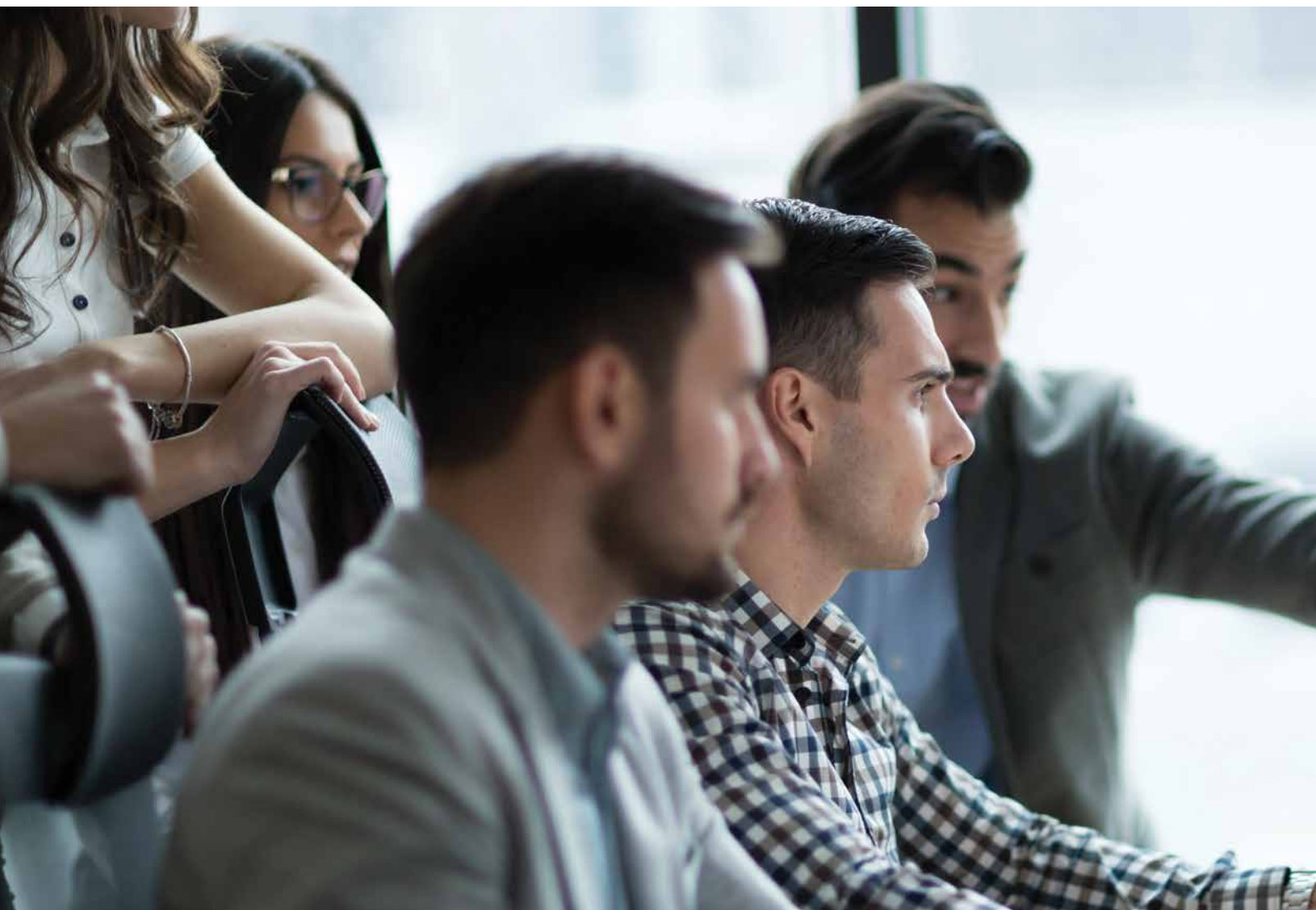
In October 2018, the SEC issued an investigative report which emphasized that issuers, in complying with the requirement to have sufficient internal accounting controls, should consider cyber-related threats, including protection against spoofed or manipulated electronic communications.⁹

The SEC has specifically emphasized that it is the board's role to understand the risks, ensure that the company is addressing those

risks, and oversee the company's cybersecurity program. The SEC indicates that companies should, as part of their proxy statement, disclose the board's involvement in cybersecurity efforts and risk management and should specifically indicate "the nature of the Board's role in overseeing the management of that risk."¹⁰ SEC Commissioner Robert J. Jackson, Jr., in a 2018 speech relating to cybersecurity, reinforced the important role and obligations of officers and directors:

In short: the cyber threat is a corporate governance issue. The companies that handle it best will have relevant expertise in the boardroom and the C-suite, a strategy for engagement with investors and the public, and—most of all—sound advice from corporate counsel who can navigate uncertain times and uncertain law in a critical area for the company's business.¹¹

8. Commission Statement and Guidance on Public Company Cybersecurity Disclosures, Securities and Exchange Commission (Feb. 21, 2018), <https://www.sec.gov/rules/interp/2018/33-10459.pdf>. The SEC has made clear that it expects companies to have comprehensive cybersecurity policies and procedures; to be transparent regarding cyber risks, security, and incident preparedness; and to make timely and non-generic disclosures in public filings. The SEC expects companies to disclose cybersecurity risks and incidents that are material to investors, including the concomitant financial, legal, and reputational consequences. Further, the SEC requires companies to "establish and maintain appropriate and effective disclosure controls and procedures that enable them to make accurate and timely disclosures of material events, including those related to cybersecurity." 9. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding Certain Cyber-Related Frauds Perpetrated Against Public Companies and Related Internal Accounting Controls Requirements, Exchange Act Release No. 84429 (Oct. 16, 2018), <https://www.sec.gov/litigation/investreport/34-84429.pdf>. 10. Commission Statement and Guidance on Public Company Cybersecurity Disclosures, 17 CFR Parts 229 and 249, SEC Release Nos. 33-10459 and 34-82746 (Feb. 6, 2018), <https://www.sec.gov/rules/interp/2018/33-10459.pdf>. 11. Robert J. Jackson Jr., Commissioner, Securities and Exchange Commission, Corporate Governance: On the Front Lines of America's Cyber War (Mar. 15, 2018), <https://www.sec.gov/news/speech/speech-jackson-cybersecurity-2018-03-15>.



Although this 2018 guidance related only to public companies, the SEC has issued guidance and best practices for other regulated entities under the federal securities laws, such as investment advisers, broker-dealers, and self-regulatory organizations, and has a website dedicated to cybersecurity issues, which similarly focus on the importance of well-implemented cybersecurity policies and procedures.¹²


The SEC has begun bringing enforcement actions in connection with cybersecurity-related failures and misconduct, and such enforcement actions will likely increase in the coming years. In March 2018, the SEC filed an enforcement action (with parallel criminal charges) against the former chief information officer of a U.S. business unit of Equifax for insider trading in connection with the sale of shares prior to the public disclosure of a massive data breach.¹³ As a result of the SEC enforcement action, the executive was ordered to pay disgorgement and prejudgment interest totaling \$125,636, is prohibited from acting as an officer or director of any public company for a period of 10 years, and was sentenced to four months in federal prison in the parallel criminal action.¹⁴ In April 2018, the SEC imposed a \$35 million penalty on Yahoo successor [Altaba](#), in the SEC's first cybersecurity enforcement action against a public company for failing



Related Content


For information on how to plan for and manage a data breach, see

> [DATA BREACH PLANNING AND MANAGEMENT](#)

 **RESEARCH PATH:** [Data Security & Privacy > Data Breaches > Planning > Practice Notes](#)

For steps to follow to avoid a data breach, see

> [DATA BREACH AVOIDANCE AND RESPONSE PLAN CHECKLIST](#)

 **RESEARCH PATH:** [Data Security & Privacy > Data Breaches > Planning > Checklists](#)

For a discussion of Federal Trade Commission (FTC) data security guidelines, see

> [FTC DATA SECURITY GUIDANCE AND ENFORCEMENT](#)

 **RESEARCH PATH:** [Data Security & Privacy > Cybersecurity Risk Management > Practice Notes](#)


For an overview of cybersecurity liability coverage, see

> [CYBERSECURITY INSURANCE](#)

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For guidance on establishing a data privacy policy, see

> [PRIVACY POLICIES: DRAFTING A POLICY](#)

 **RESEARCH PATH:** [Data Security & Privacy > Privacy Policies > Practice Notes](#)

to timely disclose a data breach.¹⁵ In September 2018, a broker-dealer and investment adviser agreed to pay \$1 million to settle SEC charges related to its failure to have sufficient cybersecurity policies

¹² See Spotlight on Cybersecurity, the SEC, and You, <https://www.sec.gov/spotlight/cybersecurity>; see also Investment Adviser and Broker-Dealer Compliance Issues Related to Regulation S-P—Privacy Notices and Safeguard Policies, SEC Risk Alert (Apr. 16, 2019), <https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Regulation%20S-P.pdf> (risk alert for investment advisers and broker-dealers, which emphasized that Regulation S-P requires registrants to have written policies and procedures for the protection of customer records and information); Cybersecurity Guidance, SEC Division of Investment Management (Apr. 2015), <https://www.sec.gov/investment/im-guidance-2015-02.pdf> (cybersecurity guidance for registered investment companies and registered investment advisers); Observations from Cybersecurity Examinations, SEC Risk Alert (Aug. 7, 2017), <https://www.sec.gov/files/observations-from-cybersecurity-examinations.pdf> (observations and guidance from cybersecurity examinations of broker-dealers, investment advisers and investment companies); SEC Staff Guidance on Current SCI Industry Standards (Nov. 19, 2014), <https://www.sec.gov/rules/final/2014/staff-guidance-current-sci-industry-standards.pdf> (adoption of Regulation Systems Compliance and Integrity applicable to certain self-regulatory organizations, including registered clearing agencies, alternative trading systems, plan processors, and exempt clearing agencies).
¹³ Former Equifax Executive Charged With Insider Trading, SEC Press Release No. 2018-40 (Mar. 14, 2018), <https://www.sec.gov/news/press-release/2018-40>.
¹⁴ SEC Obtains Final Judgment Against Former Equifax Executive Charged With Insider Trading, SEC Litigation Release No. 24541 (July 18, 2019), <https://www.sec.gov/litigation/litreleases/2019/lr24541.htm>; former Equifax employee sentenced for insider trading, U.S. Department of Justice (June 27, 2019), <https://www.justice.gov/usao-ndga/pr/former-equifax-employee-sentenced-insider-trading>.
¹⁵ Altaba, Formerly Known as Yahoo!, Charged With Failing to Disclose Massive Cybersecurity Breach; Agrees To Pay \$35 Million, SEC Press Release No. 2018-71 (Apr. 24, 2018), <https://www.sec.gov/news/press-release/2018-71>.



and procedures to prevent a cyber intrusion that compromised personal information of thousands of customers, which was the first of its kind enforcement action for violations of the Safeguards Rule and the Identity Theft Red Flags Rule, which are designed to protect confidential customer information and protect customers from the risk of identity theft.¹⁶

Companies also increasingly may be subject to cybersecurity, data protection, and data breach laws and regulations, including the European Union's General Data Protection Regulation (GDPR), the California Consumer Privacy Act (CCPA), which became effective on January 1, 2020, the New York State Department of Financial Services Cybersecurity Requirements for Financial Services Companies, and New York's recently enacted Stop Hacks and Improve Electronic Data Security Act (SHIELD Act). The GDPR, CCPA, and SHIELD Act impose requirements on companies that collect or possess certain personal information and can apply to companies located anywhere in the world. In addition, the Federal Trade Commission, the U.S. Department of Health and Human Services, and Federal Communications Commission regulate data privacy and security in specific contexts.

Conclusion

Given the continued threat of cyberattacks and breaches and the complex regulatory landscape, strong corporate defenses and compliance best practices should start at the top—with officers and directors. The costs associated with data breaches can be significant, and data breaches may lead to investigations by state or federal agencies, regulatory fines and sanctions, private litigation, shareholder suits, and even liability for officers and directors. Executives and boards are encouraged to consult counsel regarding cybersecurity compliance and initiatives. **L**

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¹⁶ SEC Charges Firm With Deficient Cybersecurity Procedures, SEC Press Release No. 2018-213 (Sept. 26, 2018), <https://www.sec.gov/news/press-release/2018-213>.



Ethan Horwitz CARLTON FIELDS

Tips for Avoiding IP Malpractice Claims

Malpractice cases are on the rise—and the amounts in issue are rising significantly as well. A recent survey of legal malpractice cases found that after “several years of stability,” the number of new malpractice claims was on the rise.¹ That survey also showed an “alarming increase in claim severity” with clients “much more willing to point fingers at lawyers.”²

OBVIOUSLY, THE BEST WAY TO AVOID MALPRACTICE CLAIMS is to win the underlying matter and win far in excess of the client’s expectations, yet that is not always doable. But there are many other steps that can be taken to reduce the risk and severity of malpractice claims.

There is significant literature regarding the ethical obligations and best practices that will help win a malpractice suit. But the real object is to avoid litigation altogether. In addition to the legal and ethical requirements, these are some practical steps that can be helpful in avoiding a claim or reducing the value of a claim.

Those steps can be generally categorized into three areas, which are somewhat overlapping:

- Intake—how a client is brought into the firm
- Management—how a client and its matters are managed
- Communication—how a client is kept informed and involved in decisions

Intake

How the attorney-client relationship is established—or not established—can have a significant effect on a later suit. While there is always the desire to land the client or matter,



sometimes there are danger signs that warn you that a client should be turned down. Or sometimes the client needs to be told things that may not be helpful in the quest for the work.

1. The survey also found that the severity of legal malpractice claims persisting with most insurers seeing payouts of over \$150 million for an individual claim. Ames & Gough LPLI 2019 Claims Survey. 2. Ames & Gough News Release, May 30, 2019.

... how the matter is managed can also have a profound effect on whether a malpractice case is brought and the severity of the case if brought.

Clearing the Client

Is this a client you really want? If there is a history of dissatisfaction with counsel—for example, if you are the third counsel on a case—that is a danger sign. Look into the client and see if there are any other danger signs. You should look into the client’s history of litigation, their history of switching counsel, and their reputation in the industry.

Financial Clearance

The details of the billing arrangement should be spelled out so the client has an understanding of what the bills will be and how they need to be paid. Even if it is too early to prepare a proper budget, it is important that the client understand the general scope of the fees involved; a client who is used to patent application fees needs to be on notice that litigation has a very different budget. Similarly, a foreign client may not be aware that the cost of U.S. litigation is significantly higher than what it may have experienced abroad. Investigation into a client’s ability to pay may avoid a client’s later malpractice suit to avoid paying a large fee it cannot afford. Taking on a client with questionable financial ability without resolving the finances up front is dangerous.

Emotional Conflict Check

Clearing the client also obviously includes a conflict check. But to avoid problems, the conflict check should comprise more than the required conflict under the ethical rules; it should include a check for conflicts that will raise the emotions of a client. For example, in some states, you may be permitted to be ethically adverse to a sister company of a client. Despite the fact that it may not be improper, a client who discovers for the first time after losing a case that a sister company of the other side was a significant client of the firm may be more likely to bring a claim. Also imagine how it will later look to a jury when, in a malpractice case, you are accused of committing the malpractice to benefit the sister company of the opponent, especially if that sister company is a long-term major client of the firm. That is not to say you must decline the new client in those cases, just that you should deal with this issue at the beginning of the representation through full disclosure and

through internal policies such as avoiding having any one attorney work for both clients.

Who Is the Client?

In many cases, it is clear who the client is; it needs to be stated, so it is not an issue. However, there are cases in which the matter is funded by others or where investors are relying on the matter or when the founder of the company looks at the company as his company based on his invention even though he has sold the majority of shares to others. Any time there is the possibility of confusion on this issue, it is better that it be specifically stated and explained who is and, just as important, who is not the client.

Scope of the Representation

Determining and specifying the scope of the representation can be critical. A client needs to know what you will—and will not—be doing for them. For example, an attorney undertaking representation of a client in a suit may want to point out that there may be insurance available but also point out that the scope of the representation does or does not include advice on that issue. A client also needs to know the limitations of what is being done. For example, if a search is being done to ensure a machine is free from a claim of infringement, a client should understand what exactly is being cleared—for example, that it is the function of the machine that is being cleared, not the metal of which it is made or the lubricant it uses.

Management

Now that you have the matter, how the matter is managed can also have a profound effect on whether a malpractice case is brought and the severity of the case if brought.

Financial Management

As soon as practical, a budget should be given to the client. Obviously the earlier the budget is given, the more of a chance that there may be unknown factors affecting the ultimate cost. But those factors can be listed and explained. Also, as the case progresses, the work will change, and the budget may need to be updated. In addition, control should be exercised to stay within the budget, and to point out to the client—in advance—when and why the budget will be exceeded. Even if, based on



conversations, there is a clear understanding between you and the client regarding the finances of a case, a budget and budget updates will enable you to remind and reinforce the financial aspects of the case so that later confusion or sticker shock is avoided. A client who instructs you to spend whatever is required in a bet-the-company infringement case may forget those instructions when the case is lost and final payment is due.

Stay Current

As a matter progresses, things change. In litigation, a new event may occur that changes the nature of the case. Or, in

the course of interviewing an inventor, the invention may in fact be two separate inventions, and the client may want applications for both. With any change, it may be helpful to update the paperwork. For example, a new retainer letter may be helpful for the additional invention to ensure the client understands it is not within the original scope of work or in the original estimate. In other situations, a new case analysis may be helpful, or the old budget may be updated. The issue is not whether in your state you must formally advise the client of the updates; the issue is making sure the client can see exactly what changes are occurring and how they will affect the work and the budget.

Communication

A key to a client's satisfaction is information, and this can only be given to the client through communications.

Report on Status

It is critical that a client be kept aware of the case status and the decisions that are being made about the progress of the case. While some decisions need not be discussed with a client—the day of a deposition unless the client will attend—there are many important and even critical decisions that a client should at least be aware of and even given the opportunity to participate in. For some, the decision is obvious, but it always helps to discuss the issues with the client so the client is kept up to date. Even lower-level decisions should be discussed with the client so the client is aware of where the case is going and is not surprised. A client who says “just deal with the case and tell me when it is over” can be a dangerous client. A client is far less likely to be litigious if along the way they are made fully aware of the issues and the decisions made.

Decision-Making

It is rare for an IP client not to be able to comprehend even the most intricate issues in an IP matter—if those issues are properly explained. In many cases, alternative ways of proceeding have competing benefits and detriments; many of the benefits and detriments are practical as well as legal. For example, if the patent in an infringement action is pulled into a post-grant procedure and only some of the claims are allowed by the examiner, there are alternatives available. Most common are the alternatives of accepting the examiner's decision and getting the patent reissued with limited claims, or filing an appeal. If a speedy resolution of the infringement case and an injunction are critical, the client may wish to forgo the appeal with its resulting delay, even if the rejected claims would have a better chance for success in the infringement case. On the other hand, if the case is all about damages, then the time required for an appeal may not be such a critical factor. An informed client making the decision and aware, for example,



Even the best of attorneys may sometimes make a mistake; hopefully those mistakes are insignificant and curable.

that it is reducing the chances for success in return for speed is less likely to litigate malpractice when the consequences of that decision are not good.

Disagreements

Most clients in IP matters are intelligent and may have different ideas of how a case should be handled. Look at that as a benefit, not a problem; some of the best ideas come from someone who looks at the issues differently. If there is a disagreement, talk it through; don't just say trust me, even if you can get away with it. Often you can explain why you are correct—and sometimes the client may even show you why they are correct. For example, in a patent case, a client who knows the technology may have good ideas on how to distinguish prior art. In a trademark case, the client may understand how consumers behave in its industry in a way that helps in a confusion argument. But in any event, if disagreements are aired and resolved, a client will understand why steps were taken and will be vested in the process.

Mistakes

Even the best of attorneys may sometimes make a mistake; hopefully those mistakes are insignificant and curable. But in any event, they should not be hidden from the client. This is the time the client can be shown that you are acting in their best interest even if it does not put you in the best light. This is also the time to get someone else in the firm involved—someone who is not vested in showing why what was done was not really a mistake. Lastly, the atmosphere in the firm should encourage junior attorneys to come forward to the responsible lawyer with any mistakes; they should not be trying to hide their mistakes from the boss. It is much better that the responsible lawyer explain the mistake to the client and try to fix it rather than have an inexperienced attorney handle that process on his or her own.

Conclusion

In this litigious age, there may be no way to avoid malpractice cases even if you do everything right. Many of these steps are

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not legally or ethically required, but implementing these steps can go a long way to reducing such cases and reducing the severity of any recovery. 

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Betsy Johnson OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

Americans with Disabilities Act: Guidance for Employers on Reasonable Accommodations and Undue Hardship

This article provides guidance for employers on providing reasonable accommodations for disabled employees pursuant to Title I of the Americans with Disabilities Act of 1990 (ADA) and amendments to it by the ADA Amendments Act of 2008 (ADAAA).¹

THE ADA AFFIRMATIVELY REQUIRES EMPLOYERS TO MAKE reasonable accommodations to the known limitations of employees or applicants, provided that the accommodation does not pose an undue hardship on the operation of the business of the employer.²

The ADA does not require employers to adopt a reasonable accommodation policy, but employers should nevertheless adopt one to help ensure that they treat all employees and applicants in a consistent and legally compliant manner.

Request for Accommodations

As a general rule, the employer does not have an obligation to engage in the interactive process or accommodate a disability until the employee requests an accommodation.³ An employee does not need to use any magic words to request an accommodation and it suffices if the employee tells the employer that he or she needs an adjustment or change at work due to a medical condition.

An exception to the general rule exists for certain mental disabilities. Specifically, where the employee has a mental impairment and cannot understand the impact of his or her noticeable behavior, then the ADA does not require the employee to request an accommodation to trigger the employer's obligation to start the interactive process. In such a circumstance, if the employer notices that the employee has difficulty performing the essential functions of the job, then the employer should initiate the interactive process.⁴

Additionally, in some cases, employees do not even need to request an accommodation where the disability is obvious to the employer.⁵ Outside of the context of the illegal use of drugs or alcohol, if the employer believes that an employee's poor job performance results from a disability, the employer may wish to ask the employee if he or she needs an accommodation.⁶

Once an employer knows of an individual's need for an accommodation, the employer must engage in an interactive process to attempt to identify an appropriate accommodation.

Determining Whether the Employee Has a Covered Disability

When considering employer and employee rights and obligations under the ADA, the employer must first assess whether the employee has a "covered" disability under the ADA that may qualify

for a reasonable accommodation under the ADA. As stated above, you must broadly interpret the phrase "substantially limits a major life activity" in your assessment. "Major life activity" includes most anything that an employee does at work. Thus, the more cautious approach is to deem the employee to have a covered disability.

Disability-Related Inquiries

"Disability-related inquiries" are questions likely to elicit information about a disability, such as:

- Whether employees have or ever had a disability
- What kinds of prescription medications they are taking
- The results of any medical or genetic tests they have had
- Asking about prior workers' compensation history
- Asking coworkers, family members, or doctors about an employee's disability

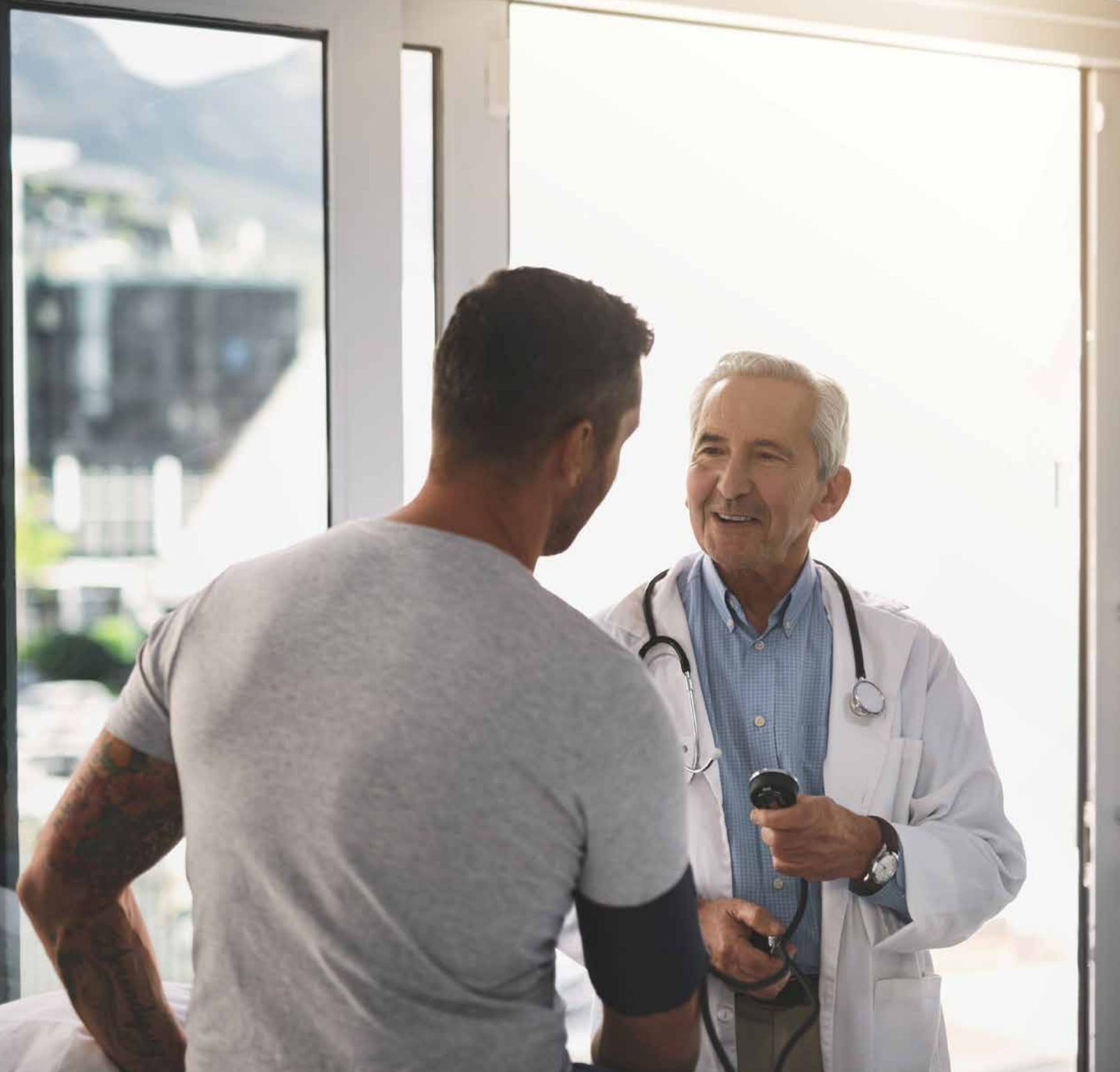
For job applicants who have not yet received a conditional offer of employment, employers may not ask about the existence, nature, or severity of a disability and may only ask if the applicant can perform the specific job functions under the ADA.⁷ When an employer makes a conditional offer to a job applicant and prior to the commencement of employment, an employer may make disability-related inquiries if the employer makes the same inquiries to all conditionally-hired individuals for the same position or job category.⁸ For employees, under the ADA, employers may ask disability-related questions only if the inquiries are "job-related and consistent with business necessity."⁹

Employers may ask employees about their general well-being, whether they can perform job functions, and about their current illegal use of drugs without running afoul of the EEOC's Guidance.¹⁰

Medical Examinations

A "medical examination" is a test generally administered by a health care professional or in a medical setting that seeks information about a person's physical or mental impairments or health. Medical examinations include vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans, and MRIs.

1. 42 U.S.C.S. § 12101 et seq. 2. 42 U.S.C.S. § 12112(b)(5). 3. See, e.g., *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008). 4. See, e.g., *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir. 2000) (en banc), vacated on other grounds, *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). 5. See, e.g., *Brady*, 531 F.3d 135 (the ADA "speaks of accommodating 'known' disabilities, not just disabilities for which accommodation has been requested"). 6. But see *Robin v. ESPO Eng'g Corp.*, 200 F.3d 1081, 1092 (7th Cir. 2000) ("regrettably recognizing[]" that an employer was not required to accommodate an individual that did not request an accommodation). 7. 42 U.S.C.S. § 12112(d)(2)(B). 8. 42 U.S.C.S. § 12112(d)(3). 9. 42 U.S.C.S. § 12112(d)(4)(A). 10. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees (2005).



Job Applicants

The ADA prohibits medical examinations of job applicants who have not yet received a conditional offer of employment, but employers may conduct medical exams on all job applicants to uncover illegal drug use.¹¹ When a job applicant receives a conditional offer of employment, an employer may mandate a medical examination for him or her before he or she begins employment if the employer

requires medical examinations for all employees hired for the same position or job category.¹² But “if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation. . . .”¹³

¹¹ 42 U.S.C.S. § 12112(d)(2); 29 C.F.R. § 1630.3(a). ¹² 42 U.S.C.S. § 12112(d)(3); 29 C.F.R. § 1630.14(b). ¹³ 29 C.F.R. § 1630.14(b)(3).

Employees

An employer can mandate medical examinations for employees if they are “job-related and consistent with business necessity.”¹⁴ Medical examinations qualify as job-related and consistent with business necessity when employers reasonably believe based on objective evidence that employees will be unable to perform the essential functions of their job because of a medical condition or employees will pose a direct threat to themselves or others due to a medical condition.¹⁵

Employers also may obtain medical information about an employee when an employee requests a reasonable accommodation or where an employee's disability or need for accommodation is not obvious. In addition to permitted medical inquiries and medical examinations, under the ADA, employers may obtain medical certification of the need for leave or extensions of leaves. Where an employer has explained what type of documentation it requires from the employee, and the employee fails to provide the documentation or provides insufficient documentation, the employer may require the employee to see a health care professional of the employer's choice. Before the employer incurs the additional expense of a separate examination, you should advise the employer to consider asking the employee's health care provider for additional information.¹⁶

Confidentiality of Information Regarding Disability Inquiries and Medical Examinations

Information obtained during examinations and inquiries should be kept confidential and made available only to appropriate individuals in determining the ability of an applicant or employee's ability to perform job-related functions.¹⁷ You should encourage employers to redact any identifiable information when consulting with other personnel in making an accommodation determination.

Duty to Engage in an Interactive Process

Once an employee requests an accommodation, the employer must, in good faith, engage in an interactive process that involves communicating with the individual and/or the individual's health care provider about identifying an appropriate accommodation. Some courts have held that the individual does not need to affirmatively request an accommodation where the employer is aware of the disability and the need for an accommodation.¹⁸ When one or more possible accommodations would suffice, the employer may choose the one that involves the least cost and difficulty. Where the employer has no preference, you should advise the employer to let the employee choose.

Related Content

For best practices for drafting disability and reasonable accommodation policies, see

> [DISABILITY AND REASONABLE ACCOMMODATION POLICIES: KEY DRAFTING TIPS](#)



RESEARCH PATH: [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Practice Notes](#)

For a sample disability and reasonable accommodation policy, see

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For a policy form that includes key topics for disability accommodations, see

> [DISABILITY ACCOMMODATIONS POLICY \(WITH ACKNOWLEDGMENT\)](#)



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The interactive process can raise complex issues regarding what constitutes a proper accommodation. To show that it engaged in the process and good faith, the employer should be prompt and responsive during the course of the interactive process. Additionally, the employer should carefully document its interactions with the employee and its efforts to identify and provide a reasonable accommodation.

An employer is not shielded from liability based on its incorrect belief that no accommodation existed that could enable the employee with a disability to perform the essential functions of the position where the employer fails to engage in a good faith interactive process. Further, an employer should not assume that the only way to accommodate the employee is to eliminate an essential function of the job.¹⁹ Both employers and employees are responsible for determining an appropriate accommodation through their engagement in the interactive process.²⁰ Where an employee is

¹⁴ 42 U.S.C.S. § 12112(d)(4)(A). ¹⁵ See, e.g., *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1312–13 (11th Cir. 2013) (upholding an employer's right to require a medical examination from an employee returning from leave after he made threatening comments in a meeting with his supervisor). ¹⁶ See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees (2005). ¹⁷ 42 U.S.C.S. § 12112(d)(4)(C). ¹⁸ See, e.g., *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 506–07 (3d Cir. 2010). ¹⁹ See, e.g., *Parker v. Sony Pictures Entm't Inc.*, 260 F.3d 100, 106 (2d Cir. 2001) (affirming its discrimination finding where a disabled employee who was able to perform the essential functions was terminated after not being allowed to return to work due to a denied reasonable accommodation request); *Schroeder v. Suffolk County Cmty. College*, 2009 U.S. Dist. LEXIS 52533, at *47–48 (E.D.N.Y. June 22, 2009) (while an employer is not required to eliminate an essential function to accommodate, it does not satisfy its reasonable accommodation obligations by assuming that the only way to accommodate is to eliminate an essential function). ²⁰ *Schroeder*, 2009 U.S. Dist. LEXIS 52533, at *48.

responsible for the breakdown in the interactive process, he or she may not recover for a failure to accommodate.²¹

Courts have held that an employer's duty to accommodate is a continuing duty that is not necessarily exhausted by one discrete effort.²² A court found that an employer violated the ADA where the employee requested to work from home and the employer failed to explore other alternatives such as a leave of absence before denying her request and terminating the employee.²³ An employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues where the employer is aware that the initial accommodation is failing and further accommodation is necessary.²⁴

When advising employers about complying with the ADA's interactive process requirement, you should recommend that they include training on the interactive and reasonable accommodation process in the training that they provide to human resources professionals, managers, and supervisors. Given the complexities of the interactive process, an employer should designate a specified human resources employee or group to handle this process rather than leave it in the hands of individual managers or supervisors.

Determining Whether the Employee Can Perform the Job's Essential Functions with or without Accommodation

If the employee can perform all of his or her essential job functions—but only with an accommodation for his or her disability—then the employer must explore whether it can accommodate the disability.

Thus, the critical analysis comes down to whether the employee can perform the essential duties of the position, with or without accommodation. Further, if the employee can perform the essential duties with an accommodation, you must evaluate whether the accommodation places an undue hardship on the employer.

The existence of current and accurate job descriptions may prove crucial to determining whether the employee can perform the essential functions of his or her job, and, in turn, whether the employee will need an accommodation. You should advise employers to clearly identify the essential functions of the position. Courts will scrutinize this issue, particularly if there are discrepancies between the supervisor's and employee's understanding of which functions are essential to the position. Employers should not rely on written job descriptions alone.

If the employee cannot perform an essential job function—even with an accommodation—the inquiry ends there. The ADA does not require the employer to provide an accommodation in such

circumstances.²⁵ However, the employer should engage in the interactive process before determining that the employee cannot perform an essential function even with an accommodation to avoid making an inaccurate assessment.

Accordingly, employers must take the time to carefully evaluate their job descriptions to confirm that the essential functions of the positions are clearly identified. Job descriptions will be an important piece of evidence in establishing that an employee's proposed accommodation, which would eliminate an essential function of the position, would create an "undue hardship" by altering and disrupting the nature and operations of an employer's business.

Determining Whether the Accommodation Is Reasonable

Once the employee and employer have identified an effective accommodation, the employer may consider whether the accommodation is reasonable. An oft-litigated issue is the reasonableness of the accommodation provided by the employer. A "reasonable accommodation" allows the individual with the disability to do one of the following:

- **Perform essential functions.** A reasonable accommodation can be an accommodation that allows the employee to perform the essential functions of the position in a way that enables him or her to enjoy equal employment opportunities, benefits, and privileges of employment.²⁶
- **Enjoy equal benefits and privileges of employment.** A reasonable accommodation can be an accommodation that allows an employee to "enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."²⁷
- **Meet a qualification standard.** Reasonable accommodations can be "modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires."²⁸ If an applicant or employee cannot meet a specific qualification standard because of a disability (e.g., possessing specific training, licenses or certificates, certain physical or mental abilities, meeting certain health and safety requirements, demonstrating certain attributes such as getting along with others or working under pressure), the ADA requires that the employer demonstrate the importance of the standard. To this end, the employer must show that the qualification standard is job-related and consistent with business necessity.²⁹ If the employer cannot do so, it may not use the standard as a basis to take adverse action against the individual with the disability.

²¹ See, e.g., *Nugent v. St. Luke's-Roosevelt Hosp. Ctr.*, 303 Fed. Appx. 943, 945–46 (2d Cir. 2008). ²² See, e.g., *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1138 (9th Cir. 2001); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1237 (9th Cir. 1999). ²³ *Humphrey*, 239 F.3d at 1128 (dismissing the employer's argument that the employee failed to request leave as an accommodation). ²⁴ *Id.* at 1138. ²⁵ See, e.g., *Lang v. Wal-Mart Stores East, L.P.*, 813 F.3d 447, 456 (1st Cir. 2016) (an employer is not required to exempt an employee from an essential job function as an accommodation). ²⁶ See 29 C.F.R. § 1630.2(o)(1)(iii); 29 C.F.R. § 1630.9(d). ²⁷ See 29 C.F.R. § 1630.2(o)(1)(iii). ²⁸ See 29 C.F.R. § 1630.2(o)(1)(i). ²⁹ See 29 C.F.R. § 1630.10.



An employer is not required to eliminate or reallocate essential functions of the job or lower production standards. The employer also is not required to provide personal use items such as glasses or hearing aids as an accommodation.

Types of Reasonable Accommodations

The ADA does not require an employer to provide the “best” accommodation possible or the accommodation specifically requested by the individual. Rather, the ADA only requires that the employer provide a reasonable accommodation to an individual who suffers from a disability. The employer has “the ultimate discretion to choose between effective accommodations.”³⁰

The ADA provides that a reasonable accommodation may include “[m]aking existing facilities used by employees readily accessible

to and usable by individuals with disabilities” and provides the following illustrative examples of reasonable accommodations:

- Job restructuring
- Part-time or modified work schedules
- Leave of absence
- Reassignment to a vacant position
- Acquisition or modification of equipment or devices
- Appropriate adjustment or modifications of examinations, training materials, or policies
- The provision of qualified readers or interpreters³¹

³⁰. [29 C.F.R. pt. 1630 app.](#) (interpretation of [29 C.F.R. § 1630.9](#)). ³¹. [42 U.S.C.S § 12111\(9\)](#).



Each of these reasonable accommodations is addressed below.

Job Restructuring

Where an employee's disability impacts only a marginal job function, the ADA requires an employer to accommodate the disability. Such accommodation may include having another employee perform the marginal function by way of reassignment. Mere inconvenience does not constitute a defense to the failure to accommodate a marginal job function.

While the employer is not required to lower quality or production standards to make an accommodation, the ADA may require an employer to provide a reasonable accommodation to assist an employee in meeting a specific production standard. In that regard, you should advise the employer to give all employees clear guidance regarding the quality and quantity of work they must produce.

Job restructuring may also involve considering telework as a reasonable accommodation. For more information on telework as a reasonable accommodation, see the section below entitled "Is Telecommuting a Reasonable Accommodation?"

Modifying Work Schedules

Absent undue hardship, employers must adjust work hours and break periods, and alter when employees must perform certain functions as part of a response to a reasonable accommodation request. Employers must also consider offering part-time schedules even where they do not provide such schedules for other employees or have a policy against it. Employers should thoroughly assess the impact on their operations before determining whether these adjustments would cause undue hardship. If an undue hardship exists, employers must consider reassignment to a position in which the employee would be able to work the hours needed.³²

³². See [EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act \(2002\)](#).

The following are examples of accommodations involving modifications to work schedules:

- **Employers may be required to make reasonable shift changes to accommodate a disabled employee's disability-related difficulties in getting to work.** A federal appellate court held that a shift change is a type of reasonable accommodation as it is a change to a workplace condition that is entirely within an employer's control and would allow the employee to get to work and perform the job.³³
- **Employers may be required to accommodate a disability-related problem outside of the workplace that influences an employee's ability to perform the essential functions of her job while at work.** Another federal appellate court held that the employer violated the ADA when it did not make shift changes for an employee with severe insomnia that rendered her unable to perform the essential functions of her job while at work when there was evidence that doing so could have alleviated her insomnia.³⁴
- **Employers may be required to modify the work schedule by violating a strict tardiness policy when punctuality is not an essential function of the position.** An employee's disability caused him to be occasionally late to work and requested to make up the lost time by working through breaks or working overtime. The employer recently implemented a strict punctuality policy and denied the accommodation claiming that punctuality was an essential function of the job. The employer's duty may hinge on whether the employee's timely presence was an essential function.³⁵

Leave as a Reasonable Accommodation

For detailed information on leave under the ADA, including a discussion of when leave can be deemed a reasonable accommodation, see the discussion in the full practice note [Americans with Disabilities Act: Guidance for Employers](#).

Reassignment to a Vacant Position

Employers have an affirmative obligation to consider reassignment as an option where no other accommodations are available that would allow the individual to perform the essential functions of the job, or if the accommodation would cause an undue hardship on the employer. An employer cannot simply refer the employee to the company website for jobs. Requiring an employee to compete for a vacant position is not an accommodation, because all persons are

free to apply for and compete for positions. In such cases, employers must place the employee in a vacant position for which the employee qualifies without requiring competition with other applicants.³⁶ The reassignment should be to an equivalent position as to pay, status, and other terms of employment.³⁷ Reassignment to a position with reduced pay, benefits, seniority, or other terms of employment, where a comparable position is available, does not constitute reasonable accommodation.³⁸ The employer may consider positions that would constitute a demotion if equivalent positions are not available.³⁹

An employer is not required to create a vacant position for the purpose of reassignment or reassign the employee to a position that would constitute a promotion.⁴⁰ The ADA also does not require reassignment where it would contravene the employer's fundamental policies underlying legitimate business interests or bump another employee who occupies the position.⁴¹ The employee bears the burden of showing that a vacant position existed to which he or she was qualified and could have been reassigned.⁴²

Appropriate Adjustment or Modifications of Examinations, Training Materials, or Policies

Employers that implement and administer tests must do so in the most effective manner to ensure that the test accurately reflects the skills, aptitude, competency, or other factors the test purports to measure, rather than reflecting the sensory, manual, or speaking-related disability of that individual. This does not apply to examinations that purport to measure sensory, manual, or speaking skills.⁴³

While a temporary job coach to assist in job training to a qualified individual may be a reasonable accommodation, an employer is not required to provide a permanent job coach to assist in the performance of the essential functions.⁴⁴

Employers must also provide accommodations so that employees may attend and participate in training programs. Accommodations may include providing written materials in alternative formats, such as braille, large print, or on audio, and providing interpreters. This applies whether it is an in-house training, provided by outside entities, or off the employer's premises, and even where the training is optional.⁴⁵

Employers may also be required to modify policies as an accommodation. For example, an employer may have to modify a dress code for employees with disabilities that make it difficult for the employee to fully comply with the dress code.⁴⁶ Similarly, employers may also be required to modify work schedules in violation of a strict punctuality policy to accommodate the employee's disability.⁴⁷

³³. *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 506–07 (3d Cir. 2010). ³⁴. *Gile v. United Airlines, Inc.*, 213 F.3d 365, 374 (7th Cir. 2000). ³⁵. See *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1366 (11th Cir. 2000), (court found that the employee's timely presence was an essential function and a request to arrive at work at any time, without reprimand, essentially required the employer to change the essential functions of the job, and thus was not reasonable). ³⁶. See, e.g., *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012); *Duvall v. Georgia-Pacific Consumer Prods., LP*, 607 F.3d 1255 (10th Cir. 2010); *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007). ³⁷. 29 C.F.R. pt. 1630 app. (interpretation of 29 C.F.R. § 1630.2(o)). ³⁸. *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 99 (2d Cir. 1999) (citing *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1177 (10th Cir. 1999)). ³⁹. *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998). ⁴⁰. *Duvall*, 607 F.3d at 1261. ⁴¹. *Id.* ⁴². See, e.g., *Lang v. Wal-Mart Stores East, L.P.*, 813 F.3d 447, 456 (1st Cir. 2016) (granting summary judgment to the employer where the employee failed to provide more than her testimony that a similar job was available for reassignment at the time of her accommodation request); *Francis v. Wyckoff Heights Med. Ctr.*, 2016 U.S. Dist. LEXIS 42849, at *51 (E.D.N.Y. Mar. 30, 2016); *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92 (2d Cir. 2009). ⁴³. 29 C.F.R. § 1630.11. ⁴⁴. *EEOC v. Hertz Corp.*, 1998 U.S. Dist. LEXIS 58, at *15 (E.D. Mich. Jan. 6, 1998). ⁴⁵. See *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002). ⁴⁶. See *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities (Dress Codes)*. ⁴⁷. *Holly v. Clairson Indus., LLC*, 492 F.3d 1247, 1263 (11th Cir. 2007).

Examples of Unreasonable Accommodations

The following are examples where courts have found requested accommodations to be unreasonable:

- **Request to change a supervisor is presumed to be unreasonable.**

There is a presumption that it is unreasonable to request a change in supervisor, although this must be evaluated on a case-by-case basis. The burden of overcoming this presumption lies with the employee. The employee bears the burden of identifying a reasonable accommodation, in which the cost does not clearly exceed the benefits.⁴⁸

- **Request to have no contact with coworkers or supervisor is unreasonable.** A federal appellate court found that an employee's request to work from home for two months with no direct contact with supervisors and no contact with coworkers was unreasonable.⁴⁹ Another federal appellate court found that employee's request for transfer away from coworkers causing prolonged and inordinate stress was unreasonable.⁵⁰

- **Eliminating an essential function of the job is not reasonable.** For example, a permanent lifting restriction that would require other employees to assist the employee with her lifting duties was not reasonable since it would require other employees to perform the employee's essential functions in addition to their own.⁵¹

- **Request to accommodate a nonessential function is unreasonable.** Although it is admirable that an employee may want to perform a function that is not required for her position, a federal appellate court held that the ADA does not require an employer to accommodate the employee to allow her to perform any nonessential function that she chooses.⁵²

- **Request for fragrance-free work environment is unreasonable.** An employee's request to implement a broad fragrance-free workplace policy was found to be objectively unreasonable.⁵³ In another case, the court held that an employee's extreme sensitivity to perfume and other fragrances, although it may temporarily restrict her ability to breathe and see, did not constitute a disability under the ADA.⁵⁴

- **Request for an accommodation that would violate a collectively bargained seniority system is unreasonable and not required.** A federal appellate court upheld the employer's denial of an employee's request to be relieved from mandatory overtime as it would have infringed on the seniority rights of other employees and exposed the employer to grievances and potential liability under the collective bargaining agreement.⁵⁵

Is Telecommuting a Reasonable Accommodation?

An employer may be required to consider telecommuting—also known as telework, teleworking, or remote work—as a reasonable accommodation where the employee's disability prevents the employee from successfully performing the job at the workplace and the functions can be performed at home without undue hardship. While many jobs will continue to require physical presence, with technological advances, physical presence in the workplace may become less necessary. The employee may consider variations of telecommuting only to the extent that the disability necessitates it. The employer may consider factors such as the employer's ability to supervise the employee or whether the employee can perform the duties off-site or if he or she requires equipment or tools that cannot be provided or accessed at the employee's home.⁵⁶ As courts consider different factors in determining the feasibility of telecommuting as an accommodation, decisions have varied.

Cases Holding That Telecommuting May Be a Reasonable Accommodation

In some cases, courts have found that telecommuting may be a reasonable accommodation:

- **Working at home can be a reasonable accommodation if the employee can perform the essential functions at home without posing an undue hardship.**⁵⁷ The court denied summary judgment where a transcriptionist with attendance issues, caused by her obsessive compulsive disorder, requested telecommuting as a reasonable accommodation to be more productive.⁵⁸ Although the employer allowed some transcriptionists to work from home, it denied her request because of her disciplinary record due to her disability-induced tardiness and absenteeism and because when the employee was at work, she met her productivity requirements.⁵⁹ The court relied on the EEOC's guidance and found that a reasonable jury could conclude that the employee could perform the essential functions of the job in this case.⁶⁰

- **Summary judgment denied where an employee asserted that she could fulfill all essential functions and had successfully done so while telecommuting.**⁶¹ The employee was a program assistant who performed most of her work on the computer and telephone; her job generally did not require her to meet with her coworkers, except when she was training incoming employees.⁶² The court found that there was a genuine issue of material fact regarding the essential functions of the employee's job and whether she could perform them from home.⁶³

48. *Kennedy v. Dresser Rand Co.*, 193 F.3d 120, 122 (2d Cir. 1999) (citation omitted). 49. *Theilig v. United Tech Corp.*, 415 Fed. Appx. 331, 333 (2d Cir. 2011). 50. *Gaul v. Lucent Techs.*, 134 F.3d 576, 579 (3d Cir. 1998). 51. See *Griffin v. Prince William Health Sys.*, 2011 U.S. Dist. LEXIS 45427, at *12–13, 24 (E.D. Va. Apr. 26, 2011) (an employer is not required to provide a permanent light duty if it eliminates an essential function of the job). 52. *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 577 (7th Cir. 2001). 53. *Core v. Champaign Cty. Bd. of Cty. Comm'rs*, 2012 U.S. Dist. LEXIS 149120, at *18 (S.D. Ohio Oct. 17, 2012) (granting summary judgment for an employer that offered to accommodate an employee by banning certain types of fragrances that adversely affected the employee since it is a reasonable accommodation in light of the employee's known limitations). 54. See *Robinson v. Morgan Stanley Dean Witter*, 2007 U.S. Dist. LEXIS 64624, at *13–14 (N.D. Ill. Aug. 31, 2007). 55. *Kralik v. Durbin*, 130 F.3d 76, 83 (3d Cir. 1997). See also *Eckles v. CONRAIL*, 94 F.3d 1041 (7th Cir. 1996) (the ADA does not require accommodations that would sacrifice the collectively bargained, bona fide seniority rights of other employees). 56. See EEOC Fact Sheet: Work at Home/Telecommuting as a Reasonable Accommodation. 57. *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1132 (9th Cir. 2001). 58. *Id.* at 1132–33. 59. *Id.* at 1132. 60. *Id.* 61. *Pinegar v. Shinseki*, 665 F. Supp. 2d 487, 502 (M.D. Pa. 2009). 62. *Id.* at 490–91. 63. *Id.* at 502–03.

Employers do not have to make a reasonable accommodation for the employee if the reasonable accommodation would cause an undue hardship on the operations of the employer's business.

Cases Holding That Telecommuting Was Not a Reasonable Accommodation Request

The following are examples where courts have found requests to telecommuting to be unreasonable:

- **Telecommuting is not a reasonable accommodation where regular, in-person attendance is an essential job function.**⁶⁴ The court found that an employee's request to telecommute up to four days a week was unreasonable where the employee's resale buyer job required teamwork, meetings, and on-site availability to participate in face-to-face interactions.⁶⁵
- **Software engineer's request for telecommuting was unreasonable because her duties of monitoring contractors and answering questions required her presence in the workplace.**⁶⁶ The court also considered that the employee performed her essential functions exceedingly well without accommodations.⁶⁷
- **IT specialist's request to work from home was unreasonable where the employee could not establish that he would perform all the essential duties from his home.**⁶⁸ The employee further acknowledged that even if the court granted the accommodation, there may be days that he would not be able to perform his duties from home due to his condition, thereby suggesting that he was not otherwise qualified to perform the essential functions of the job.⁶⁹

Undue Hardship

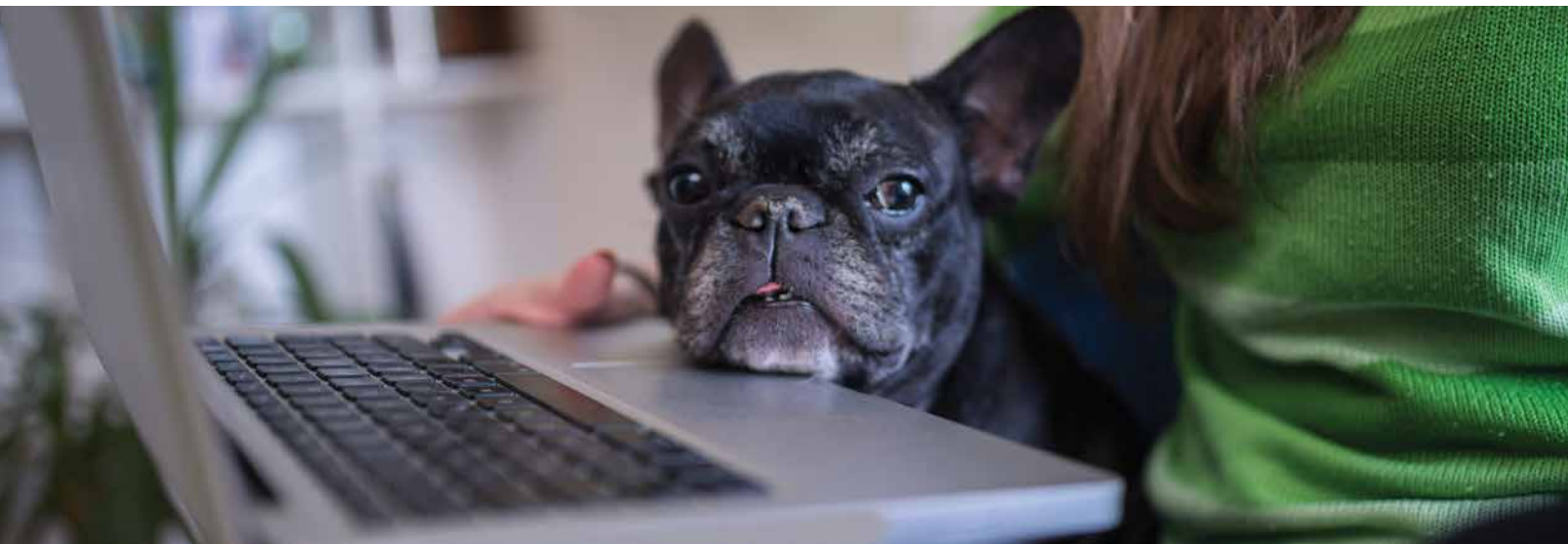
Employers do not have to make a reasonable accommodation for the employee if the reasonable accommodation would cause an undue hardship on the operations of the employer's business.⁷⁰

Undue hardship means an action requiring significant difficulty or expense when considered in light of factors such as:

- The nature and cost of the accommodation
- The facility's financial resources
- The entire company's financial resources
- The structure and main functions of the company –and–
- The impact of the accommodation upon the facility's operations and ability to conduct business⁷¹


No hard and fast rules govern when an accommodation creates an undue hardship; instead, employers must handle each request on a case-by-case basis. What does and does not create an undue hardship constitutes a question of fact. When weighed against these factors, a large company may find it more difficult to argue that the cost of accommodation imposes an undue financial burden or show undue hardship in reallocating nominal tasks of the disabled employees to other employees.

⁶⁴. *EEOC v. Ford Motor Co.*, 782 F.3d 753, 763 (6th Cir. 2015). ⁶⁵. *Id.* ⁶⁶. *Rauen v. United States Tobacco Mfg.*, 319 F.3d 891, 897 (7th Cir. 2003). ⁶⁷. *Id.* ⁶⁸. *Kiburz v. England*, 2008 U.S. Dist. LEXIS 55023, at *21 (M.D. Pa. July 16, 2008). ⁶⁹. *Id.* at *23. ⁷⁰. 42 U.S.C.S. § 12112(b)(5)(A). ⁷¹. 29 C.F.R. § 1630.2(p).



Employers should be cautious when denying an accommodation based on its financial impact on the employer. An undue hardship defense must show that the accommodation imposes a significant expense when considered against the multiple factors, including not only the financial resources of the facility, but of the entire covered entity.⁷² The employer cannot rely solely on the excessive cost of the accommodation, but should be prepared to demonstrate the actual impact against the entity's budget.

Example. In *Searls v. Johns Hopkins Hospital*, a hospital retracted a job offer to a hearing-impaired nurse who requested an accommodation of a sign language interpreter.⁷³ The full-time salary was assessed to be approximately \$120,000, or 0.007% of the entity's overall operational budget. The court rejected the hospital's argument that it had no money in its budget for reasonable accommodations and would therefore need to lay off two nurses to provide the accommodation. The court also rejected the hospital's argument that the interpreter's salary was twice the salary of a nurse.⁷⁴ The court found that in light of the \$1.7 billion budget of the greater entity, the hospital was unable to demonstrate how the actual cost could impose an undue hardship on the hospital.

To read the complete practice note on guidance for employers related to the ADA in Lexis Practice Advisor, please go to [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Practice Notes](#). 

Betsy Johnson is a shareholder at the Los Angeles office of Ogletree Deakins. She provides day-to-day advice and counsel to her clients on a broad spectrum of employment and labor relations issues, including state and federal wage and hour, employee compensation, employee leaves of absence, discrimination and harassment, performance management, and discipline and termination. Ms. Johnson assists employers in developing, drafting, and implementing personnel policies and procedures and developing strategies for managing disability and employee leave of absence issues. She assists and represents employers in negotiating collective bargaining agreements and in grievance and arbitration proceedings.



RESEARCH PATH: [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Practice Notes](#)

Related Content

For drafting tips and guidance to assist counsel in developing a document that an employee will use to request a proposed reasonable accommodation, see

> [DISABILITY ACCOMMODATION REQUEST \(ADA\)](#)



RESEARCH PATH: [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Forms](#)

For a form to document the determination of an employee's request for a reasonable accommodation, see

> [DISABILITY ACCOMMODATION REQUEST RESOLUTION \(ADA\)](#)



RESEARCH PATH: [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Forms](#)

For state-specific disability accommodation policies, see

> [THE ATTENDANCE POLICY AND DISABILITY ACCOMMODATION COLUMN OF ATTENDANCE, LEAVES, AND DISABILITIES STATE EXPERT FORMS CHART](#)



RESEARCH PATH: [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Forms](#)

For assistance in creating a telecommuting policy, see

> [TELECOMMUTING EMPLOYEES: BEST PRACTICES CHECKLIST](#)



RESEARCH PATH: [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Checklists](#)

For practical guidance on drafting a telecommuting policy, see

> [TELECOMMUTING POLICIES: KEY DRAFTING TIPS](#)



RESEARCH PATH: [Labor & Employment > Employment Policies > Terms of Employment > Practice Notes](#)

For an annotated telecommuting policy, see

> [TELECOMMUTING POLICY](#)



RESEARCH PATH: [Labor & Employment > Employment Policies > Terms of Employment > Forms](#)

⁷² 42 U.S.C.S. § 12111(10). ⁷³ 158 F. Supp. 3d 427, 433 (D. Md. 2016). ⁷⁴ *Id.* at 439 (citing 29 C.F.R. pt. 1630 app. (interpretation of 29 C.F.R. § 1630.15(d)), which states that simply comparing the cost of accommodation against the individual's salary will not suffice).



Joseph D. Guarino DLA PIPER

■ Disability Accommodation Request Form (ADA)

This form is a Disability Accommodation Request (ADA) that an employee can use to request a reasonable accommodation. It contains practical guidance and drafting notes.

This form is intended for private employers. It is based on federal law and does not address all potential state law distinctions; thus, you should check any relevant state and local laws.

Employee Information:

Name/Title/Department/Contact Information

Accommodation Request:

What is the nature of the disability for which you have requested a reasonable accommodation? Please identify any limitations caused by this disability.

Please list the job functions you are having trouble performing or will have trouble performing due to a disability.




Please describe the type of reasonable accommodation you require that would allow you to perform the essential functions of your job. If possible, please identify a specific accommodation. If you are aware of a specific piece of equipment that you require, please identify it.

Related Content


For a detailed discussion of the Americans with Disabilities Act (ADA) and disability management, see

> [AMERICANS WITH DISABILITIES ACT: GUIDANCE FOR EMPLOYERS](#)

 **RESEARCH PATH:** [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Practice Notes](#)


For best practices for drafting disability and reasonable accommodation policies, see

> [DISABILITY AND REASONABLE ACCOMMODATION POLICIES: KEY DRAFTING TIPS](#)

 **RESEARCH PATH:** [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Practice Notes](#)


For a form to document the determination of an employee's request for a reasonable accommodation under the ADA, see

> [DISABILITY ACCOMMODATION REQUEST RESOLUTION \(ADA\)](#)

 **RESEARCH PATH:** [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Forms](#)


For state-specific disability accommodation policies, see the Attendance Policy and Disability Accommodation column of

> [ATTENDANCE, LEAVES, AND DISABILITIES STATE EXPERT FORMS CHART](#)

 **RESEARCH PATH:** [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Forms](#)

For information on state laws concerning disability accommodation, see the relevant state law practice notes in

> [DISCRIMINATION, HARASSMENT, AND RETALIATION STATE PRACTICE NOTES CHART](#)

 **RESEARCH PATH:** [Labor & Employment > State Law Surveys and Content Guides > State Law Content Guides > Forms](#)

For what time period will the reasonable accommodation be needed? Do you anticipate that your need for the accommodation will be recurring? Please state whether this request is time sensitive.

[employee signature]

[date]

[request received by]

[date]

All medical information obtained by the Company with respect to an employee's request for an accommodation will be kept confidential by the Company and placed in separate files.

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits covered employers from requesting or requiring genetic information of an individual or an individual's family member, except as specifically allowed by this law. To comply with GINA, the Company asks that employees not provide any genetic information when responding to this request for medical information. Genetic information, as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

If you have any questions about this form, the information to be provided or the status of any accommodation request, please contact [identify appropriate Company official by title].

Drafting notes and alternate clauses related to this [Disability Accommodation Request \(ADA\)](#) form are available in Lexis Practice Advisor.

Form provided by [Joseph D. Guarino](#), a partner at DLA Piper. His practice emphasizes the representation of management and employers in labor and employment matters, including both preventive counseling and litigation. His clients have a national and worldwide presence and primarily conduct business in the healthcare, dietary supplement, transportation, retail, and financial services industries.



RESEARCH PATH: [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Forms](#)





Sara Kula DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP

■ Disability Accommodation

Request Resolution Form (ADA)

An employer may use this form to document the determination of an employee's request for a reasonable accommodation under the Americans with Disabilities Act (ADA). The form is intended for private employers. It is based on federal law and does not address all potential state law distinctions; thus, you should check any relevant state and local laws.

The ADA requires an employer to provide reasonable accommodations to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause an undue hardship on the operation of the employer's business. [42 U.S.C. § 12112\(b\)\(5\)](#). This form is meant to be completed and provided to the employee after the employer has engaged in an interactive process with the employee concerning the employee's accommodation request. While providing a written resolution form to an ADA accommodation request is not required, it is recommended as a best practice.

Employee (identified below) has requested an accommodation related to a disability. [Company name] (the Company) has engaged in good faith written and/or oral communications with the employee regarding the employee's accommodation needs, potential accommodations, and, where appropriate, difficulties that the proposed accommodations could pose for the Company. This document provides a record of the Company's determination concerning the employee's accommodation request. It does not, and is not intended to, document the Company's complete analysis resulting in its determination.

I. Information Regarding Request

Employee Name:

Employee Job Title:

Supervisor:

Date of Accommodation Request:



Nature of Accommodation Requested (check all applicable):

- ☐ Job restructuring
- ☐ Leave
- ☐ Modified or part-time schedule
- ☐ Modified workplace policy
- ☐ Reassignment to vacant position
- ☐ Modification to equipment or facilities
- ☐ Other

Description of Accommodation Requested

II. Documentation Relating to Request

Were Medical Records Requested to Support Accommodation Request (check one)?

- ☐ YES ☐ NO

Were Medical Records Provided to Support Accommodation Request (check one)?

- ☐ YES ☐ NO ☐ YES, BUT ADDITIONAL INFORMATION/CLARIFICATION IS REQUIRED

III. Determination

Employer's Decision (check one and complete corresponding information below):

- ☐ Accommodation request granted
- ☐ Alternative effective accommodation offered, and (check one):
 - ☐ Accepted by employee ☐ Rejected by employee
- ☐ Accommodation denied

If an accommodation was granted or an alternative effective accommodation was offered, complete the following information:

Description of Accommodation:

Accommodation Start Date:



Accommodation End Date (if applicable):

Accommodation Review Date (if applicable):

If an accommodation was denied, complete the following information:


Reason for Denial (check primary reason):

- ☐ Employee did not respond to information requested and/or additional information is necessary to evaluate the accommodation request
- ☐ The employee's medical condition does not meet the ADA's definition of disability
- ☐ The accommodation would not be effective
- ☐ The accommodation would require removal of an essential job function
- ☐ The medical documentation provided does not adequately support the request
- ☐ The accommodation would require lowering of a performance or production standard
- ☐ The accommodation would cause an undue hardship to the organization
- ☐ The accommodation would create a direct threat to the safety of employee or others
- ☐ Other

Related Content


For information on the ADA and disability management, see

> [AMERICANS WITH DISABILITIES ACT: GUIDANCE FOR EMPLOYERS](#)

 **RESEARCH PATH:** [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Practice Notes](#)

For an annotated ADA request for accommodation form, see

> [DISABILITY ACCOMMODATION REQUEST \(ADA\)](#)

 **RESEARCH PATH:** [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Forms](#)


For information on state laws concerning disability accommodation, see the relevant state law practice notes in

> [DISCRIMINATION, HARASSMENT, AND RETALIATION STATE PRACTICE NOTES CHART](#)

 **RESEARCH PATH:** [Labor & Employment > Discrimination, Harassment, and Retaliation > EEO Laws and Protections > Practice Notes](#)

For state-specific disability accommodation policies, see the Attendance Policy and Disability Accommodation column of

> [ATTENDANCE, LEAVES, AND DISABILITIES STATE EXPERT FORMS CHART](#)

 **RESEARCH PATH:** [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Forms](#)



Further Explanation of Denial:

Completed by:

[employee signature]

[date]

Statement to Employee

If any of the information in this document is incorrect, please inform [company representative name] as soon as possible.

If you wish to request reconsideration of this determination, you must submit a written request to [company representative name], [title] at [contact information of company representative] within [number] of days of receiving a denial.

[employee signature acknowledging receipt]

[date]

Drafting notes and alternate clauses related to this [Disability Accommodation Request Resolution \(ADA\)](#) form are available in Lexis Practice Advisor.

Form provided by [Sara Kula](#), a partner at DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, where she works with her clients to create and implement HR compliant policies and practices, provides guidance on difficult employee issues, and advocates for clients when disputes arise. Sara specializes in the areas of wage and hour, leave management and disability accommodations, discrimination and harassment, retaliation, employment agreements, performance management, workplace investigations, and other human resources best practices.



RESEARCH PATH: [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Forms](#)





Jonathan R. Mook DIMUROGINSBERG, P.C.
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Americans with Disabilities Act: Guidance for Commercial Real Estate Owners

One goal of the Americans with Disabilities Act of 1990 (the ADA or the Act) is to ensure that commercial facilities and public accommodations are accessible to persons with disabilities. As a result, ADA regulations have far-reaching effects on both newly constructed and existing buildings.

THIS ARTICLE EXPLAINS ADA ACCESSIBILITY REQUIREMENTS and provides guidance to commercial real estate owners and building managers (and their counsel) on how to comply with these requirements.

Overview and Scope of the ADA

In 1990, Congress enacted the ADA.¹ The Act provides comprehensive civil rights protection for individuals with disabilities.

The ADA has as much impact on the real estate industry and the architectural design of buildings as it has on the operation of any business. The Act affects the design and construction of new facilities and the maintenance, alteration, and renovation of existing facilities, essentially mandating that all such construction and alterations accommodate persons with disabilities.

Individuals Protected

The ADA protects three categories of individuals with disabilities:



- Individuals who have a physical or mental impairment that substantially limits one or more major life activities
- Individuals who have a record of a physical or mental impairment that substantially limits one or more of the individual's major life activities
- Individuals who are regarded as having an impairment that is not minor and transitory, whether they have the impairment or not, and are the subject of an adverse action because of that perceived impairment²

¹ 42 U.S.C.S. § 12181 et seq. ² 28 C.F.R. § 36.104.

The ADA provides that any person who owns, leases, or operates a place of public accommodation cannot discriminate against an individual on the basis of a disability...

The definition is minimal and, according to Congress, is to be interpreted in a broad and expansive manner.

While minor impairments, such as simple myopia, a broken leg that heals normally, or a trick knee do not constitute disabilities, more serious medical conditions generally are covered. The Department of Justice has said that the following conditions “should easily be concluded” to constitute disabilities:

- Deafness
- Blindness
- Intellectual disability
- Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair
- Autism
- Cancer
- Cerebral Palsy
- Diabetes
- Epilepsy, muscular dystrophy, and multiple sclerosis
- Human immunodeficiency virus (HIV) infection
- Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive-compulsive disorder, and schizophrenia³

Commercial Facilities and Public Accommodations Covered

Title III of the ADA applies to a variety of facilities, most particularly commercial facilities, and public accommodations.⁴

Commercial facilities are broadly defined as nonresidential facilities whose operations affect commerce. They include office buildings, factories, and warehouses.⁵

A place of public accommodation means a facility that is operated by a private entity and whose operations affect commerce and falls within one of the following categories:

- An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor
- A restaurant, bar, or other establishment serving food or drink
- A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment
- An auditorium, convention center, lecture hall, or other place of public gathering
- A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment
- A laundromat, dry cleaner, bank, barbershop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health-care provider, hospital, or other service establishment
- A terminal, depot, or other station used for specified public transportation
- A museum, library, gallery, or other place of public display or collection
- A park, zoo, amusement park, or other place of recreation
- A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education
- A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment
- A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation⁶

The list is broad and the places of public accommodation that are not covered by the Act are few.

Prohibition on Discrimination against the Disabled

The ADA provides that any person who owns, leases, or operates a place of public accommodation cannot discriminate against an individual on the basis of a disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations or is otherwise in violation of the Act.⁷ The scope of this obligation includes a duty to make reasonable modifications in policies, practices, and procedures when such modifications are necessary in order to provide facilities, accommodations, goods, or services to an individual with a disability.⁸

³ Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, [81 Fed. Reg. 53,204, 53,224 \(Aug. 11, 2016\)](#); [28 C.F.R. § 105\(d\)\(2\)\(iii\)](#).
⁴ [42 U.S.C.S. § 12189](#); [28 C.F.R. § 36.102](#). ⁵ [42 U.S.C.S. § 12187](#). ⁶ [42 U.S.C.S. § 12181\(7\)](#); [28 C.F.R. § 36.104](#). ⁷ [42 U.S.C.S. § 12182\(a\)](#). ⁸ [28 C.F.R. § 36.302\(a\)](#); [42 U.S.C.S. § 12182](#).



Who is Liable under the Act?

The ADA applies to most parties with an interest in real estate. Hence, owners, landlords, management companies, tenants, architects, contractors, and other entities that own, use, lease, manage, design, or construct facilities not only have the potential to be liable themselves but to pass on the liability to the parties with whom they contracted.⁹ The Act basically provides for joint and several liability where a property is not in compliance. Thus, both an owner and a tenant of a property can be liable for discrimination. This liability, however, can be traded off or allocated under an indemnification clause of a lease.¹⁰

For example, ABC Company leases space in a shopping center it owns to XYZ Boutique. In their lease, the parties have allocated to XYZ Boutique the responsibility for complying with the barrier removal requirements of Title III within that store. However, if XYZ Boutique fails to remove barriers, both ABC Company (the landlord) and XYZ Boutique (the tenant) are liable for violating the ADA and can be sued by an XYZ customer.

Allocation of Liability through Indemnification Clauses

Leases

Looking to the example above, in a lease, ABC Company could require XYZ Boutique to indemnify it against all losses caused by XYZ's failure to comply with its obligations under the lease. However, such matters would be between the parties and would not affect their liability under the ADA.

Contracts Related to Construction and Alteration

In an effort to limit liability, when entering any contract for construction or alteration, there should be some provision to ensure that the architect, designer, engineer, or builder has undertaken a review so as to try to ensure compliance with the ADA and its attendant regulations. A certification of that compliance may be a valuable provision of such a contract. Moreover, some type of indemnification clause where compliance is not met should exist. Additionally, the contract should cover the cost of any compliance measures necessary if a violation is found. The indemnification clause should be broad and include indemnification for damages, costs of corrective action, attorney's fees, and other defense costs. To be acceptable to most design professionals and be insurable under errors and omissions policies, such indemnification must not demand more than the standard care of professional practice.

New Construction of Public Accommodations and Commercial Facilities

Americans with Disabilities Act Accessibility Guidelines (ADAAG)

As a general rule under the ADA, discrimination includes a failure to design and construct a facility that is readily accessible to and usable by individuals with disabilities.¹¹ All new construction (and alterations) must comply with the architectural standards for accessibility known as the Americans with Disabilities Act Accessibility Guidelines (ADAAG or Guidelines). These Guidelines were issued by the Architectural and Transportation Barriers Compliance Board and were published as an appendix to the federal regulations.¹² The rules for the construction of new facilities are much stricter than those that apply to the removal of barriers in existing structures, which only require compliance where readily achievable. The rules for new construction apply to public accommodations and commercial facilities: in essence, any nonresidential facility whose operations may affect commerce (i.e., practically any type of commercial or business structure).

⁹ 42 U.S.C. § 12182(a); 28 C.F.R. § 36.201. ¹⁰ 28 C.F.R. § 36.201(b). ¹¹ 42 U.S.C. § 12183(a)(1); 28 C.F.R. § 36.401(a). ¹² 28 C.F.R. pt. 36, app. A.



Other Standards and Building Codes

Facilities covered by the ADA that are constructed or altered must also follow local and state laws, typically building codes. Building codes for most jurisdictions are based on model building codes, the most prevalent being those of the International Code Council (ICC). Jurisdictions often add or amend scoping and standards contained in the model building codes that make them more or less stringent than the ADAAG. For example, the state of Florida has substantially amended the accessibility requirements of its building code.¹³

The ICC is a nonprofit association that provides a range of building safety solutions, including the development of model building codes. The American National Standards Institute (ANSI) is a private, not-for-profit that oversees the development of standards for a variety of services and products. ICC model codes reference ANSI 117.1 as the standard for meeting accessibility. ANSI 117.1 was first comprehensively promulgated in 1961 and subsequently referenced in some state building codes in various forms between 1961 and 1990. ANSI 117.1 (2009) is the standard/guideline that most model building codes reference, and it established the basis and structure for ADAAG. ANSI has adopted a 2017 version containing some significant more stringent changes, but this version will probably not find its way into codes adopted by the states for several years. On a practical level, those seeking to be fully compliant must be cognizant of both ADAAG and other jurisdictional accessibility requirements. While the ADA relies on civil rights enforcement, local or state code compliance employs building permit plan reviews and inspections.

ADA Standards for New Construction

General Design Standards

The Guidelines contain general design standards (often referred to as technical standards) for building and site construction and improvements. These standards include:

- Parking
- Accessible routes
- Ramps
- Stairs
- Elevators
- Doors
- Entrances
- Drinking fountains
- Bathrooms
- Light and heat controls and operating mechanisms
- Storage areas
- Alarms
- Signage
- Fixed seating and tables
- Assembly areas
- Automated teller machines
- Dressing rooms

¹³. See [Fla. Stat. Ann. § 553.502](#).

The ADAAG also contains specific technical standards for restaurants, medical care facilities, mercantile facilities, libraries, and transient lodgings, such as hotels and various shelters.

The requirements of the ADAAG for new construction are very extensive. The following are examples of new construction requirements:

- At least 60% of all public entrances must be accessible.
- There must be accessible entrances to enclosed parking, pedestrian tunnels, and elevated walkways.
- An accessible route must connect accessible public transportation stops, parking spaces, passenger loading zones, and public streets or sidewalks on the property to all accessible features and spaces within a building.
- Every public and common use toilet or bathroom must be accessible. Only one stall must be accessible, unless there are six or more stalls, in which case two stalls must be accessible, one of which must be of an alternate, narrow-style design. Sinks, counters, switches, and accessories must all be accessible.
- Each floor in a building without a supervised sprinkler system must contain an “area of rescue assistance.” That is an area with direct access to an exit stairway where people unable to use stairs may await assistance during an emergency evacuation.
- Fixed seating assembly areas that accommodate 50 or more people or have audio-amplification systems must have a permanently installed assistive listening system.
- Dispersal of wheelchair seating in theaters is required where there are more than 300 seats. Fixed seating for companions must be located adjacent to each wheelchair location.
- Where automated teller machines are provided, at least one must be accessible.
- Five percent of fitting and dressing rooms (but never fewer than one) must be accessible.

Requirements for Specific Facilities

The ADAAG also contains specific technical standards for restaurants, medical care facilities, mercantile facilities, libraries, and transient lodgings, such as hotels and various shelters.

The following are examples of specific requirements required in the new construction of special types of facilities, such as restaurants, medical care facilities, mercantile establishments, libraries, and hotels:

- In restaurants, generally all dining areas and 5% of fixed tables, but not fewer than one, must be accessible.
- In medical care facilities, all public and common use areas must be accessible. In general-purpose hospitals and in psychiatric and detoxification facilities, 10% of patient bedrooms and toilets must be accessible. The required percentage is 100% for special facilities treating conditions that affect mobility and 50% for long-term care facilities and nursing homes.
- In retail establishments, at least one of each type of counter containing a cash register and at least one of each design of checkout aisle must be accessible. In some cases, additional checkout aisles are required to be accessible (i.e., from 20% to 40%) depending on the number of checkout aisles and the size of the facility.
- In libraries, all public areas must be accessible. In addition, 5% of fixed tables or study carrels (or at least one) must be accessible. At least one lane at the checkout area and aisles between magazine displays and stacks must be accessible.
- In hotels, 4% of the first 100 rooms and approximately 2% of rooms in excess of 100 must be accessible to persons with hearing impairments (i.e., contain visual alarms, visual notification devices, volume-control telephones, and an accessible electrical outlet for a TDD) and to persons with mobility impairments. Moreover, an identical percentage of additional rooms must be equipped with flashing lights or other visual alarms for people with hearing impairments.

Technical and scoping requirements for alterations are sometimes less stringent than those for new construction. For example, when compliance with the new construction requirements would be technically unfeasible, one accessible unisex bathroom per floor is acceptable.

Elevator Exemption

In the new construction of small structures of limited use, there is an exemption for the requirement of an elevator. Where a facility is less than three stories and has less than 3,000 square feet per story, an elevator need not be included unless the building is a shopping center, a shopping mall, a professional office of a health-care provider, or the U.S. attorney general determines that a particular category of facilities requires the installation of elevators based on the usage of those facilities.¹⁴

Therefore, some small office buildings and other facilities may be exempted from the elevator requirement as it applies under the ADA. However, there may be other state and local regulations that may not permit the same exemption for elevators.

Exemption for Structurally Impractical Construction

As stated above, as a general rule under the ADA, discrimination includes a failure to design and construct a facility that is readily accessible to, and usable by, individuals with disabilities.¹⁵ This standard is applicable unless it can be demonstrated that it is structurally impractical for the facility to meet the requirements of the Act.¹⁶ Compliance is considered structurally impractical only in rare circumstances when unique characteristics of the terrain prevent the incorporation of accessibility features.¹⁷ Moreover, if providing accessibilities to individuals with some types of disabilities is structurally impractical, accessibility to other types of disabilities is still required.¹⁸

Improvements and Alterations to Public Accommodations and Commercial Facilities

When alterations are made to existing buildings, the Act requires an analysis of the building's accessibility to the disabled so as to encourage implementation of the Act's accessibility requirements. An alteration is a change that affects the usability of a facility. For example, if during remodeling, renovation, or restoration, a doorway is being relocated, the new doorway must be wide enough to meet the requirements of the ADAAG. Alterations that affect the usability of a facility include remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes, or rearrangement in structural parts or elements and changes or rearrangements in the planned configuration of walls and height partitions.¹⁹ Local and state building codes may also mandate changes to improve accessibility beyond the area being altered. Normal maintenance, reroofing, painting, and wallpapering, asbestos removal, or changes to heating, ventilation, and air conditioning systems, or electrical systems

are not alterations for purposes of the Act unless they affect the usability of the facility.²⁰

Examples

For example, flooring in a store is being replaced. This is an alteration because it can affect whether or not an individual in a wheelchair can travel in the store. The new floor must comply with ADAAG requirements for a nonslip surface or with the ADAAG carpeting requirements.

As another example, an electrical outlet is being relocated. The location of the new outlet can affect usability by an individual who uses a wheelchair because, if the outlet is placed too low, the individual will be unable to reach it. This is an alteration that must be done in accordance with ADAAG reach requirements.

Alteration Requirements

There are two general rules with regard to the alteration provisions of the Act. The first rule requires altered portions of a facility to be made accessible to, and usable by, disabled individuals. The second rule requires that any alteration that affects the usability of or access to an area of the facility that contains a primary function be constructed so that the path of travel to the altered area be accessible to, and usable by, disabled individuals.²¹

Accessible and Usable

If a facility is altered in a manner that could affect its usability, the alterations will be treated as discriminatory if they do not, to the maximum extent feasible, make the altered portions of the facility readily accessible to and usable by disabled individuals.²²

The architectural standards (i.e., ADAAG) for accessibility are the same as those covering new construction. Thus, all alterations must comply with the architectural standards contained in the ADAAG. The ADAAG specifies how many, and under which particular circumstances, accessibility features must be incorporated into existing facilities and buildings that are to undergo alterations.²³ They are similar in nature to the requirements of new construction.

Primary Function and Path of Travel


The second rule relating to alterations provides that any alteration affecting the area of the "primary function" of a facility must also affect the "path of travel" to that altered area (and to bathrooms, telephones, drinking fountains, and other features that serve the altered area) so as to make it accessible to, and usable by, individuals with disabilities. This must be

¹⁴ 42 U.S.C.S. § 12183(b); 28 C.F.R. § 36.401(d). ¹⁵ 42 U.S.C.S. § 12183(a)(1); 28 C.F.R. § 36.401(a). ¹⁶ 42 U.S.C.S. § 12183(a)(1); 28 C.F.R. § 36.401(c). ¹⁷ 28 C.F.R. § 36.401(c)(1). ¹⁸ 28 C.F.R. § 36.401(c)(3). ¹⁹ 28 C.F.R. § 36.402(a). ²⁰ 28 C.F.R. § 36.402(b)(1).

Related Content


For sample clauses that are drafted from the landlord's perspective and can be used in a commercial lease to indemnify the landlord for liabilities caused by the tenant's negligence, see

> [TENANT INDEMNIFICATION CLAUSES \(COMMERCIAL LEASE\) \(PRO-LANDLORD\)](#)

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For drafting tips in preparing a commercial lease that indemnifies the landlord for claims arising from occurrences on the leased property, see

> [INDEMNIFICATION OF LANDLORD CLAUSES \(COMMERCIAL LEASE\)](#)

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For a checklist that provides guidance for assessing whether an existing public accommodation or commercial facility complies with the 2010 ADA Standards for Accessible Design, see

> [ADA ACCESSIBILITY CHECKLIST \(EXISTING FACILITIES\)](#)

 **RESEARCH PATH:** [Real Estate > Commercial Purchase and Sales > Miscellaneous Ownership Issues > Checklists](#)

achieved to the maximum extent feasible, as long as the scope and cost of these alterations prompted by the Act are not disproportionate to the overall cost of the alterations.²⁴ When analyzing what alterations are necessary to the path of travel within an altered area, the primary function of the facility must be identified and analyzed.

Primary Function

Primary function is defined in the regulations as a “major activity for which the facility is intended.”²⁵ This, presumably, will include areas such as the customer services lobby of a bank, the dining area of a cafeteria, meeting rooms of a conference center, and offices and other work areas in business facilities where the purpose of the facility is carried out. The primary function concept does not include alterations to such attendant locations as mechanical rooms, boiler rooms, supply rooms, employee lounges or locker rooms, supply closets, entrances, corridors and restrooms, entry vestibules, etc.



An alteration to an area of primary function might include:

- Remodeling of a merchandise area, display area, or employee work area in a department store
- Replacing the floor in a client service or employee work area of a service facility
- Realignment of a loading area in a factory
- Installing a computer center in a law firm

Possible repairs to a primary function area which may not affect the usability of the area might include alterations to windows, hardware controls, electrical outlets, signs, and similar features.

21. 42 U.S.C.S. § 12183(a)(2). 22. 42 U.S.C.S. § 12183(a)(2). 23. See 28 C.F.R. pt. 36, app. A. 24. 42 U.S.C.S. § 12183(a)(2); 28 C.F.R. § 36.403. 25. 28 C.F.R. § 36.403(b).

Path of Travel

The concept of “path of travel” means a continuous, unobstructed pedestrian passage by which the altered area can be entered or exited, and which connects the altered area with an exterior approach to the facility (e.g., sidewalk, parking lot); an entrance to the facility; or other parts of the facility.²⁶ Thus, path of travel may consist of:

- Walks
- Sidewalks
- Curb ramps and other interior or exterior pedestrian ramps
- Clear floor paths through lobbies, corridors, rooms, parking access aisles, or elevators
- A combination of these improved areas

Importantly, alterations to the path of travel must be provided unless otherwise disproportionate to the overall alterations.²⁷ The alterations to provide an accessible path of travel are considered disproportionate if those renovation costs exceed 20% of the cost of the alteration to the primary function area. This calculation is based upon the entire renovation cost.²⁸

This requirement cannot be evaded by undertaking a series of small alterations if they could have been performed in a single undertaking. The regulations require the cost analysis to consider all alterations within a three-year period to be aggregated to determine whether or not the alterations are disproportionate.

Costs of expenditures to create an accessible path of travel include:

- Costs associated with providing an accessible entrance and an accessible route to the altered area (e.g., the cost of widening doorways or installing ramps)
- Costs associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls
- Costs associated with relocating an inaccessible drinking fountain²⁹

As with other exceptions and exemptions of the Act, the exception for disproportionate alteration costs has limited applicability. Even if the costs of the alterations along the path

²⁶. 28 C.F.R. § 36.403(e). ²⁷. 42 U.S.C.S. § 12183(a)(2); 28 C.F.R. § 36.403(f). ²⁸. 28 C.F.R. § 36.403(f). ²⁹. 28 C.F.R. § 36.403(f)(2).



of travel are disproportionate, the owner or operator of the facility must still make alterations to the path of travel to the extent they are not disproportionate.

When determining which alterations should be made along the path of travel, the regulations offer the following priorities to be followed:

1. An accessible entrance
2. An accessible route to the altered area
3. At least one accessible restroom for each sex or a single unisex restroom
4. Accessible drinking fountains
5. When possible, additional accessible elements such as parking, storage, and alarms³⁰

A further limitation on the path of travel requirement applies to multi-tenant properties. If a tenant makes alterations in an area that only the tenant occupies, the path of travel obligation will not be triggered against the landlord as to facilities exclusively under the landlord's control, as long as those areas are not otherwise being altered.³¹ This provision saves the landlord from prospective remodeling each time a tenant might want to make improvements under a lease.

Historic Buildings

Facilities eligible for listing in the National Register of Historic Places must comply with the alteration requirements of the ADA to the maximum extent feasible. To the extent compliance in the normally prescribed manner is not technically feasible, alternative methods of access must be provided to individuals with disabilities.³² "Technically infeasible" means "an alteration of a building or facility that has little likelihood of being accomplished because of the existing structural frame or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features that are in full and strict compliance with minimum requirements for new construction and that are necessary to provide accessibility."³³

Removal of Existing Architectural Barriers

Readily Achievable Barrier Removal

Under the Act, discrimination includes a failure to remove from existing facilities architectural barriers and communication barriers that are structural in nature.³⁴ Not all barriers need to be removed however. Removal is required only where removal is readily achievable. This term is defined as that which is "easily accomplishable and able to be carried out without much difficulty or expense."



Readily Achievable Standard

Whether any of these measures is readily achievable is to be determined on a case-by-case basis in light of the particular circumstances presented.³⁵ For instance, costs that are insignificant to one business may present a tremendous hardship to another. Factors in making such a determination include:

- The nature and cost of the action needed
- The nature of the site or sites involved, including:
 - The overall financial resources of the site
 - The number of employees
 - The effect of the action on expenses and resources
 - Legitimate safety requirements
 - The impact of the action on operations
- The relationship between the site and any parent corporation or entity, including:
 - The geographic separateness of the site and any parent corporation
 - The administrative relationship between the site and any parent corporation
 - The fiscal relationship of the site and any parent corporation
 - If applicable, the nature of the parent corporation, including:
 - The overall financial resources
 - The number of employees
 - The existence of other facilities of the parent corporation or entity
 - The type of operation(s) of any parent corporation or entity

30. 28 C.F.R. § 36.403(g)(2). 31. 28 C.F.R. § 36.403(d). 32. 28 C.F.R. § 36.405. 33. *Id.* 34. 42 U.S.C.S. § 12182(b)(2)(A)(iv); 28 C.F.R. § 36.304(a). 35. 28 C.F.R. § 36.104.

The measures taken to comply with the barrier removal requirements must conform with the specific architectural standards for alterations and new construction as described in the ADAAG.

Types of Barrier Removal

Examples of architectural and communicative barriers that may need to be removed or alterations that may need to be made as being readily achievable include:

- Installing ramps
- Making curb cuts in sidewalks and entrances
- Repositioning shelves
- Rearranging tables, chairs, vending machines, display racks, and other furniture
- Adding raised markings on elevator control buttons
- Installing flashing alarm lights
- Widening doors
- Installing offset hinges to widen doorways
- Eliminating a turnstile or providing an alternative accessible path
- Installing accessible door hardware
- Installing grab bars in toilet stalls
- Rearranging toilet partitions to increase maneuvering space
- Insulating lavatory pipes under sinks to prevent burns
- Installing a raised toilet seat
- Installing a full-length bathroom mirror
- Repositioning the paper towel dispenser in a bathroom
- Creating designated accessible parking spaces
- Installing an accessible paper cup dispenser at an existing inaccessible water fountain
- Removing high pile, low-density carpeting³⁶

Priority in Barrier Removal

The measures taken to comply with the barrier removal requirements must conform with the specific architectural standards for alterations and new construction as described in the ADAAG.

The regulations suggest that architectural and communication barriers be removed to provide access to individuals with disabilities, in the following order of priority:

1. Take measures to provide access to the facility from public sidewalks, parking, or public transportation. These measures may include, for example, installing an entrance ramp, widening entrances, and providing accessible parking places.
2. Provide access to those areas in the facility where goods and services are made available to the public. This should include, for example, adjusting the layout of display racks, rearranging tables, providing Brailled and raised character signage, widening doors, providing visual alarms, and installing ramps.
3. Take measures to provide access to restroom facilities, including, for example, removal of obstructing furniture or vending machines, widening of doors, installation of ramps, providing accessible signage, widening of toilet stalls, and installation of grab bars.
4. Take any other measures necessary to provide access to the goods, services, advantages, or accommodation.³⁷

Where Barrier Removal Not Readily Achievable

Where alterations are not readily achievable, an obligation remains upon a place of public accommodation to make “. . . its goods, services, facilities, privileges, advantages or accommodations . . . ” available through other readily achievable methods.³⁸ For example, the fact that a ramp with the mandated degree of slope cannot readily be installed does not excuse the obligation to install a ramp with a steeper slope if that will enhance accessibility for individuals with disabilities. Similarly, where removal of a barrier is not readily achievable, alternative methods must be implemented to make the goods or services available, such as home delivery, curbside service, or retrieving items from inaccessible shelves.

Enforcement

The Justice Department may institute action against alleged violators of the ADA in cases of general public importance or where a pattern of practice of discrimination is alleged. The attorney general may seek monetary damages (not including

36. 28 C.F.R. § 36.304(b). 37. 28 C.F.R. § 36.304(c). 38. 28 C.F.R. § 36.305(a).



punitive damages) and civil penalties may be awarded.³⁹ Civil penalties may not exceed \$50,000 for a first violation or \$100,000 for any subsequent violation.⁴⁰ In considering the appropriateness of a civil penalty, the court will consider any good faith effort or attempt to comply with the ADA.⁴¹

In exercising its authority, the Justice Department has investigated potential violations of Title III of the ADA and, in most cases, has been able to reach settlements to ensure accessibility. For example, in 2019, the Justice Department reached settlements with three medical providers to ensure that their facilities had accessible parking spaces, accessible medical equipment, and accessible entrances.⁴²

In addition, private parties are permitted to bring actions to obtain court orders to stop discrimination.⁴³ In the case of a private party suit, the court may:

- Grant temporary, preliminary, or permanent relief
- Require that an auxiliary aid, service, modification, policy, practice, procedure, or alternative method be provided
- Require the facilities to be made readily accessible to and usable by individuals with disabilities⁴⁴

Importantly, no monetary damages are available in suits brought by private parties. A reasonable attorney's fee, however, may be awarded.⁴⁵

Since the provisions of Title III of the ADA took effect in 1992, there have been thousands of lawsuits brought alleging inaccessibility of commercial facilities and public accommodations. The federal government does not keep statistics on Title III lawsuits, but according to one private source, in 2018, there were more than 10,000 ADA Title III lawsuits filed in federal court.⁴⁶ Lawsuits have been brought against retail stores, restaurants, grocery stores, and motels and hotels alleging that their facilities are inaccessible due to architectural barriers.⁴⁷


In addition to private lawsuits alleging that a particular facility covered by Title III is inaccessible, private plaintiffs also have instituted class actions against chain restaurants for having plans or designs that do not comply with the accessibility requirements of the ADA.⁴⁸ Similar suits have been brought against owners or operators of hotels, medical facilities, and movie theaters.⁴⁹ Class actions also have been instituted against owners or operators of retail store chains.⁵⁰

³⁹ 42 U.S.C.S. § 12188; 28 C.F.R. § 36.503(b). ⁴⁰ 28 C.F.R. § 36.504. ⁴¹ 42 U.S.C.S. § 12188, 28 C.F.R. § 36.504(d). ⁴² See U.S. Department of Justice, "Americans with Disabilities Act Investigations Ensure Accessibility at Three Medical Providers" (Feb. 21, 2019). See also U.S. Department of Justice, "Justice Department Reaches Agreement with Teachers Test Prep to Ensure Equal Access for Individuals with Disabilities" (June 27, 2018). ⁴³ 28 C.F.R. § 36.504(a)(1). ⁴⁴ 42 U.S.C.S. § 12188(b)(2)(A). ⁴⁵ 42 U.S.C.S. § 12205; 28 C.F.R. § 36.505. ⁴⁶ See <http://nwadacenter.org/news/ada-news-january-28-2019>. ⁴⁷ See Nat'l Alliance for Accessibility, Inc. v. Macy's Retail Holdings, Inc., 2012 U.S. Dist. LEXIS 156170 (M.D.N.C. Oct. 30, 2012); *Molski v. Arby's Huntington Beach*, 359 F. Supp. 2d 938 (C.D. Cal. 2005); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323 (11th Cir. 2013); *D'Ilil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031 (9th Cir. 2008); *Nat'l Alliance for Accessibility, Inc. v. CMG Bethesda Owner LLC*, 2012 U.S. Dist. LEXIS 173655 (D. Md. Dec. 7, 2012). ⁴⁸ See *Clark v. McDonald's Corp.*, 213 F.R.D. 198 (D.N.J. 2003); *Castaneda v. Burger King Corp.*, 264 F.R.D. 557 (N.D. Cal. 2009); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604 (N.D. Cal. 2003). ⁴⁹ See *Civil Rights Educ. & Enforcement Ctr. v. Hosp. Properties Trust*, 867 F.3d 1093 (9th Cir. 2017); *Access Now, Inc. v. AHM CGH, Inc.*, 2000 U.S. Dist. LEXIS 14788 (S.D. Fla. July 12, 2000); *Arnold v. UA Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994). ⁵⁰ See *Colo. Cross-Disability Coalition v. Abercrombie & Fitch Co.*, 765 F.3d 1205 (10th Cir. 2014); *Mielo v. Steak 'N Shake Operations, Inc.*, 897 F.3d 467 (3d Cir. 2018); *Ass'n for Disabled Americans v. 7-Eleven, Inc.*, 2002 U.S. Dist. LEXIS 6163 (N.D. Tex. Apr. 10, 2002).



Role of State Laws or Local Building Codes

The ADA regulations allow states and local governments to apply to the U.S. Assistant Attorney General for Civil Rights, or his or her designee, for certification that a building code meets or exceeds the minimum requirements of the Act pertaining to the accessibility and usability of commercial facilities and public accommodations.⁵¹ If the assistant attorney general finds the code acceptable, a certification of equivalency will be issued.⁵² The regulations define a “certification of equivalency” as final certification that a code “meets or exceeds the minimum requirements of Title III of the Act for accessibility and usability of facilities covered by that title.”⁵³ A certification will be deemed a certification of equivalency only with respect to those elements that are specifically covered by the certified code and addressed by the standards against which the equivalency is measured.⁵⁴ Only Florida and a small handful of other states are currently certified by the Department of Justice.

If an enforcement proceeding is brought against a party under Title III of the ADA, the certification will be considered rebuttable evidence that such state law or local ordinance “does meet or exceed the minimum requirements of Title III.”⁵⁵ However, certification will not be effective where a building code official permits a facility to be constructed or altered in such a way that it does not conform with the applicable provisions of the certified code. Thus, if a building code official waives an accessibility element or permits a change that does not provide for equivalent facilitation, the code’s certification will no longer be evidence that the facility has been constructed or altered in accordance with the ADA.⁵⁶ 

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RESEARCH PATH: [Real Estate > Commercial Purchase and Sales > Miscellaneous Ownership Issues](#)

51. 28 C.F.R. § 36.602. 52. 28 C.F.R. § 36.602. 53. 28 C.F.R. § 36.601. 54. 28 C.F.R. § 36.607(a)(1). 55. 28 C.F.R. § 36.602. 56. 56 Fed. Reg. 35,544, 35,555–35,556 (1991).



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Antibody Claims: Patent Eligibility and Written Description Issues

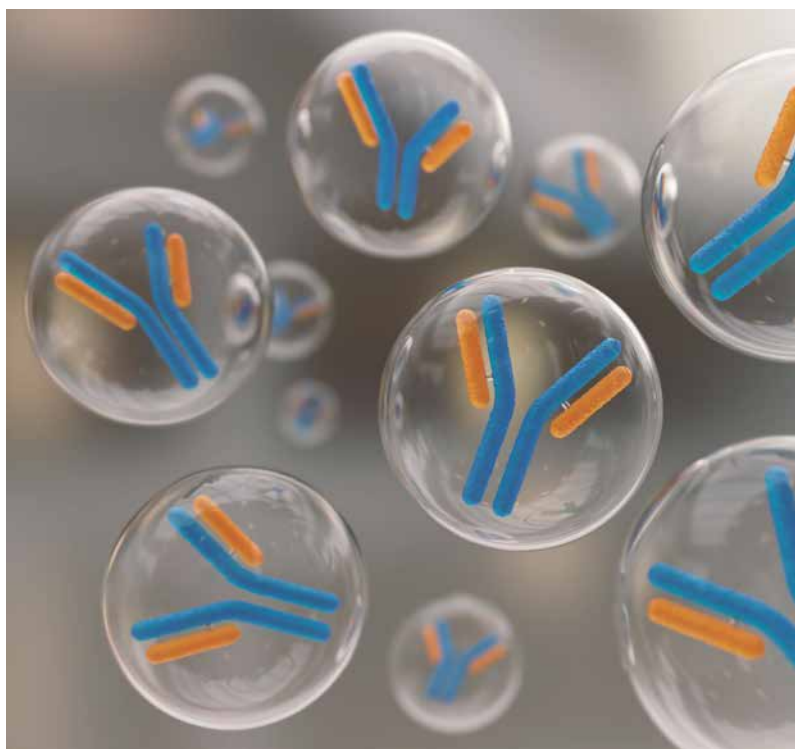
The rise of antibody-based treatments in the pharmaceuticals market has been accompanied by developments in U.S. patent law that may adversely affect the scope of intellectual property protections available for such treatments. Some of those developments concern the basic patent eligibility requirement.¹ Others concern the written description and enablement requirements.² This article summarizes both sets of developments and provides some practical advice on how antibody patentees can address them.

Overview

ANTIBODIES ARE GLYCOPROTEINS THAT ARE GENERATED by the immune systems of humans and other animals to tag and target pathogenic agents (antigens) for destruction. Although antibodies in their natural state are diverse in form and function, technological advances over the past few decades have enabled the industrial-scale production of monoclonal antibodies: antibodies that possess the same protein sequence and structure, bind to the same antigens, and thus demonstrate relatively predictable therapeutic effects when administered to patients. These breakthroughs in manufacturing consistency and scale in turn have led to a steady procession of regulatory approvals for antibody-based treatments. In 2018, six of the 10 best-selling drugs in the United States included antibodies or molecules incorporating antibody fragments as their active ingredients.³

Antibody Technology

In their natural state, antibodies are Y-shaped tetrameric molecules composed of two heavy amino acid chains and two light amino acid chains. Each heavy chain has a variable



1. 35 U.S.C.S. § 101. 2. 35 U.S.C.S. § 112. 3. See [The Top 20 Drugs by 2018 U.S. Sales, FiercePharma, June 17, 2019](#).

domain (VH), and three or four constant domains (CH1, CH2, CH3, CH4). Each light chain has a variable (VL) and constant (CL) domain. Each of the VH and VL domains include hypervariable regions, also called complementarity determining regions or CDRs, that determine the antigen to which the antibody will bind.

Each arm of the Y is composed of a light chain paired with the VH and CH1 domains of the heavy chain. The vertical segment of the Y is composed of the remaining CH domains of the two heavy chains. Each arm of the Y is referred to as a Fab region; the vertical segment of the Y is referred to as the Fc region. The Fab regions bind a specific portion (epitope) of the antigen of interest; the CDRs within the Fab regions determine to what specific epitope the antibody will bind. The Fc region does not bind to an epitope; instead, it binds to Fc receptors on cells of the immune system to effectuate an immune response. The specific nature of the immune response depends upon the class, or isotype, to which the antibody belongs. Many therapeutic monoclonal antibodies are of the IgG isotype.

Monoclonal antibodies traditionally have been manufactured by exposing an animal subject, such as a mouse, to the antigen of interest; harvesting antibody-producing plasma cells from the subjects; selecting particular antibodies generated by particular plasma cells for their desirable characteristics; then fusing the selected plasma cells with tumor cells to produce cell lines called hybridomas. Due to their tumor-like characteristics, these hybridomas multiply indefinitely and can be used to produce large quantities of the desired monoclonal antibodies.

The past three decades have seen the introduction of numerous artificial modifications to the structure and manufacture of antibodies. These modifications include:

- Producing antibodies using nonmammalian cell lines
- Replacing nonhuman antibody domains with human domains to generate humanized antibodies, which are less likely to provoke adverse reactions in human patients
- Introducing mutations to Fab amino acid sequences to improve antigen binding specificity or strength
- Introducing mutations to Fc amino acid sequences to modify the immune responses triggered by the antibodies
- Swapping or adding Fab fragments such that the resultant bispecific antibodies bind to two antigens
- Fusing antibodies or antibody fragments to non-antibody molecules to create conjugates or fusion proteins that can be used for a variety of diagnostic or therapeutic purposes



Antibody Patent Claims

The diversity and complexity of current antibody-related technologies is matched by the diversity and complexity of the patents that claim them; moreover, new antibody-related technologies continue to appear frequently. Accordingly, any summary of antibody-related patent claims risks being overly reductive and out of date. For purposes of this article, however, antibody patent claims can be classified as:

- Composition of matter claims (COM claims)
- Method of treatment claims (MOT claims)
- Diagnostic claims

COM Claims

COM claims include claims directed to:

- Antibodies and antibody fragments
- Pharmaceutical compositions for antibodies
- Conjugates and fusion proteins in which antibodies or antibody fragments are combined with other molecules

COM claims may identify the claimed antibodies using structural limitations. The following table lists different structural limitations that can be used and examples of claim language employing those limitations:

Structural Limitation	Claim Example
Referring directly to the amino acid sequences of the antibodies	An isolated monoclonal antibody comprising a VL domain having the amino acid sequence of SEQ. ID No. 1 and a VH domain having the amino acid sequence of SEQ ID. No. 2
Referring directly to DNA or RNA molecules encoding the antibodies	A nucleic acid polymer encoding a monoclonal antibody, wherein said polymer comprises SEQ. ID No. 1
Broader claim coverage not limited to a single sequence can be achieved using percent homology limitations	An isolated monoclonal antibody comprising a VL amino acid sequence which is at least 90% homologous to the amino acid sequence of SEQ ID No. 1
Identifying the claimed antibodies using functional limitations	A monoclonal antibody which binds antigen X with a Kd of < Y
Identifying the claimed antibodies by reference to the cell lines used to make them	A monoclonal antibody produced by the hybridoma deposited with the American Type Culture Collection having the ATCC Designation XXXX

It is not uncommon for COM claims to recite various combinations of these types of limitations.

MOT Claims

MOT claims recite a method of treating an illness comprising administering to a patient suffering from that illness a therapeutically effective amount of an antibody. As with COM claims, MOT claims may identify the claimed antibody using multiple types of limitations. MOT claims also may include limitations that require a particular therapeutic outcome (e.g., “a method of treating proliferative disorder A in a subject comprising administering a therapeutically effective amount of antibody B to a subject in need thereof, wherein said administration inhibits the growth of C cells in said subject”).

Diagnostic Claims

Diagnostic claims are directed to the use of antibodies to bind and detect the presence of disease-associated antigens in patients (e.g., “a method for diagnosing antigen X-related disease in a human comprising obtaining a tissue sample from said human, contacting said sample with an anti-antigen X antibody, and detecting binding between antigen X in the sample and the antibody”).

All three classes of antibody claims may face issues under [35 U.S.C.S. § 101](#) and [35 U.S.C.S. § 112](#).

Section 101 Issues for Antibody Patent Claims

Overview of Section 101

[35 U.S.C.S. § 101](#) defines what subject matter is eligible in the United States for patent protection. Section 101 in relevant part states that “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor.”

Historically, courts have interpreted Section 101 to prevent the patenting of “abstract ideas,” “laws of nature,” and “natural phenomena” (including “products of nature”)—though these judicial exceptions to patent eligibility do not expressly appear in the statute. Courts have justified these judicial exceptions in part on the ground that they existed prior to and independent of human discovery, and that to permit their monopolization through the patent system would unfairly preempt their use by the public.⁴

Section 101 Applied to Antibodies

Antibodies—absent the modifications discussed above—are the naturally occurring products of biological immune systems, and

⁴ See *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948). ⁵ See *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95 (C.C.S.D.N.Y. 1911); *United Cannabis Corp. v. Pure Hemp Collective Inc.*, 2019 U.S. Dist. LEXIS 66092 (D. Colo. Apr. 17, 2019). ⁶ *Diamond v. Chakrabarty*, 447 U.S. 303, 310 (1980).



thus at first glance, would appear to be patent-ineligible under the product-of-nature judicial exception. Courts, however, have long recognized two exceptions to that exception. First, if a natural product is isolated and purified such that it displays “markedly different characteristics” compared to its naturally occurring counterpart, it may be patent-eligible. This exception has been applied by courts to allow patents for purified naturally occurring substances ranging from adrenaline in 1911 to cannabinoids in 2019.⁵ The exception should apply to monoclonal antibodies as well—though no court has expressly applied the isolated/purified exception to an antibody COM claim.

Second, human modifications to biological material, such as genetic alterations that result in a bacterium that can consume oil spills, can be patented.⁶ Thus, antibodies that incorporate artificial modifications should also be held patent-eligible under that precedent.

The Supreme Court’s Decisions in *Mayo* and *Myriad* and Their Application

The continued vitality of these exceptions, however, has been called into question by two U.S. Supreme Court decisions

from 2012–2013. Neither of these decisions directly concerns antibodies; nevertheless, both have ramifications for life science patents.

In *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*,⁷ the Supreme Court held patent-ineligible claims to a “method of optimizing [the] therapeutic efficacy” of a drug treatment regimen, wherein the amount of the drug in a patient’s blood “indicates a need” to increase or decrease the dose subsequently administered to the patient. Although the drug in question was not a naturally occurring molecule, the Supreme Court concluded that the claims “set forth laws of nature—namely, relationships between concentrations of certain metabolites in the blood and the likelihood that a dosage of a thiopurine drug will prove ineffective or cause harm.”⁸ The Supreme Court then looked to determine whether the claims recite “significantly more” than the judicial exception, or merely recite “well-understood, routine, or conventional” matter.⁹ Because the claims in *Mayo* were “directed to” laws of nature, and the claim limitations recited nothing more than routine steps, the Supreme Court concluded that the claims were not patent-eligible.¹⁰


7. 566 U.S. 66 (2012). 8. 566 U.S. at 77. 9. 566 U.S. at 79. 10. 566 U.S. at 79–80.



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In *Ass'n for Molecular Pathology v. Myriad Genetics*,¹¹ the Supreme Court held patent-ineligible claims to “[a]n isolated DNA coding for a BRCA1 polypeptide, said polypeptide having the amino acid sequence set forth in SEQ ID NO:2.” Because the sequence recited in the claim was identical to the naturally occurring BRCA1 sequence, the Supreme Court concluded that “Myriad did not create anything. To be sure, it found an important and useful gene, but separating that gene from its surrounding genetic material is not an act of invention. Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the Section 101 inquiry.”¹²

In the wake of *Mayo* and *Myriad*, the U.S. Court of Appeals for the Federal Circuit has applied those decisions to delineate two categories of life science claims according to their patent-eligibility—including claims involving antibodies.

First, the Federal Circuit has repeatedly found claims to be patent-eligible when “directed to a specific method of treatment for specific patients using a specific compound at specific doses to achieve a specific outcome.”¹³

The Federal Circuit has distinguished these method-of-treatment claims from the patent-ineligible (and more ambiguously worded) “method of optimizing” claims at issue in *Mayo*. According to the Federal Circuit, the *Mayo* claims were patent-ineligible because they did not require the treatment of a specific disease and did not require a physician to administer

¹¹ 569 U.S. 576 (2013). ¹² 569 U.S. at 591. ¹³ See *Vanda Pharms. Inc. v. West-Ward Pharms. Int'l Ltd.*, 887 F.3d 1117, 1136 (Fed. Cir. 2018); see also *Natural Alternatives Int'l, Inc. v. Creative Compounds, LLC*, 918 F.3d 1338 (Fed. Cir. 2019); *Endo Pharms. Inc. v. Teva Pharms. USA, Inc.*, 919 F.3d 1347 (Fed. Cir. 2019).

The dividing line between a patent-eligible method-of-treatment claim and a patent-ineligible diagnostic or detection claim is not always clear.

a specific dose, but instead simply “indicate[d] a need” to adjust dosage. According to the Federal Circuit, the lack of a clear directive in the claim to administer a specific dose gave rise to undue preemption concerns: “[i]n *Mayo*, ‘a doctor . . . could violate the patent even if he did not actually alter his treatment decision in the light of the test.’”¹⁴

Second, the Federal Circuit repeatedly has found claims to be patent-ineligible when directed to the observation, detection, or diagnosis of medical phenomena using routine or conventional techniques. Such claims include claims to:

- A method of diagnosing disorders associated with the MuSK protein by detecting, in a biological sample, the presence of autoantibodies that bind a labeled MuSK epitope¹⁵
- A method of detecting paternally inherited cell-free fetal DNA in a maternal blood sample¹⁶
- A method of detecting a tuberculosis bacterium in a biological sample by amplifying and detecting DNA sequences corresponding to the bacterium’s genes¹⁷
- A method of detecting elevated levels of myeloperoxidase (MPO) in a blood sample using anti-MPO antibodies¹⁸

Although these diagnostic claims rest on novel human discoveries and require human activity, the Federal Circuit, synthesizing *Mayo* and *Myriad*, reasoned that such claims ultimately are “directed to” the observation of natural phenomena, and that the claim limitations require only routine or conventional laboratory activities (e.g., detecting antibody-epitope binding using a labeled epitope; amplifying naturally occurring DNA sequences using polymerase chain reaction (PCR)).

The dividing line between a patent-eligible method-of-treatment claim and a patent-ineligible diagnostic or detection claim is not always clear. For example, the Federal Circuit recently found patent-ineligible a method claim reciting steps that required administering a drug (inhaled nitric oxide or iNO)

to certain patients, while withholding administration to other patients determined to be at risk of adverse events. In this instance, the Federal Circuit reasoned that

[t]he invention is not focused on changing the physiological state of the patient to treat the disease. The claimed invention is focused on screening for a natural law. Information about an adverse event was observed by the inventors. The patent instructs doctors to screen for that information. Once the information is detected, no iNO treatment is given. And as far as the claim specifies, the patient’s state may remain unchanged and natural bodily processes may proceed.¹⁹

Takeaways from Section 101 Case Law

Some important lessons are suggested by these and other recent Federal Circuit decisions with respect to preserving the patent eligibility of antibody claims:

- Antibody-based MOT claims that recite the treatment of a specific disease using a specific antibody at a specific dosage to achieve a specific therapeutic outcome should be upheld as patent-eligible.
- Antibody-based diagnostic claims (i.e., claims that include preambles reciting a method of “observing,” “detecting,” or “diagnosing”) are likely to be held patent-ineligible unless the patentee can demonstrate that the claims encompass or require nonroutine or unconventional activity. In that regard, patentees should, where possible, avoid characterizing in their patent specifications any claim limitations as “routine,” “conventional,” etc.

Although patent eligibility under Section 101 previously has been characterized as an issue of law, capable of resolution without detailed examination of the factual record, the the Federal Circuit in *Berkheimer v. HP Inc.*²⁰ ruled that the subsidiary issue of whether claim limitations recite routine or conventional subject matter is a question of fact. Accordingly, patentees seeking to insulate antibody claims against potential

¹⁴. *Vanda Pharms. Inc.*, 887 F.3d at 1135. ¹⁵. *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 915 F.3d 743 (Fed. Cir. 2019). ¹⁶. *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371 (Fed. Cir. 2015). ¹⁷. *Roche Molecular Sys. v. Cepheid*, 905 F.3d 1363 (Fed. Cir. 2018). ¹⁸. *Cleveland Clinic Found. v. True Health Diagnostics LLC*, 760 Fed. Appx. 1013 (Fed. Cir. 2019). ¹⁹. *INO Therapeutics LLC v. Praxair Distrib. Inc.*, 782 Fed. Appx. 1001, 1008 (Fed. Cir. 2019) (nonprecedential). ²⁰. 881 F.3d 1360, 1365 (Fed. Cir. 2018).

Section 101 threats in litigation may wish to allege, where possible, any nonroutine or unconventional aspects of the claimed subject matter in their pleadings at the start of litigation. This is because a court generally must accept such allegations as true in situations where a defendant moves to dismiss the litigation at the pleadings stage and must view those allegations in a light most favorable to the patentee in situations where a defendant attempts to obtain summary judgment of patent-ineligibility.²¹

One important question that remains unanswered by the Federal Circuit and by lower courts is whether and to what extent the Supreme Court's *Myriad* jurisprudence may affect the patent eligibility of antibody COM claims. As a substantive matter, antibodies clearly are distinguishable from the isolated DNA sequences at issue in *Myriad*: unlike those DNA sequences, the fundamental utility of isolated monoclonal antibodies does not lie in their being a physical embodiment of the sequence information contained therein. And, as a procedural matter, antibody COM claims that recite narrow structural or functional limitations should be relatively well insulated from Section 101 threats in litigation, as any naturally occurring antibodies that meet the claimed structural or functional limitations likely would have been uncovered and addressed during patent prosecution.

The present state of affairs under *Mayo* and *Myriad* may soon change. The Federal Circuit and the U.S. biotechnology industry have expressed growing dissatisfaction with the Supreme Court's *Mayo* and *Myriad* jurisprudence. And in a July 2019 order, the en banc Federal Circuit issued 80-plus pages of colloquy criticizing those Supreme Court decisions for, among other things, harming incentives to develop new diagnostic and therapeutic technologies, establishing a de facto prohibition against diagnostic claims, and sowing uncertainty as to the patent eligibility of other types of life science claims.²² As of the time of publication, Congress is considering draft legislation that would, among other things, abrogate the "abstract ideas," "laws of nature," and "natural phenomena" judicial exceptions to Section 101.

Section 112 Issues for Antibody Patent Claims

Overview of Section 112

[35 U.S.C.S. § 112](#) sets forth a written description requirement and an enablement requirement for patent specifications. The written description requirement demands that a patent

specification provide a written description of the invention sufficient to convince a person of ordinary skill in the art (POSA) that the inventors were in possession of the claimed invention as of the patent's filing date. The enablement requirement demands that a patent specification enable a POSA to practice the claimed invention without having to engage in undue experimentation.

Section 112 Applied to Antibodies

In the past, the enablement requirement has not presented significant obstacles to the patentability of antibody claims above and beyond those faced by other types of patent claims. Indeed, two of the seminal Federal Circuit cases on enablement were antibody cases; in both, the Federal Circuit concluded that methods used to generate and screen antibodies against specific antigens were "well-known" and "routine."²³ That situation, however, may be changing. Two recent Delaware district court rulings have held that claims directed to broad genres of antibodies were non-enabled where practicing the full scope of the claims would require a POSA to engage in essentially the same amount of work as the patentees—even where the work in question was "routine."²⁴

The written description requirement has been a source of confusion as applied to antibody claims. This confusion arose in part due to a conflict between the United States Patent and Trademark Office (USPTO) and the Federal Circuit over what is known as the well-characterized antigen test.

In 2000 and 2008, the USPTO published training materials indicating that a broad functional claim reciting "an antibody capable of binding to antigen X" would satisfy the written description requirement if the patent specification adequately described the antigen in question by reference to its sequence and physical properties—even if the specification did not expressly describe the claimed antibodies—because generating antibodies to that antigen constituted "routine" technology.²⁵

The Federal Circuit, however, in a quartet of decisions, narrowed and ultimately abrogated the well-characterized antigen test:

- In *Noelle v. Lederman*,²⁶ the Federal Circuit held that the written description requirement was violated where the claims at issue covered antibodies that bound the antigen CD40CR generally, because the patent specification described only the mouse form of CD40CR and did not describe human or other CD40CR antigens.

²¹ See *Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306 (Fed. Cir. 2019); *Berkheimer*, 881 F.3d at 1365. ²² See *Athena Diagnostics, Inc. v. Mayo Collaborative Servs.*, 927 F.3d 1333 (Fed. Cir. 2019). ²³ *Hybritech v. Monoclonal Antibodies*, 802 F.2d 1367 (Fed. Cir. 1986); *In re Wands*, 858 F.2d 731 (Fed. Cir. 1988). ²⁴ *MorphoSys v. Janssen Biotech*, 358 F. Supp. 3d 354, 372 (D. Del. 2019) (granting summary judgment of non-enablement based upon a finding that "a POSA would require substantial time and effort to discover antibodies within the claims that are not conservative variants of the disclosed antibodies."); *Amgen Inc. v. Sanofi*, 2019 U.S. Dist. LEXIS 146305 at *36 (D. Del. Aug. 28, 2019) (granting motion for judgment as a matter of law of non-enablement: "despite the routine techniques employed, it appears that a person of ordinary skill in the art would still be required to do essentially the same amount of work as the inventors of the patents-in-suit, or engage in a trial-and-error process of amino acid substitution as even conservative substitutions may have unexpected results.") (internal quotations and citations omitted). ²⁵ See *USPTO Written Description Training Materials* (Rev. 1 Mar 25, 2008), pp. 45–46. ²⁶ 355 F.3d 1343 (Fed. Cir. 2004).



- In *Centocor Ortho Biotech, Inc. v. Abbott Labs.*,²⁷ the Federal Circuit held that the written description requirement was violated where the claims recited an anti-TNF- α antibody with a “human variable region,” because the patent specification did not describe those antibodies, and the production of antibodies having the claimed human variable region was not then possible using routine technology, according to the facts adduced in that case.

- In *Abbvie Deutschland GmbH & Co. v. Janssen Biotech, Inc.*,²⁸ the Federal Circuit held that the written description requirement was violated where the claims recited “neutralizing isolated human antibody, or antigen-binding portion thereof that binds to human IL-12 and disassociates from human IL-12 with a koff rate constant of 1×10^{-2} s⁻¹ or less,” because the specification described only a subset of the antibodies covered by that claim (i.e., about 300 “Joe-9” antibodies all of which shared “90% or more sequence similarity in the variable regions and over 200 of those antibodies differ from [the original improved antibody] Y61 by only one amino acid”).²⁹ The Federal Circuit in *AbbVie* further noted that “[i]t is true that functionally defined claims can meet the written description requirement if a reasonable structure-function correlation is established, whether by the inventor as described in the specification or known in the art at the time of the filing date. However, the record here does not indicate such an established correlation. Instead, *AbbVie* used a trial and error approach to modify individual amino acids in order to improve the IL-12 binding affinity.”³⁰

- In *Amgen Inc. v. Sanofi*,³¹ the Federal Circuit held that the Delaware district court erred in instructing a jury that the written description requirement could be met “by the disclosure of a newly characterized antigen . . . if you find that the level of skill and knowledge in the art of antibodies at the time of filing was such that production of antibodies against such an antigen was conventional or routine.” According to the Federal Circuit, the “well characterized antigen” test “flouts basic legal principles of the written description requirement. Section 112 requires a ‘written description of the invention.’ But this test allows patentees to claim antibodies by describing something that is not the invention (i.e., the antigen).”³²

27. 636 F.3d 1341 (Fed. Cir. 2011). 28. 759 F.3d 1285 (Fed. Cir. 2014). 29. 759 F.3d at 1291. 30. 759 F.3d at 1301. 31. 872 F.3d 1367 (Fed. Cir. 2017). 32. 872 F.3d at 1379.

...antibody patentees should continue to pursue a variety of claim types and should include as much detail and data as possible about the structure and function of the claimed antibodies in their patent specifications.

Takeaways from Section 112 Case Law

Although antibody written description and enablement case law tends to be highly fact-specific, these developments suggest some important lessons as to how to draft antibody-related patent claims and patent specifications to mitigate potential written description and enablement issues:

- As an initial matter, it is apparent that the well-characterized antigen test has been eliminated from U.S. jurisprudence: patentees no longer can broadly claim “an antibody capable of binding to antigen X” where the specification in question includes a description of antigen X, but not of the antibodies themselves.
- The demise of the well-characterized antigen test does not necessarily mean that antibody COM claims which define antibodies using only functional limitations no longer are viable. In the *Amgen* case, a jury on remand from the Federal Circuit found that a claim to an isolated monoclonal antibody “wherein the isolated monoclonal antibody binds to at least two” specific amino acid residues of the enzyme PCSK9 satisfied the written description requirement. The specification in question described 24 exemplary antibodies; X-ray crystallography data was included for two of those antibodies and epitope binning data was included for all 24 antibodies. The district court upheld the jury’s written description verdict (though, as noted above, it ultimately held that the claims in question were not enabled).³³ Accordingly, functional claiming for antibodies may satisfy the written description requirement, depending upon the scope of the functional limitation and the scope of representative species disclosed in the specification.
- When claiming a broad genus of antibodies (whether by structural or functional limitations), the accompanying patent specifications should include a description of diverse species across the scope of genus. As illustrated by the *AbbVie* decision above, a description of even 300 representative species may not be sufficient to satisfy the written description requirement if all 300 representative species are structurally and functionally similar.
- Data obtained from relatively inexpensive testing (e.g., epitope binning, alanine scanning) can be used to characterize the function of representative antibodies species, elucidate possible structure–function relationships, and thereby provide written description and enablement support for functional claim limitations.

³³ *Amgen Inc.*, 2019 U.S. Dist. LEXIS 146305 at *14, 36-37.



Summary

The current state of Section 101 and Section 112 jurisprudence presents a number of risks for antibody-related patent claims in the United States.

As to Section 101, the Federal Circuit, following the Supreme Court's *Mayo* and *Myriad* precedent, appears to have drawn a distinction between method-of-treatment claims, which it considers patent-eligible, and diagnostic claims, which it considers patent-ineligible. Whether and under what circumstances *Mayo* or *Myriad* may apply to other types of life science patent claims remains uncertain. That uncertainty is a source of continuing frustration for both the Federal Circuit and the biotechnology industry; such uncertainty might be resolved in the near future through Congressional reform of Section 101.

As to Section 112, broad antibody genus claims potentially may present enablement concerns, and the abrogation of the well-characterized antigen test by the Federal Circuit means that patentees no longer can obtain broad claims to a genus of antibodies capable of binding a certain antigen where the antibodies themselves are not adequately described in the patent specification. However, claims that define antibodies



Related Content

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For a summary of the U.S. Patent and Trademark Office (USPTO) 2019 Revised Patent Subject Matter Eligibility Guidance, see

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by functional limitations potentially may meet the written description requirement if a sufficiently diverse set of exemplary antibody species is disclosed in the specification.

In view of the above risks and uncertainties, antibody patentees should continue to pursue a variety of claim types and should include as much detail and data as possible about the structure and function of the claimed antibodies in their patent specifications. **L**

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High Yield vs. Investment Grade Covenants

There are fundamental differences between the covenants of high yield and investment grade debt securities. While investment grade covenants tend to be less restrictive and more limited, high yield covenants are often much more onerous, in large part because of the creditworthiness of the issuer. This checklist outlines key debt covenants and explains their differences.

A COVENANT IS A PROMISE TO TAKE AN ACTION (AN affirmative covenant) or to refrain from taking an action (a negative covenant). Negative covenants in bonds are typically based on incurrence tests. These covenants cannot be breached except by incurring or taking some affirmative action, such as incurring debt or a lien or making a restricted payment. On the other hand, maintenance covenants must be maintained at all times or at regular intervals, such as maintaining a certain leverage ratio. Covenants in debt securities are almost always incurrence- versus maintenance-based.

Covenants Explained

While each covenant package is distinct and should be tailored to an issuer's operations and industry, the key covenants are outlined in the adjacent chart. Most of these covenants have built-in exceptions, or baskets, capped at specific dollar amounts or percentages of certain financial figures (e.g., earnings before taxes, depreciation, and amortization (EBITDA) or total assets), also called a grower, and other exceptions, providing the issuer with the flexibility that it needs to operate its business and grow over the life of the bonds. Such exceptions are often numerous and wide-ranging and are often highly negotiated.



Covenant	Definition
Limitation on restricted payments (i.e., the RP covenant)	The RP covenant regulates the amount of cash and other assets that may flow out of the issuer and its restricted subsidiaries. It typically limits cash dividends, the redemption or repurchase of the issuer's capital stock, the redemption or repurchase of subordinated debt obligations, and restricted investments.
Limitation on indebtedness	The debt covenant regulates how much unsecured debt the issuer and its restricted subsidiaries (and in some cases, subsidiary guarantors) may incur.
Limitation on sale-and-leaseback	The sale-and-leaseback covenant limits transactions whereby an issuer sells a fixed asset to a bank or other institution and then rents it back.
Limitation on liens	The lien covenant regulates how much secured debt the issuer and its restricted subsidiaries may incur. It protects the investors' position in the capital structure by regulating the incurrence of secured debt that may be effectively senior to or pari passu to the bonds and ensuring that the bonds will have a senior priority lien on collateral that secures any junior debt.
Limitation on asset sales	The asset sale covenant establishes guidelines that must be followed in any asset sale and, subject to certain exceptions, permits the issuer or its restricted subsidiaries to use the proceeds either to prepay certain debt or reinvest in the business. If the proceeds are not used pursuant to the guidelines, the issuer will be required to offer to repurchase the bonds from bondholders at par.
Limitation on affiliate transactions	This covenant limits the issuer's and its restricted subsidiaries' ability to enter into transactions with affiliates unless those transactions are on terms no less favorable than would be available for similar transactions with unrelated third parties.
Reporting	The reporting covenant governs the information the issuer must provide to its investors in order to support trading in the securities and to monitor the performance of the issuer. The covenant can vary significantly from issuer to issuer depending on, among other things, whether the issuer is a public or a private company.
Merger covenant	This covenant is principally designed to prevent a business combination in which the surviving obligor of the bonds is not financially healthy, as typically measured by whether the fixed charge coverage ratio (FCCR) of the issuer and its restricted subsidiaries following the transaction would be equal to or greater than the FCCR of the issuer and its subsidiaries prior to the transaction.
Change of control	This covenant requires that the issuer purchase the bonds from bondholders at a price equal to 101% of principal if a change of control occurs. A change of control is typically defined to occur when (1) a person or group obtains ownership of 50% or more of the voting stock of the issuer, (2) a merger or consolidation transaction occurs in which the equity holders of the issuer before the transaction do not represent the majority of equity holders of the surviving entity, (3) the issuer sells all or substantially all of its assets, or (4) the issuer adopts a plan of liquidation.

Covenants Compared			
Covenant	High Yield	Investment Grade	Commentary
Limitation on Restricted Payments	✓		
Limitation on indebtedness	✓		Some investment grade deals contain a limitation on incurrence of debt by subsidiaries of the issuer.
Limitation on sale-and-leaseback		✓	In a high yield deal, the sale-and-leaseback limitation is typically a part of the debt covenant.
Limitation on liens	✓	✓	Investment grade deals typically have a large general liens basket sized at a percentage of total assets, net tangible assets, or EBITDA. In addition, some high yield deals have a provision by which, upon the bonds becoming investment grade, the liens covenant flips into this type of formulation.
Limitation on asset sales	✓		
Limitation on affiliate transactions	✓		
Reporting	✓		
Merger covenant	✓	✓	Investment grade deals typically do not have the FCCR requirement noted previously.
Future guarantors covenant	✓		
Change of control	✓	✓	Most investment grade deals have a double trigger change of control provision where no put is required at 101% unless a change of control occurs and there is a rating decline. Some very highly rated bonds do not have a change of control provision at all.



Related Content

For additional information on high-yield covenants, see

> **HIGH-YIELD VS. INVESTMENT-GRADE COVENANTS**

 **RESEARCH PATH:** [Capital Markets & Corporate Governance > Debt Securities Offerings > Rule 144A/Regulation S Debt Offerings > Practice Notes](#)

For an overview of trends in the high yield debt arena, see

> **MARKET TRENDS 2018/19: HIGH YIELD DEBT OFFERINGS**

 **RESEARCH PATH:** [Capital Markets & Corporate Governance > Trends & Insights > Market Trends > Practice Notes](#)

For practical guidance on dealing with high yield offerings, see

> **TOP 10 PRACTICE TIPS: HIGH YIELD DEBT OFFERINGS**

 **RESEARCH PATH:** [Capital Markets & Corporate Governance > Debt Securities Offerings > Rule 144A/Regulation S Debt Offerings > Practice Notes](#)

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 **RESEARCH PATH:** [Capital Markets & Corporate Governance > Debt Securities Offerings > Rule 144A/Regulation S Debt Offerings > Checklists](#)



Jim Wagstaffe AND THE WAGSTAFFE GROUP

The Enforceability of Boilerplate Contractual Provisions

Recent caselaw has upheld the enforceability of boilerplate contractual provisions regarding forum selection, choice of law, and mandatory alternative dispute resolution. These clauses, seemingly innocuous in their inception, often provide the fulcrum for success or failure in ensuing litigation. This article addresses this important development in the law.

SO-CALLED BOILERPLATE CONTRACTUAL LANGUAGE INCLUDES the following types of provisions:

- Forum grabbers (consent to jurisdiction and forum selection)
- Alternative dispute resolution commands (mediation and arbitration)
- Law trumpsers (governing law and remedy door closers)
- Rules for interpretation (e.g., non-*contra* preferendum clauses)

Forum Grabbers

Anyone who says it is no big deal where the contract-dispute litigation will take place and before whom has never litigated a major case to its completion. In fact, there has been a judicial revolution in the last few years as to the enforcement of clauses such as consent to jurisdiction and venue forum selection clauses. There is no more important case on this topic than *Atlantic Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49 (2013), a Justice Samuel Alito opinion cited more than 2,000 times in the past five years. There, the forum selection clause identified Virginia as the designated venue notwithstanding that the underlying dispute was filed in Texas because the payment dispute arose out of construction at Fort Hood located in that state. Although virtually all witnesses and documents were located in Texas, the Supreme Court held that if valid,



“a contract is a contract,” and don’t bother with other considerations.

The party with the superior bargaining power (the Virginia-based entity selecting the local subcontractor) got its way. The impact of the decision cannot be overestimated, forcing the Texas party and its local attorneys to litigate their \$150,000 construction dispute in a geographically inconvenient (and expensive) forum.

Related Content

For more information on the requirement of personal jurisdiction over parties in a federal case, see

> **PERSONAL JURISDICTION (FEDERAL)**



RESEARCH PATH: [Civil Litigation > Initial Pleadings and Documents > Assessing Jurisdiction and Venue > Practice Notes](#)

For guidance in raising federal question jurisdiction in a motion to dismiss or challenging such a motion, see

> **FEDERAL QUESTION JURISDICTION: PLEADING AND CHALLENGING FEDERAL QUESTION JURISDICTION CHECKLIST (FEDERAL)**



RESEARCH PATH: [Civil Litigation > Initial Pleadings and Documents > Assessing Jurisdiction and Venue > Checklists](#)

For assistance in pleading or challenging diversity jurisdiction in a federal action, see

> **DIVERSITY JURISDICTION: PLEADING AND CHALLENGING DIVERSITY JURISDICTION (FEDERAL)**



RESEARCH PATH: [Civil Litigation > Initial Pleadings and Documents > Assessing Jurisdiction and Venue > Practice Notes](#)

For an analysis of supplemental jurisdiction in a federal case, see

> **SUPPLEMENTAL JURISDICTION (FEDERAL)**



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Courts have applied the same presumptive enforcement for forum shopping clauses framed as “consent to personal jurisdiction” provisions. Since consent is a traditional basis for jurisdiction untethered by minimum contacts limitations, enforcement of such seemingly boilerplate clauses can indeed be game changing.

Such clauses are enforceable when contained:

- In a cruise line ticket¹
- As part of an online reservation²
- In a bill of lading³
- In a term of use in the shrink wrap⁴

Thus, there is little doubt that such a provision ordinarily will be enforceable in the boilerplate of a written contract itself.

Removal

Courts have also now been reading contractual clauses selecting only a state court forum as constituting a waiver of the otherwise existing right to remove the case to federal court on federal question or diversity jurisdiction grounds.⁵

Importantly, if only one of the parties to the suit has agreed exclusively to state court, this nevertheless constitutes a waiver of the removal right for all parties.⁶

ADR and Arbitration Clauses

For many decades, both state and federal courts have placed their imprimatur on contractual provisions mandating pre-lawsuit procedures (e.g., mediation) and other alternative dispute resolution commands such as compelled arbitration—so much so that all doubts will be resolved in favor of such provisions.⁷

A highly prominent series of Supreme Court cases has uniformly been approving and enforcing clauses that mandate individual—rather than class-wide—arbitration. In fact, if a class arbitration right is to exist, it must be clear since an ambiguous contract will not suffice.⁸



¹ See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 589 (1991). ² See *Decker v. Circus Circus Hotel*, 49 F. Supp. 2d 743, 748 (D.N.J. 1999) (venue transferred on basis of online forum selection clause); *Rudgayer v. Google, Inc.*, 986 F. Supp. 2d 151, 155 (E.D.N.Y. 2013) (click-wrap agreement reasonably communicated to email account holders). ³ See *Kukje Jwajae Ins. Co. v. M/V Hyundai Liberty*, 408 F.3d 1250, 1254–55 (9th Cir. 2005) (bill of lading forum selection clause enforceable). ⁴ See *Taxes of Puerto Rico, Inc. v. Taxworks, Inc.*, 5 F. Supp. 3d 185, 189 (D. P.R. 2014) (venue selection clause in end user provision in software package). ⁵ See *City of Albany v. CH2M Hill, Inc.*, 924 F.3d 1306 (9th Cir. 2019); *Bartels v. Saber Healthcare Grp., LLC*, 880 F.3d 668 (4th Cir. 2018); *Medtronic Sofamor Danek, Inc. v. Gannon*, 913 F.3d 704 (8th Cir. 2019); *Grand View v. Helix Elec.*, 847 F.3d 255 (5th Cir. 2017); see also *Wagstaffe Prac. Guide: Fed. Civ. Proc. Before Trial* § 8-VII[A][2]. ⁶ *Autoridad de Energía Eléctrica v. Vitol S.A.*, 859 F.3d 140 (1st Cir. 2017). ⁷ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. 287, 298 (2010); *Wagstaffe Prac. Guide: Fed. Civ. Proc. Before Trial* § 13-VII[H]. ⁸ See *Lamp Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019); see also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (court confirms enforceability of class action waivers in arbitration agreements); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (same).

Since provisions affecting forum designation, arbitration, and interpretation can be so important, much of the action in recent cases centers on whether such provisions are valid and enforceable.

The boilerplate ADR or arbitration provision can be particularly significant because parties generally are free to stipulate to any procedure and to the person or persons who will decide the dispute. As such, litigation might be avoided or deemed not worth it if the chosen approach seems weighted in favor of an overly expedited or industry-friendly process.⁹

Other Formerly Boilerplate Provisions

In addition to forum selection and jury-avoiding clauses, the other standard provisions also can make a large difference in modern litigation, if held enforceable. These include the following:

- Law trumping clauses such as choice of law provisions
- Remedy door-closing clauses such as provisions limiting or eliminating consequential damages
- Interpretation changers such as a provision underscoring that the contract was drafted by both sides and hence there is no contra preferendum (interpret against the drafter) aspect to later litigation conflicts

And there is even law now in some jurisdictions that the boilerplate or boilerplate aspect of a contract in the form of an attorney signing solely “to approve as to form and content” might have real meaning. Just this year, the California Supreme Court held that if an attorney signs the contract with this formulaic phrase, it could result in a factual finding that counsel both recommended their clients sign and intended to be bound by the provision themselves.¹⁰

Court Analysis

Since provisions affecting forum designation, arbitration, and interpretation can be so important, much of the action in recent cases centers on whether such provisions are valid and enforceable. Generally, such clauses will be enforced if they:

- Are reasonably communicated to the parties
- Would not be unreasonable, unjust, or otherwise violate a strong state public policy¹¹

Many states have enacted statutes that limit the enforceability of selected forum, choice of law, or arbitration clauses in certain types of situations and cases (e.g., identified consumer cases, employment contracts, subcontract construction cases,

⁹. See *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (parties free to specify idiosyncratic terms of arbitration). ¹⁰. *Monster Energy Co. v. Schechter*, 7 Cal. 5th 781 (2019). ¹¹. See *Martinez v. Bloomberg L.P.*, 740 F.3d 211 (2d Cir. 2014) (forum selection clauses); *Al Copeland Invs., LLC v. First Specialty Ins. Corp.*, 884 F.3d 540 (5th Cir. 2018) (strong presumption to enforce forum selection clause unless obtained through fraud, selects a gravely inconvenient forum, is fundamentally unfair, or violates a strong public policy of the forum); *Starke v. SquareTrade, Inc.*, 913 F.3d 279 (2d Cir. 2019) (arbitration clause in terms and conditions section on product seller's website was not clear and conspicuous as to require arbitration); cf. *Dicent v. Kaplan Univ.*, 758 Fed. Appx. 311 (3d Cir. 2019) (court compelled arbitration based on clause in an agreement electronically signed by a student taking online courses).



Related Content

For an overview of the practice of combining mediation and arbitration by using the same neutral party as both the arbitrator and mediator, see

> [MEDIATION-ARBITRATION CONSIDERATIONS](#)



RESEARCH PATH: [Civil Litigation > Arbitration and Other ADR > Practice Notes](#)

For a discussion of issues to consider when deciding whether to litigate or arbitrate a dispute, see

> [ARBITRATION VS. LITIGATION IN THE UNITED STATES \(FEDERAL\)](#)



RESEARCH PATH: [Civil Litigation > Arbitration and Other ADR > Practice Notes](#)

For an explanation of the requirements in the Federal Arbitration Act, see

> [FEDERAL ARBITRATION ACT FUNDAMENTALS](#)



RESEARCH PATH: [Civil Litigation > Arbitration and Other ADR > Practice Notes](#)

franchisor–franchisee contracts, etc.). So, one must be sure to check local law as to such state public policies in this area.¹²

And finally, what has become one of the hottest issues regarding what we used to think of as boilerplate clauses is whether they can apply to non-signatories (e.g., third-party beneficiary of a contract). Whether such clauses will apply to such non-signatories as third-party beneficiaries, successors, subsidiaries, or corporate employees and officers often will depend on the severability of the action as well as the relationship between the signing and non-signing parties.¹³

Counterpart Signature Provision

Finally, and happily, there is at least one boilerplate term that plainly remains so in this modern age. A provision allowing counterpart signatures, while fairly common, typically is meaningless. Specifically, signing a contract in this format (i.e., signing different copies of the identical contract) is superfluous since court holdings in most jurisdictions allow enforcement of agreements in this format even if there is not a counterpart clause.¹⁴ So, some boilerplate remains so.



However, the main thing to remember about the effect of various boilerplate provisions is that the law is ever changing. **L**

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RESEARCH PATH: [Civil Litigation > Initial Pleadings and Documents > Assessing Jurisdiction and Venue > Articles](#)

¹² See *Cal. Lab. Code § 925* (employers cannot condition employment on employee's agreement to forum selection or choice of law clauses as to states other than where employment takes place); see also *Gemini Tech. v. Smith & Wesson*, 931 F.3d 911 (9th Cir. 2019) (forum selection clause not enforceable since it violates clear state public policy invalidating clauses requiring litigation out-of-state). ¹³ See *In re McGraw-Hill Global Educ. Holdings LLC*, 909 F.3d 48 (3d Cir. 2018) (non-signatory not bound if not "closely related"); *In re Howmedica Osteonics Corp.*, 867 F.3d 390, 407 (3d Cir. 2017); see also *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 2019 U.S. LEXIS 4418 (2019) (certiorari granted to decide if a non-signatory can compel arbitration in an international setting).

¹⁴ See *Espejo v. S. Cal. Permanente Med. Grp.*, 246 Cal. App. 4th 1047, 1060–61 (2016) (authenticated electronic signature per *Cal. Civ. Code § 1633.7* on arbitration agreement valid and enforceable).

Malaysian Mobile Court Helps to Bring Undocumented People Under Rule of Law



People living in the remote jungles of Malaysia can now claim their nationality and prove their identities through documents issued by a mobile court established by LexisNexis

LED BY GAYTHRI RAMAN, MANAGING DIRECTOR OF

LexisNexis Southeast Asia, a team of magistrates, lawyers, medical officers, government officials, and former Malaysian Chief Justice Tan Sri Richard Malanjum traveled to Kampung Matanggal, Sabah, a village in the Malaysian jungle. The team set up makeshift law offices and court chambers. Villagers were asked to register before being directed to the appropriate officials for the issuance of birth certificates, marriage certificates, and other government documents. Attorneys were assigned to assist in preparing paperwork. Judges then approved the paperwork, applicants had their pictures taken, and certificates were issued.

Among the applicants was Rosnah, a 16-year-old girl who had attended school, but was unable to sit for exams because she could not prove her identity until she obtained a birth certificate issued to her by the mobile court.

An estimated 10 million people around the world are undocumented, leaving them outside the rule of law, often because of their inability to travel to urban areas to obtain the necessary papers. Mobile

courts like the one established by LexisNexis are helping to address the issue, one village at a time.

LexisNexis supports the rule of law around the world by:

- Providing products and services that enable customers to excel in the practice and business of law and help justice systems, governments, and businesses to function more effectively, efficiently, and transparently
- Documenting local, national, and international laws and making them accessible in print and online to individuals and professionals in the public and private sectors
- Partnering with governments and non-profit organizations to help make justice systems more efficient and transparently and
- Supporting corporate citizenship initiatives that strengthen civil society and the rule of law across the globe.

In support of its rule of law activities, LexisNexis established the [LexisNexis Rule of Law Foundation](#) in 2019.