

# TRIFECTA OF THE ADA PROCESS



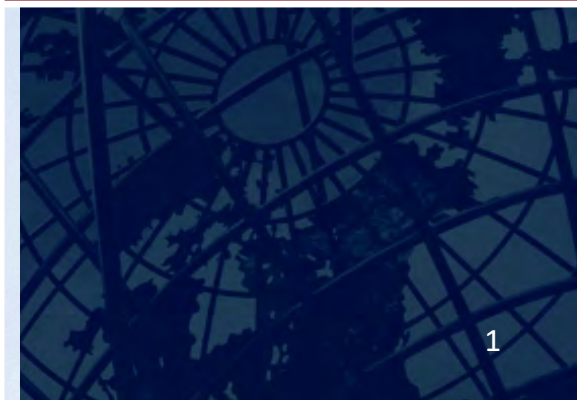
**Duane Morris**

[ [www.duanemorris.com](http://www.duanemorris.com) ]

How the “Right Thing” Safeguards School Resources from External Investigations/Lawsuits, Lost Staffing Efficiencies, and Unduly Burdensome Accommodations

©2018 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.

Duane Morris – *Firm and Affiliate Offices* | New York | London | Singapore | Los Angeles | Chicago | Houston | Hanoi  
Philadelphia | San Diego | San Francisco | Baltimore | Boston | Washington, D.C. | Las Vegas | Atlanta | Miami | Pittsburgh  
Newark | Wilmington | Princeton | Lake Tahoe | Ho Chi Minh City | Duane Morris LLP – *A Delaware limited liability partnership*



# THE TROUBLESOME TRIFECTA

---

- Litigation/Government Investigations
- Lost Efficiency/Redundant Internal Resources
- Expensive Accommodations

# 1a) GOVERNMENT ACTIONS

---

- **Federal:**

- Dep't of Ed.'s Office of Civil Rights
  - ❖ 268 active investigations\*
  - 17 are in California

- **State:**

- Bureau of Private Postsecondary Education
  - ❖ In 2016: 97 enforcement actions\*\*

\*<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/dis2.html>

\*\*[https://www.bppe.ca.gov/enforcement/2016\\_annual\\_enf.pdf](https://www.bppe.ca.gov/enforcement/2016_annual_enf.pdf)

## 1b) PRIVATE LITIGATION

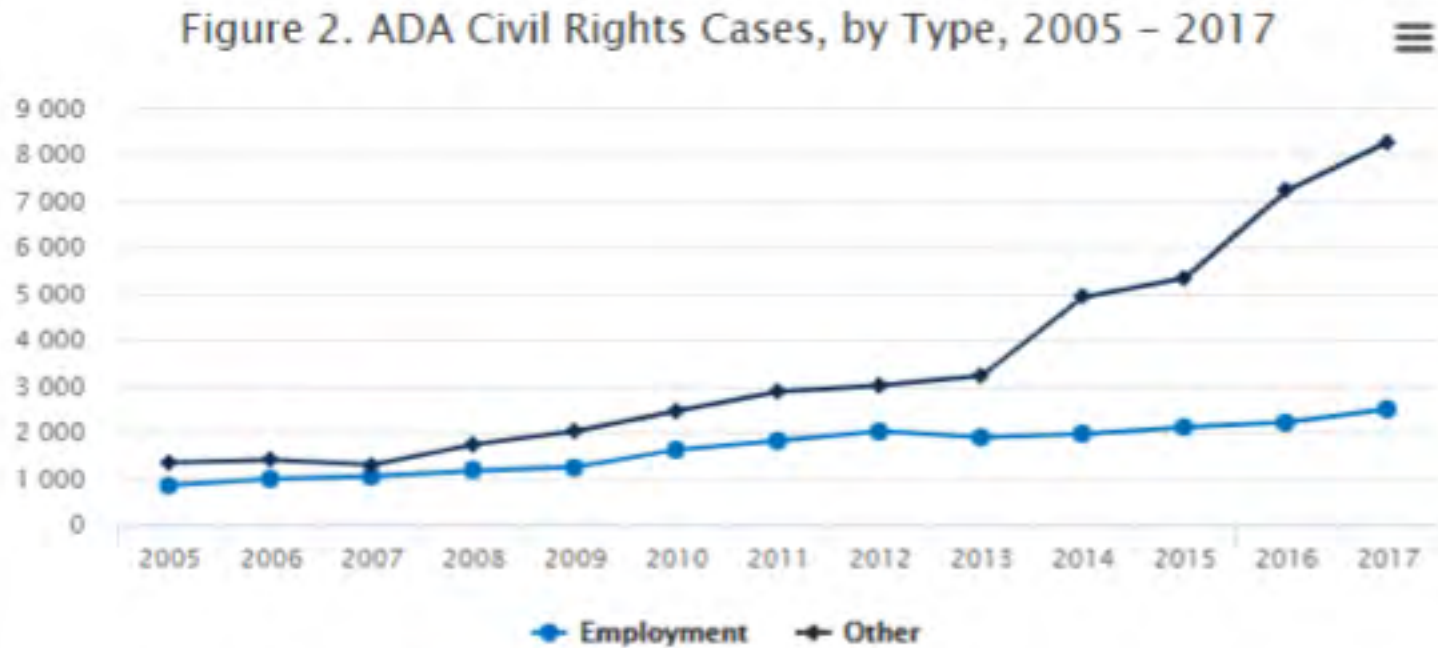
---

- Private Federal Lawsuits:
  - ADA/Section 504 of Rehabilitation Act
    - ❖ In 2017:
      - 10,773 ADA cases (27% of civil rights cases)
      - ADA cases increased 395% since 2005
      - Other civil rights cases decreased by 12%\*

\*<http://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act>

# RISE OF NON-EMPLOYMENT ADA CLAIMS

Figure 2

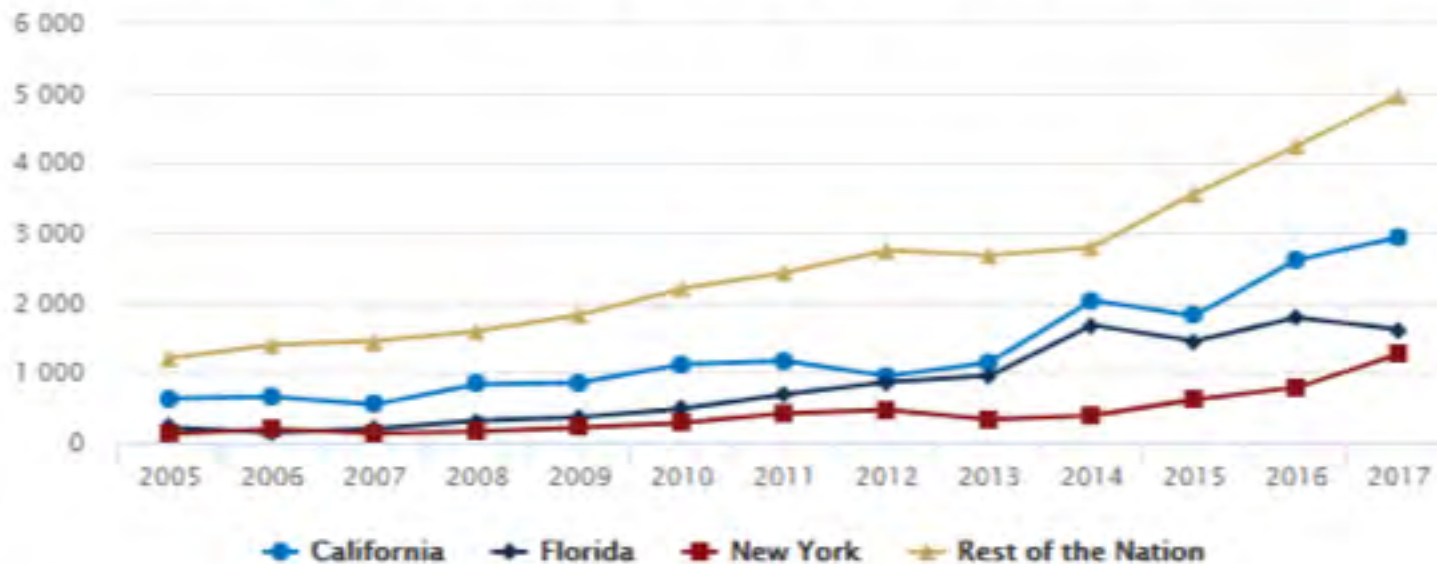


Source: Table C2, 12-Month Periods Ending December 31, 2005 through 2017.

# ADA CLAIMS IN CALIFORNIA

Figure 3

Figure 3. ADA Civil Rights, by State, 2005 - 2017



Source: Table C2, 12-Month Periods Ending December 31, 2005 through 2017, Aggregated by State.

## 1c) STATE LITIGATION

---

- Private California Lawsuits:
  - California Disabled Persons Act
  - California Fair Employment and Housing Act
  - California Unruh Civil Rights Act
    - ❖ Remedies include:
      - Minimum fine of \$4000/violation
      - Attorneys' fees
      - Punitive damages
      - Injunctive relief

## 2) LOSS OF INTERNAL RESOURCES

---

- Protecting your personnel from:
  - Miscommunication
    - ❖ What was communicated to the student?
    - ❖ What was communicated to ADA Coordinator?
  - Redundancy
    - ❖ Multiple people handling at same time
  - Repetitiveness
    - ❖ Having to investigate several times



### 3) EXPENSIVE ACCOMMODATIONS

---

- Accommodations can be expensive
  - ASL interpreters:
    - ❖ \$75/hour
    - ❖ 2 interpreters at a time
    - ❖ 1600 hours
      - Total: \$240,000
  - Physical Barriers
    - ❖ Installing power door openers (\$1,500 to \$40,000)
    - ❖ Installing ramps, guard rails, etc.

# LOSS PREVENTION: FOLLOWING ACCOMMODATION PROCESS

---

- Accommodation laws are driven by process
- Adherence to process:
  - Makes defensible decisions
  - Minimizes taxation on internal resources
  - Equips decisionmakers to handle all issues
- Follow process except for...

# SERVICE DOGS

Two Questions:

- 1) Required for a disability?  
And
- 2) Trained to perform a task to help with an impairment?



## ...and miniature horses

---



Compliments of Duane Morris LLP

# ACCOMMODATION PROCESS

---

- Requesting the accommodation
  - Inform all students of process
  - Student-driven
  - Direct all requests to the ADA Coordinator

# FREQUENT PITFALLS

---

- Student requests an accommodation from an instructor
  - Creates a he said/she said situation between the student and the instructor
  - May result in unequal granting of accommodations
- Instructor suggests student may need an accommodation
  - Perceived disability is discrimination

# ACCOMMODATION PROCESS

---

- Is the applicant/student disabled?
  - Known or obvious disability?
  - Substantial Impairment of Major Life Activity?
  - Medical documentation?

# FREQUENT PITFALLS

---

- Assuming/Projecting impairments
- Timid in Requesting Documentation
- Accepting an IEP (**NEVER, EVER DO THIS**)



# ACCOMMODATION PROCESS

---

- Is there a nexus between requested accommodation and the disability?
  - Scenario 1: student with ADHD requests additional time to take a written test.
  - Scenario 2: student using a wheelchair requests additional time to take a written test?
  - Scenario 3: student with a hearing impairment requests additional time to take a written test?

# INTERACTIVE PROCESS

“YOU CAN'T ALWAYS GET WHAT YOU WANT,  
BUT IF YOU TRY SOMETIMES, YOU MIGHT FIND,  
YOU GET WHAT YOU NEED”

*Handwritten text*

The Rolling Stones

Compliments of Duane Morris LLP

18

# THE TAIL DOES NOT WAG THE DOG



# DEFENSES TO PROVIDING ACCOMMODATIONS

---

- PERSONAL AIDS: PER SE UNREASONABLE
  - Attendants
  - Individually prescribed devices
  - Readers for personal use
  - Other devices of a personal nature

# DEFENSES TO PROVIDING ACCOMMODATIONS

- **UNDUE BURDEN**
  - No Brightline Test
  - Usual Suspects:
    - ❖ (1) Size of the university
    - ❖ (2) Corporate structure of the university
    - ❖ (3) The nature and cost of the accommodation needed
  - Clever Factors:
    - ❖ Impact on composite scores
    - ❖ Gross income vs. net profit
    - ❖ Executive salaries
  - **More factors = More defensible**

# DEFENSES TO PROVIDING ACCOMMODATIONS

---

- **FUNDAMENTAL CHANGE IN NATURE OF PROGRAM**
  - Academic Standards
    - ❖ Waiving homework
    - ❖ Lowering threshold for passing
  - Academic Content
    - ❖ Not teaching a particular subject
  - Regulatory Requirements
    - ❖ Time to complete requirements

# CONCLUDING THOUGHTS

---

- Follow the process
- Collaboration, not assumption
- Document E...VER...Y...THING

# Thank you for attending!

## Any Questions?



Bryce Young  
Duane Morris LLP

[byoung@duanemorris.com](mailto:byoung@duanemorris.com)

(619) 744-2212

