



Utility Legal Issues Update

Alaska Power Association
2017 Annual Meeting

Andy Leman
Kemppel, Huffman & Ellis, P.C.

Mandatory Pets Are Everywhere Update

- People continue to want to take their pets everywhere
 - Last year we talked about emotional support turkeys and marmosets
 - This year it is Daniel the Emotional Support Duck
 - Shouldn't be a surprise, but we also had an emotional support dog bite a fellow passenger
 - Remember, we aren't airlines and don't have to allow pets in as many circumstances as they do



Corporate Governance

- **NRECA Governance Task Force**

- Much as it did with Capital Credits in 2005, NRECA and CFC have formed a task force to issue a report on cooperative governance
- Helena Jones of AVEC is on the task force from Alaska
- Expects to complete work later this year

- **Director Meeting Fees**

- Cooperative in New Mexico had audit conducted that found directors had received \$67,426 in meeting fees in violation of Policy
 - The problem was that directors were paid for multiple meetings on the same day
 - AS 10.25.140 says you can receive a “daily” fee for attending cooperative business, so be careful

Corporate Governance

- **Director Attendance**

- Late last year a former cooperative director in Alabama sued the cooperative, seeking to be reinstated to his Board seat
 - Former director claimed he was wrongly removed from Board
 - Cooperative said he'd failed to attend three Board meetings without good cause
 - Bylaws said: "A Trustee position shall automatically become vacant if he/she misses three (3) regular meetings of the Board during any twelve (12) month period unless the remaining Trustees by a majority vote resolve that there was a good cause for such absences."

Corporate Governance

- **Director Attendance**
 - **Director claimed:**
 - The Board failed to provide proper notice of meetings
 - That only the members of the cooperative could remove him from the Board
 - That the Board gave him no notice of the impending removal or opportunity to defend himself
 - That the Board had applied the “good cause” standard inconsistently
- **Case is set for trial later this year**

Role of the Board in Preventing Fraud

- Alaska utilities have had a stark reminder about the risk of fraud this past year
- According to public reports, former NEA General Manager charged \$970,358 to cooperative credit card over 12 years
 - Approximately \$400,000 repaid so far according to reports
 - NEA has incurred over \$60,000 in investigation and legal fees
- NEA has filed suit against former manager to recover the difference
- Has been reported to law enforcement

Role of the Board in Preventing Fraud

- What can Boards do to detect and prevent something like this from occurring?
 - Policies
 - Review policies on check-writing and electronic payments
 - Review policies on company credit cards
 - Make sure we actually have a policy that says “fraud is wrong”
 - Make sure policies are regularly reviewed and that employees know about them

Role of the Board in Preventing Fraud

- What can Boards do to detect and prevent something like this from occurring?
 - Reporting Process
 - Make sure that either in the fraud reporting policy or your whistleblower policy there is a clear way for employees to report suspected fraud
 - Pre-Employment Background Checks
 - It's amazing what you can find online
 - It's amazing what you can't find online

Role of the Board in Preventing Fraud

- What can Boards do to detect and prevent something like this from occurring?
 - Make sure CFO has a relationship with the Board
 - Manager is your only direct employee, but CFO should be as comfortable as possible approaching the Board about an issue with the manager
 - Make sure the Board understands what an audit does and does not do
 - Usually review a very small percentage of the transactions the utility
 - Most fraud is not detected by external audits

Role of the Board in Preventing Fraud

- What can Boards do to detect and prevent something like this from occurring?
 - Make sure the utility has a process for reviewing company expenditures
 - For a small utility that might mean including a check register and credit card statement in the Board packet
 - For a larger utility, it might mean ensuring that the accounting staff have the policies and resources in place to monitor compliance
 - Have good insurance
 - When all else fails, it's good to have employee fidelity insurance

Taxation of Utilities

- In 2015, State of Alaska imposed a “refined fuel surcharge” of \$0.01 per gallon on all fuel users, including all utilities in the state
- Under AS 10.25.540(b)(2), electric cooperatives are exempt from state taxes and pay a retail per kwh tax instead
- Under AS 29.71.030, a municipality is not subject to tax unless “the law or regulation expressly provides that the municipality is to be assessed or taxed by the particular law or regulation.”
- With APA’s assistance, we organized a group of cooperative and municipal utilities to seek a refund of these surcharges

Taxation of Utilities

- State initially denied the refund claims by the cooperatives, but reversed course and agreed to grant them prior to holding an informal conference
- State denied the refund claims by the municipal utility and upheld the denial after an informal conference
- Savings for utilities that do add up, and vindicates the unique status of cooperatives and municipal utilities in Alaska

Capital Credits

- Since 2009, there have been approximately 50 lawsuits filed against more than 70 cooperatives in the Lower 48 relating to governance, capital credits or both
 - Most have been settled or gone away
 - Focus has shifted over time from governance issues to capital credits
 - Texas and Montana most recent cases, Alabama, Florida and Georgia have had the most activity

Capital Credits

- Starting to see court decisions on some of these lawsuits
 - In late 2016, North Carolina court held that cooperative did not owe fiduciary duty with regard to discounted early retirements of capital credits to estates
 - Court emphasized that estates were not required to retire early
 - Also important that discounting was disclosed on forms signed by the estate's representatives
 - Lawsuit did not challenge cooperative's ability to retire estate capital credits early



Capital Credits

- Not making capital credit retirements at all continues to invite litigation, but also for failure to make retirements for former members
- Starting to see allegations that capital credit practices are unfair trade practices, but not with any success so far



Capital Credits

- Don't buy a lawyer a boat – allocate & retire capital credits
- Fair cycle & reasonable equity level



Court Case: Renewables

- Interesting case from Vermont earlier this year holding that “unattractive” solar arrays are not a nuisance
 - So neighbors can’t sue for loss of property value



Court Case: Pole Attachments

- Electric utility in Arkansas sued after a tractor pulled down a cable attached to its pole that was not owned by the utility
 - Cable injured a motorcyclist
 - Cable was attached under pole attachment agreement with utility
 - Court held that:
 - Electric utility had duty to inspect and maintain its power lines
 - Utility did not own the cable, it was not used to transmit electricity and utility had no legal duty to inspect and maintain it

Court Case: Easements

- Cooperative had Bylaw that required members to grant easements to the Cooperative on “reasonable terms and conditions” as required by the Cooperative
- Cooperative told member it needed a 44 foot wide easement to re-route a transmission line because of severe storm erosion
- Threatened to disconnect member unless easement granted
- Court held it was not reasonable to require the easement be granted without compensation, and thus no violation of the Bylaws by the member and could not be disconnected

ADA Website Barriers

- Mentioned last year that late in 2015, cooperatives in the Lower 48 started getting letters from attorneys alleging their websites violate the Americans with Disabilities Act
 - This summer a court in Florida found that Winn-Dixie's website was covered under the ADA as a "public accommodation"
 - No dispute the store's physical locations were public accommodations
 - Court focused on fact that website was heavily integrated with physical locations
 - Refill prescriptions, access coupons, find store locations



ADA Website Barriers

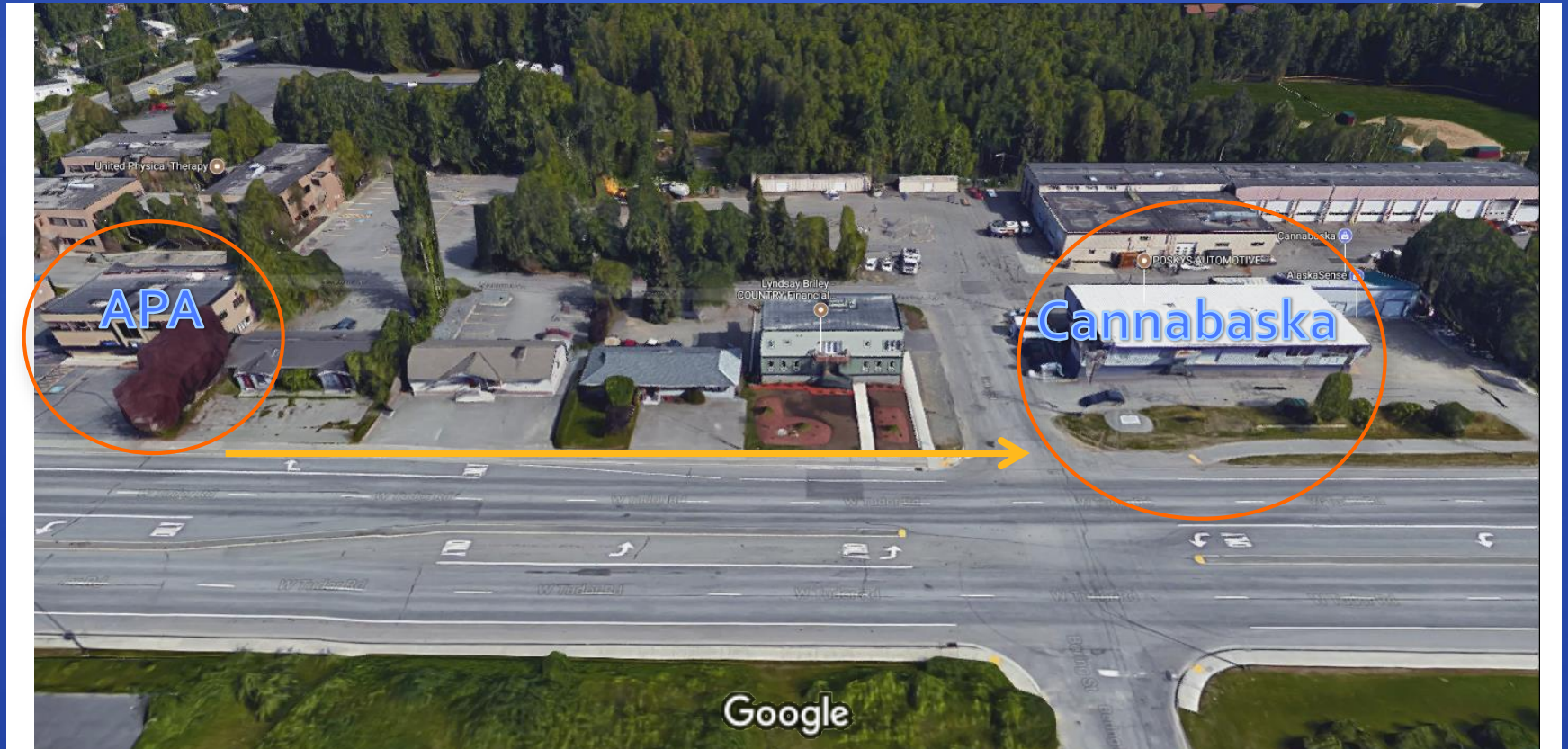
- By contrast, earlier this summer a court in California ruled that Domino's website was not covered by the ADA and it could not be forced to follow the WCAG 2.0 standards
- Bottom line: If you are revamping or updating your website, follow WCAG 2.0 to the extent you can
- Even if you're not planning a res-design, talk to your web designer about what it would take to achieve compliance

Reefer Madness is Here

- Industrial marijuana grows are popping up all over Alaska
 - Neighbor in Fairbanks describes it as being like “having my head up a skunk’s butt”
 - Fairbanks has the most
- Fairbanks, the North Star Borough and the Kenai Peninsula Borough are all holding elections this fall that could ban commercial marijuana growing and selling
 - But even if they pass, residents would remain free to grow up to six plants at home and carry up to an ounce of marijuana



Reefer Madness is Here



Reefer Madness

- Story in the Washington Post this summer noted that in states with legal marijuana, employers are having trouble finding employees who can pass a drug test
 - Positive tests for marijuana in the US increased by 75% in 2016
- The Alaska Police Standards Council ruled that law enforcement officials can't be involved in state-legalized marijuana businesses

Reefer Madness

- Continuing to see lawsuits in other states from medical marijuana cardholders who are fired for testing positive for THC
 - Alaska has a medical marijuana program for many years
 - Requires registration with State of Alaska
 - Patient must have “debilitating medical condition”
 - Doctor must certify that other treatments have been considered but that patient might benefit from medical use of marijuana
 - Alaska law, however, says that nothing in the medical marijuana law requires “accommodation of any medical use of marijuana in places of employment”

Reefer Madness

- The Alaska Marijuana Control Board is holding its meeting this week in Nome
- Large number of Alaska communities have not imposed any restrictions on marijuana
 - But remember, even if communities impose restrictions, they cannot restrict personal use and personal marijuana plants
- And surprisingly, marijuana businesses have figured out how to transport marijuana by air and are doing so routinely

Reefer Madness

- What does all this mean for utilities?
 - My prediction is that in five years, marijuana in Alaska is going to look a lot like alcohol in Alaska, for good and for bad
 - CDL restrictions will remain, but utilities will face increasing pressure to abandon marijuana testing for non-safety sensitive positions
 - Utilities are going to have to review and revise their drug policies and collective bargaining agreements to attract and retain employees
 - Utilities are going to have to be more vigilant about training supervisors to judge impairment and figure out how to record and document impairment tests

Impact of the Election on Labor and Employment Law

- Trump Administration is potentially a huge change in labor and employment for utilities
 - Overtime rules – currently on hold
 - Immigration – ?
 - NLRB membership and decisions likely to change but will take time to work through the process
 - DOL rescinded its guidance regarding independent contractor misclassification

Impact of the Election on Labor and Employment Law

- Trump Administration is potentially a huge change in labor and employment for utilities
 - DOL announced it will issue opinion letters again on wage and hour issues
 - EEOC will not likely see significant change for some time
 - Some indication administration wants paid parental leave requirement
 - Likely little direct impact on utilities in Alaska

Legal or Illegal?

- The election of President Trump threatens to make it harder to find material for the Legal or Illegal Game
 - Changes in the make-up of the National Labor Relations Board will likely mean fewer instances of the Board declaring reasonable employee policy manual provisions to be a violation of the National Labor Relations Act
 - But we still have material . . .

Legal or Illegal?

- CSR suffered from debilitating migraines
 - Treated with non-prescription drugs, but when those didn't work, used a prescribed injection of a narcotic, Dilaudid
 - Would sometimes cause confusion, sleepiness, slurred speech and an itchy feeling
 - Doctor advised her she could return to work a few hours after injection
- Employer had “fitness for duty policy” prohibiting working under the influence of drugs or alcohol
 - No exceptions for prescribed medication

Legal or Illegal?

- Supervisor became concerned with absences and attendance
 - Employee requested intermittent leave and FMLA and got it
- After confronting employee about an absence, supervisor thought employee might be impaired and had her drug tested
- Employee's doctor sent letter explaining need for injections, stating "if she is able to rest after her shot, she is not impaired and is able to work without restriction"

Legal or Illegal?

- Drug test came back positive for opioids
- Employer forced employee to sign return to work agreement and undergo substance abuse prevention evaluation and another drug test
- Employer terminated after second drug test again showed opioids
- Employee filed suit under Americans with Disabilities Act and state law
- Legal or illegal?

Legal or Illegal?

- Alaska state employee filed for state worker's disability benefits
 - Claimed that prolonged sitting at work aggravated pre-existing medical condition
 - Said that chronic pain rendered her unable to work
- State granted non-occupational benefits, but denied occupational benefits because not caused by occupation
- ALJ found that work was substantial factor causing her disabling pain

Legal or Illegal?

- State employee disability cases do not have the presumption of coverage like workers' compensation for private employers, so employee has burden of proof
- Legal or Illegal (does she get occupational benefits or not)?

Legal or Illegal?

- Guest complained a casino employee inappropriately asked for a tip and made a sarcastic comment when it wasn't provided
- When the employer tried to interview the employee, he asked for a union representative
- The employee wouldn't try to find a union representative, and the employer couldn't locate one either
- Casino placed employee on paid suspension pending investigation
- Legal or illegal?

Legal or Illegal?

- Catering company employee posted on Facebook the following comment about her supervisor during a union election campaign to organize the work force:
 - “Bob is such a NASTY MOTHER F***ER don’t know how to talk to people !!!!! F*** his mother and his entire f***ing family!!!! What a LOSER!!! Vote YES for the UNION!!!!!!
- Post was publicly accessible, and employee took it down after three days
- Employer terminated the employee
- Legal or illegal?

Legal or Illegal?

- Grocery store clerk with bad back was fired because he had a 35 pound lifting limit
- Store argued that lifting was essential function of the job
- Employee argued that he had the bad back for many years and with the help of co-employees on heaving items, had done his job successfully for 38 years
- Legal or illegal?

Legal or Illegal?

- Road grader operator with post-colon cancer bowel issues was fired for refusing to relieve himself outdoors
 - Employee made employer aware of his condition and asked to be allowed to drive to restroom or have port-a-pottie at job site
 - Had to use the restroom up to 10 times per day
 - Employer fired him for poor performance, but employee alleged real motive was disability-based prejudice
- Legal or illegal?

Why People Hate Lawyers

- In January, a California law firm filed suit against Nestle, the maker of Raisinets, for deceptive packaging.
 - Lawsuit claims 40% of the box is empty space



- In November, a California man sued Kripsy Kreme for misleading the public with the way it names some of its donuts, including the: Glazed Raspberry Filled and Glazed Blueberry Cake donuts.

The End