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Business Law  
fall 2017

# Legal Matters®

## Beware pitfalls of cloud contracts

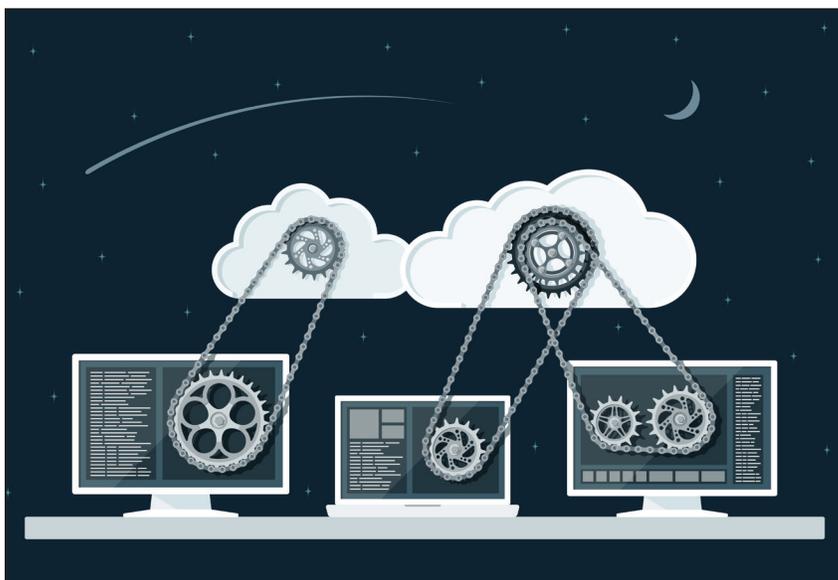
**T**hink it's just your business' data being stored in the cloud these days? Think again. Some (or all) of the provisions of your contract with your cloud provider also may be "floating," and can thus be changed at any time, often without notice to you.

How is this possible? Part of the blame rests with the modern-day trend of simplified contracts that include some brief general terms and conditions hyperlinked to online terms that can change at any time.

Typically, these contracts are presented on an as-is basis, and built-in protections, including service levels, generally provide only basic protection. Businesses then have little to no ability to terminate the agreement, even if key terms — including support obligations, service levels, service descriptions and performance standards — change to their disadvantage. Such key terms can change at any time, generally without notice.

As a result, businesses really can't be assured that they will have key functionality and performance for their cloud-based system available when they need it. Even though you're being asked to commit to purchasing a service, most of the elements that make that service valuable to you are not fixed.

Despite this, the customer is bound by the contract but the vendor is not, and can change the contract at any time.



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With the advice of a trained legal professional, businesses that use cloud providers can mitigate some of these risks. Consider these suggestions:

- 1) Require contract terms to be put in writing and attached to the agreement as fixed provisions.
- 2) Build in language that makes clear the vendor cannot materially decrease the overall levels of performance and functionality

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# Must websites accommodate blind users?

Just because the Department of Justice does not yet have new website accessibility rules for places of public accommodation doesn't mean businesses hosting websites aren't already at risk.

Blind or visually impaired plaintiffs have been filing federal lawsuits against companies over the accessibility of their websites, although they're meeting with different results.

A federal judge in Florida recently handed down a verdict in the case of *Gil v. Winn-Dixie Stores, Inc.*, finding that Winn-Dixie had violated Title III of the Americans with Disabilities Act by having a website that could not be used by the blind plaintiff.

A week later, a federal court judge in California ruled that blind plaintiff Sean Gorecki could contin-

gateway to the physical stores.

The court also determined that Winn-Dixie's website was inaccessible to visually impaired individuals who must use screen reader software and therefore violated the ADA. Even though third parties operated parts of the website, the court still held Winn-Dixie responsible for the lack of accessibility.

Lastly, the court ruled that the \$250,000 cost of making the website accessible was not an undue burden as the cost was small compared to the millions Winn-Dixie had spent to launch and later remake the site.

The ruling directly contradicts two wins for retailers in this arena from earlier this year.

In a Florida case, a federal court judge dismissed a lawsuit because the plaintiff failed to allege that his ability to use Bang & Olufsen's retail website prevented him from accessing its stores. Explicitly rejecting the argument that the ADA requires a website to provide the same online shopping experience as it does for non-disabled people, the court held that the statute only requires that "if a retailer chooses to have a website, the website cannot impede a disabled person's full use and enjoyment of the brick-and-mortar store."

In a California case, a federal court dismissed a lawsuit by a blind plaintiff who claimed that he could not use his screen reader to order a pizza from Domino's Pizza. While rejecting the argument that the ADA did not cover websites, the court ruled that Domino's had met its obligations under the law by providing access to its services by phone, and that requiring Domino's to have an accessible website at this time, when neither the law nor the regulations require websites to be accessible, would violate the company's constitutional rights.

Despite the mix of opinions being handed down by courts, the rise in these types of cases is noteworthy, and could inspire others to file lawsuits and issue pre-litigation demand letters against retailers asserting website accessibility claims. Businesses should consult with a legal professional to determine if there is a need to craft a strategy for preemptively dealing with these issues.



Sebastien.delorme via Wikimedia Commons

ue his lawsuit against retailer Hobby Lobby about the accessibility of its website. Hobby Lobby had asked the court to dismiss the case on various grounds, all of which were rejected by the judge.

In the Winn-Dixie case, Judge Robert Scola ruled on three issues:

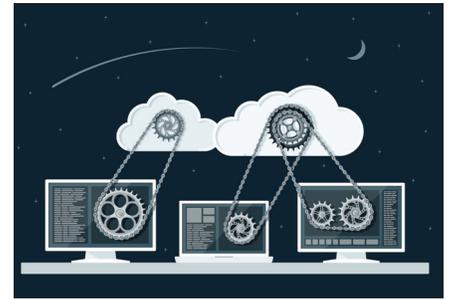
- Whether Winn-Dixie's website was subject to the ADA;
- Whether the plaintiff was denied the full and equal enjoyment of Winn-Dixie's goods and services because of his disability; and
- Whether the requested modifications to Winn-Dixie's website were reasonable and readily achievable.

The judge concluded that Winn-Dixie's website was subject to the ADA, noting that it operates as a

# Beware the many pitfalls of contracts in the cloud

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- reflected in the terms as of the date the contract is signed.
- 3) Set clear termination rights that protect the business in the event of:
    - Objective failure to achieve service levels.
    - Changes to the overall terms of the engagement if the content of one or more of the online portions of the agreement changes.
  - 4) Long-term contracts should be avoided. Instead push for shorter initial terms with the right to renew for additional one-year periods.



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## What to avoid when signing an office lease

Unforeseen costs can crush a business that opts to sign an office lease without legal counsel. From initial construction costs to later capital improvements, the list of potential hidden costs is long and adds up quickly.

To avoid the possibility of paying several large bills down the line, ask your lawyer to help you negotiate a fair lease up front that covers the following, as necessary: a landlord-performed buildout, a tenant-performed buildout, operating expenses and end-of-lease condition.

### Landlord-performed buildout

If the landlord is performing demolition and/or construction at the space you are planning to lease, crucial details need to be ironed out in advance and put in writing, including the nature and scope of the construction, a procedure for preparing and approving plans and specifications, the construction schedule and the approval of contractors.

It's common to see a lease that includes a construction allowance, or set amount of money the landlord will pay, with any costs beyond that falling on the tenant.

Unless you have protections built into the lease to limit how much the landlord can spend on construction without your approval, the landlord has a "blank check" to incur construction costs in excess of the construction allowance. That is an even bigger concern when the construction is being performed by the landlord's affiliated construction company, which is often the case.

### Tenant-performed buildout

If you opt to handle buildout on your own, there is still the potential for hidden costs. A lease in this situation will typically provide that the premises are to be delivered by the landlord "as is," with no obligation on the landlord's part to perform any work or

improvements prior to delivery. Thus, the landlord has no legal obligation to demolish the prior tenant's installation, remove furniture, equipment or cabling, or address any issues or problems with the premises, such as correcting existing legal violations or removing hazardous materials. A legal professional can help write an agreement that shifts the burden of the delivery condition of the premises from the tenant to the landlord.

### Operating expenses

Most leases require the tenant to pay its proportionate share of the operating expenses for the building, but there are certain things you should try to avoid. In particular, capital improvements — upgrades to the building performed by the landlord that enhance the value of the building — should not be the tenant's responsibility. While you can be expected to pay a share of the day-to-day operating expenses of the building, as a tenant you should not pay for major upgrades to the building unless the landlord is required by law to perform the upgrade, or the upgrade results in greater efficiencies or reduces overall operating expenses for the building.

### End-of-lease condition

When your lease is up and it's time to turn the premises back over to the landlord, what are you obligated to do and what costs could come your way? Many leases require the tenant to remove its furniture, trade fixtures and equipment at the end of the lease term. Be careful to avoid provisions that make you responsible for restoring the premises to the condition that existed prior to the installation of any alterations or improvements you chose to make. Most leases provide that alterations or improvements installed by the tenant become the property of the landlord upon installation.

### We welcome your referrals.

We value all of our clients. While we are a busy firm, we welcome your referrals. We promise to provide first-class service to anyone that you refer to our firm. If you have already referred clients to our firm, thank you!



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## Disclosing sponsorships now easier on Instagram

Whether you accept or give sponsorships tied to Instagram posts, Instagram is making an effort to make the disclosure process easier.

The social media network is now testing and considering for widespread use a tool that allows users to tag a brand within posts. If the brand confirms the relationship, the post will then be marked as an ad with a “paid partnership with [brand name]” tag at the top.

The Federal Trade Commission recently called out Instagram in par-



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ticular in a flurry of letters reiterating that influencers and marketers must clearly disclose their relationships to

comply with the agency’s Endorsement Guides. The agency noted that endorsements need to be disclosed near the top of posts so that consumers who view posts in their streams or on mobile devices will see the disclosure without having to click “more.”

Although Instagram is making the change to help its users, the site is by no means guaranteeing compliance. Still, the new tool could be use-

ful for business marketers who will be able to access data about a tagged post’s engagement with Instagram users.