



Swatting Gnats

Insights

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Since the early 2000s, the buzzing gnats of employment litigation involving retailers have been individual Fair Labor Standards Act (FLSA) lawsuits. Whether brought for unpaid overtime, working through lunches, or working off the clock, this type of individual FLSA claim has been filed thousands of times.

While FLSA claims have not gone away, a new type of “gnat lawsuit” has risen to pester companies over exceedingly minor disputes. These new lawsuits are brought under Title III of the Americans with Disabilities Act (ADA) and contend that certain aspects of buildings, bathrooms, and parking lots do not comply with the Act’s detailed regulations for building standards.

What’s At Issue

Title III of the ADA governs places of public accommodation and sets out the obligation that operators of places of public accommodation remove architectural barriers that prevent a disabled person from frequenting the place of public accommodation where doing so is readily achievable. It further requires that new construction (for first occupancy after January 26, 1993) and alterations of existing construction performed after January 26, 1992 be designed to be “readily accessible to and usable by individuals with disabilities.” Like most laws, these pronouncements are broad and certainly sound reasonable. The devil is in the regulations.

In 2010, the Justice Department adopted revised regulations to provide parameters for the ADA’s requirement that facilities be “readily accessible and usable by individuals with disabilities.” These standards are 252 pages long and cover most areas of retail stores where the public is allowed including checkout aisles, shopping areas, and bathrooms. They also cover accessible parking, wheelchair-ramp design, and seating areas. These regulations provide excruciating detail for compliance from the exact number of inches a soap dispenser can be located above the floor in a lavatory to the maximum amount of force that can be required to open a door.

This is not to suggest that the regulations are not appropriate for their purpose. One can easily imagine the frustration of wheelchair users being unable to reach the soap to wash their hands after using the bathroom or being unable to open the door to a store. When the regulations are followed, structures will be readily accessible.

And the detail of the regulations does serve the purpose of being able to assess compliance without any gray area for new construction, although there can be significant disagreement about what is

“readily achievable” for barrier removal in existing facilities. But the flipside of the coin is that noncompliance in new construction is also easy to spot by individuals using the facilities, and the gray “readily achievable” standard is subject to challenge.

The Lawsuit Swarm

When they first appeared on the scene, individual FLSA claims were annoying for several reasons. First, there was no requirement of amicable demand. The first notice most employers had of the claim was when served with a lawsuit. The vast majority of the claims were for very small sums, often only a few hundred dollars of back wages. Additionally, they were often he-said-she-said cases that created fact issues making summary judgment difficult to obtain.

Defending a federal lawsuit through trial, regardless of the amount in controversy, is expensive. Moreover, the true incentives for the claims being filed were usually the attorneys’ right to obtain fees, and liability for those fees increased if employers took depositions and discovery. So employers faced with low value lawsuits, a risk of loss at trial, and the increase in liability for attorneys’ fees created by defending themselves, often made the economically driven decision to settle early for a small sum.

The ADA Title III accommodation lawsuit bears many similarities to the individual FLSA suit and is borne of the same motivation: attorneys’ fees. First, there is no requirement that a plaintiff make any form of amicable demand. Thus, the first notice a business will have of the issues is a complaint in federal court. The reason for this is simple. Once a complaint is filed, an attorney can claim to have incurred fees even if the business immediately fixes the issues. On the other hand, were amicable demand required prior to suit, many businesses would voluntarily fix the issues and the attorney could claim no work.

ADA Title III suits also often involve little money. The plaintiff can receive no monetary award. The plaintiff is entitled only to an order compelling the defendant to comply with the regulations and make the corrections to the facility. Actually fixing the problems typically identified involves no great expense. Surveying the complaints filed in ADA Title III lawsuits identifies a set of very common violations that are repeatedly found. These include uninsulated pipes on the wheelchair accessible bathroom sink, soap dispensers that are too high, cracks in the parking lot, lack of appropriate handicapped parking spaces, and not enough maneuvering space in a bathroom for a wheelchair.

ADA Title III suits have one significant advantage over FLSA claims for plaintiffs’ attorneys, making them even easier to bring: a plaintiff’s attorney needs a new claimant for each FLSA suit. But in the Title III world, the same individual can file multiple suits against different businesses. Most of the plaintiffs’ firms bringing these claims rely on a few individuals each of whom visits businesses looking for violations and suing when those are found.

Additionally, the fact that an individual sues under Title III of the ADA for a particular violation does not prevent other individuals from suing over the same violation. Thus, some businesses have been

raced with separate lawsuits by separate plaintiffs and attorneys being filed against them at the same time on identical alleged violations. If an employer settles with one plaintiff who agrees that a particular change does not have to be made because it is not readily achievable, that settlement provides no protection against another individual filing suit in making the same claim. Finally, some Title III suits are being brought for the minutest of details. For example, a retailer was sued on one alleged violation, a passageway being one inch short of the required 32 inches in width.

The pattern for Title III violations is identical to that with FLSA violations. Once an individual lawsuit is filed, the lawyer will work with the employer to identify the agreed-upon fixes and upon agreement by the defendant to do so, seek to settle the case for a few thousand dollars (or more) in attorneys' fees and costs.

Killing Bugs

The simplest solution to avoiding ADA Title III claims is to be in compliance. But, given the length and detail of the regulations, understanding what they require with any level of specificity is difficult and beyond the competence and experience of many store managers. It may even prove more expensive to hire a consultant to evaluate and identify issues to be fixed in stores than it does to simply accept and resolve the lawsuits that are filed. That being said, many retail store issues can be assessed with a ruler and some easy observation. Parking is a good example of this process.

The regulations provide clear rules for accessible parking. Each accessible parking space must be eight feet wide. If the total number of parking spaces provided for customers is between one and 25, at least one accessible space must be van accessible (either an 11-foot space with a five-foot access aisle or an 8-foot space with an 8-foot access aisle). If between 26 and 50 are provided, then at least two accessible spaces must be provided. One of the spaces must be van accessible. The second space may either be adjacent to the van accessible access aisle or have its own access aisle that is a minimum of five feet wide. This continues to rise by one accessible space for each 25 parking spaces.

All accessible spaces must be marked with a vertical sign displaying the international symbol of accessibility that is at least 60 inches high from the bottom of the sign. Where curb ramps are used, they may not intrude into the parking access aisles. If the facility has one to six accessible parking spaces, at least one must be van accessible, meaning either 11 feet wide or eight feet wide with an eight-foot access aisle. Additional van accessible spaces are required at a rate of one for every six accessible spaces.

The accessible spaces must be the parking spaces closest to the store's accessible entrance and on the shortest accessible route to the store entrance. Many suits are filed over lack of signage, ramps intruding into spaces or access aisles and spaces that are too narrow, improperly marked, or with running or cross slopes that are too steep (greater than 1:48). But virtually all the problems can be discovered with a ruler, a little knowledge about what to look for, and a slope meter.

The Bottom Line

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Perhaps the plaintiffs in Title III ADA cases believe that businesses are not interested in their ability to utilize the business' service unimpeded. Of course, nothing is further from the truth. Disabled individuals spend money on goods and services just as non-disabled individuals do. Most businesses want these patrons and would readily fix these minor issues if simply notified.

Unfortunately, the law has been set up to encourage the filing of lawsuits rather than a workable resolution and as a result, countless dollars that could have been spent on other business needs are falling into the hands of plaintiffs' attorneys.

Please note that some states have more stringent regulations than the ADA. This article addresses only ADA compliance. We've developed an easy-to-read booklet on ADA public accommodations. It's accessible (along with several other booklets in the series) on our website at www.fisherphillips.com. For a free hard copy, or for assistance with your compliance needs, please contact your regular Fisher Phillips attorney.

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