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SCOTUS WILL HEAR CASE ABOUT ADA ACCOMMODATION "TESTER" WHO SUED BUSINESS SHE NEVER PLANNED TO VISIT

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The Supreme Court just agreed on Monday to weigh in on whether a private citizen can serve as a legal "tester" that goes from business to business looking for – and suing for – alleged violations of the Americans with Disabilities Act (ADA), even if they have no intent of patronizing the business. A hotel in Maine is challenging a federal appeals court ruling in favor of a so-called "accessibility tester" who has filed hundreds of such lawsuits against hotels even though she never planned to stay at their properties. Why is the case significant for hospitality, retail, and just about any other business with a physical location (and possibly just a website)? The ADA doesn't require claimants to notify you of alleged violations that would give you a chance to fix the problem before a lawsuit is filed. That means many businesses are caught off guard when served with a lawsuit. Worse, they may spend thousands of dollars in attorneys' fees to resolve a case – even when the cost of actual compliance is very low. What do you need to know about the potential impact of a SCOTUS ruling in *Acheson Hotels v. Laufer*?

Law Aims to Eliminate Barriers

The goal of Title III is to create a physical environment that is navigable by all. Thus, guests with disabilities who visit a hotel property – or any business with a physical space open to the public – must be provided the same access to the property and goods and services offered therein as non-disabled guests. For certain older facilities, Title III entitles guests with disabilities to accommodations that eliminate

Related People

Scott Fanning
Partner
312.346.8061

Steve A. Miller
Partner
312.580.7817

potential barriers to goods and services where such removal is "readily achievable" or "easy accomplishable and able to be carried out without much difficulty or expense." This is generally determined by examining the nature and cost of barrier removal in context of the business's financial resources. Facilities that are newly constructed, however, must be built in compliance with the applicable regulations.

In recent years, there's been a steep increase in litigation brought against hospitality businesses under Title III asserting that certain aspects of a building, bathroom, or parking lot do not comply with the ADA's detailed standards and regulations. Additionally, regulations require hotels to make information available on their reservation portals about accessibility features on the hotel property and in rooms so potential guests with disabilities can decide if the property meets their individual needs.

Over time, the interpretation of Title III has also been expanded to cover websites and mobile apps so that individuals who rely on assistive technology to connect to the internet, such as screen readers or text magnification software, can have access to the goods and services made available through these digital tools. In other words, your business may not even need to have a brick-and-mortar presence in order to be subjected to a possible ADA Title III demand or claim.

"Testing" the Law Through "Surf-By" Lawsuits

While the ADA's goals are understandable, some plaintiffs' lawyers have found a lucrative niche by engaging the services of "testers" – private citizens who go from business to business looking for ADA violations. This is nothing new. Businesses have been forced to deal with "drive-by" lawsuits for some time now, which are filed by plaintiffs who spot technical ADA violations — such as inaccessible entrances — by simply driving down the street.

In recent years, however, businesses have seen an explosion when it comes to the digital equivalent of such suits. "Surf-by" lawsuits are initiated when someone simply logs onto your company's website to search for possible accessibility violations – either shortcomings within the architecture of your website itself or whether your web presence reveals violations at your physical property – and follows through by filing an ADA lawsuit against you if any are found, often without prior warning.

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Hotels are especially susceptible to such "surf-by" lawsuits if they allow online booking through their website because of the federal regulations requiring hotel guest reservation systems to identify and describe the accessible features in the hotel and guest rooms. Plaintiffs, such as the Plaintiff in *Acheson Hotels v. Laufer*, have exploited the vagueness of such regulations to sue hotels on the basis that such descriptions are insufficiently detailed or otherwise incomplete. This means that your business can be sued by someone who is simply surfing for a lawsuit, which highlights the importance of ensuring your company's physical location and your website are compliant with current laws and regulations and are reasonably accommodating those with disabilities.

The SCOTUS Case

Acheson Hotels v. Laufer involves an "accessibility tester" who is claiming that a lodge in small-town Maine violated the ADA by failing to disclose adequate accessibility information on its website. Here are the key points you should note about the case:

- **Legal right to sue — or "standing" — is disputed.** The plaintiff claims to have the legal right to sue — even though she never planned to stay at the property — because she has a visual impairment and also uses a wheelchair. She alleges that she suffered "frustration and humiliation" when the reservation portals didn't give her adequate information about whether she could take advantage of the accommodations. She further claims that most businesses fail to comply with the ADA until they are sued.

- **Hotel says plaintiff didn't suffer any harm.** The hotel argues that the plaintiff has no standing to sue because she didn't plan to stay at the property – she lives in Florida, after all, and admitted she had no plans to visit New England – and therefore did not suffer any injury. The hotel further asserts that a five-minute phone call with the property could have answered her questions.

- **Litigation is costly for small businesses.** According to the hotel's request to SCOTUS, the plaintiff has filed hundreds of "tester" lawsuits, often targeting small hotels and bed-and-breakfasts and seeking attorneys' fees in addition to orders directing the properties to comply with the law. "For these small businesses, the cost of litigating an ADA

case — plus a potential fee award — could push them into bankruptcy," the hotel said, noting that most business owners are forced to settle.

- **Courts are divided on the issue.** The district court in this case sided with the hotel, but the 1st U.S. Circuit Court of Appeals reversed and ruled in favor of the plaintiff. You should note, however, that federal appellate courts disagree on the answers to the issued raised in this case and there is currently a 3-3 split among the federal appellate courts. Thus, SCOTUS could resolve a circuit split and set a national standard when it comes to ADA Title III surf-by lawsuits.
- **SCOTUS will review next term.** The Supreme Court is expected to hear the case next term and issue an opinion in the first half of 2024.

What Should Businesses Do?

Hotels should take this opportunity to ensure adequate information is listed on your reservation portals about the accessibility features of your properties and guest rooms.

Moreover, the SCOTUS case has lessons for all employers beyond the hospitality industry. With some exceptions, Title III applies broadly to commercial facilities and private businesses that offer goods and services to the public, including restaurants, retail stores, theaters and stadiums, doctor's offices, private schools, daycare centers, and more. It's a good practice for all businesses to review their physical locations and ensure their properties are compliant with accessibility standards.

In this digital era, you'll also want to ensure website compliance in addition to accessibility at your brick-and-mortar locations. For example, does your website have features that help facilitate easier navigation and are compatible with assistive technologies?

You should review your website on a regular basis and update your policies as needed. Notably, there are countless online tools that allow business owners to check whether their websites meet guidelines. If websites are being maintained internally, the designated employees should receive regular training on website accessibility. And if your website or mobile app is maintained by a third party, you

should regularly meet with them to make sure all aspects of the website are accessible to those with disabilities.

Although none of these steps are foolproof, they can be used to put your businesses' best foot forward if facing a "drive-by" or "surf-by" lawsuit.

Conclusion

We will continue to monitor developments related to this case and provide an update after oral argument – including our predictions for how SCOTUS will decide – so make sure you subscribe to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, any attorney in our Employee Leaves and Accommodations Practice Group, or the authors of this Insight.