On May 26, 2020, a woman with an alleged respiratory disability filed suit under the Americans with Disabilities Act (ADA) against a supermarket chain in Pennsylvania after she was denied entry because she could not wear a face mask. This lawsuit marks a growing trend of disability access lawsuits challenging face mask policies.

The Pennsylvania face-covering order at issue in the lawsuit generally requires that public accommodations deny access to individuals not wearing masks, but makes an exception for individuals who cannot wear masks due to medical conditions. The supermarket chain has taken a stricter approach, requiring that all guests—without exception—wear face masks to shop in its stores.

The supermarket chain at the center of the suit in this case is not alone. Many other retailers have implemented face mask policies that do not provide an exception for individuals who cannot wear face coverings due to medical reasons. This raises a question: is such a face mask policy lawful?

The ADA requires "reasonable modifications" of policies, practices, or procedures, such as the face mask rule, when necessary to provide goods and services to individuals with disabilities. However, the ADA does not require a public accommodation to permit an individual to participate in, or benefit from, the goods or services if that individual poses a "direct threat" to the health or safety of others. Whether something rises to the level of direct threat depends on various factors and requires an individualized assessment of the medical evidence. The business carries the burden to prove the direct threat defense. Does the risk of spreading the coronavirus (SARS-CoV-2) qualify as a "direct threat"? Cases like this may start to provide an answer to that question.

**Key Takeaways**

Public accommodations that elect to implement policies requiring all guests to wear face coverings without exception, particularly where a state or local order provides for medical exceptions, may want to thoroughly evaluate the "direct threat" in order to be in the best position to defend against any ADA challenge. Public accommodations that deny entry to customers who cannot wear face masks may want to consider offering other comparable services, such as online ordering, curbside pickup, or special shopping hours, to excluded customers.
Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm’s Coronavirus COVID-19 Resource Center as additional information becomes available. Important information for employers is also available via the firm’s webinar programs.