

ADA DEFENSE ADVICE

Author(s): Trainor Fairbrook

Service animals, most commonly dogs, do amazing things for the humans they serve. They can pull wheelchairs up slopes or across difficult terrain, help a person who has fallen arise, alert people about an eminent seizure or other attack; they can even unload the dryer and bring in the mail. They deeply enhance a person's independence. Service animals have also become use in assisting veterans with post-traumatic stress disorders re-acclimate into society, by leading their humans away from triggering environments or controlling emotional outbursts. Children with autism have also greatly benefitted from the use of service dogs in recent years.

Unfortunately, as dogs have become more popular in public places, numerous pet lovers now claim that their pets are emotional support animals or even service dogs to keep their pet in tow. These pets can disrupt business operations and undermine the appropriate welcome of true service dogs.

This article is designed to provide business owners with an understanding the difference between service animals and pets, and the tools to determine how to accommodate service animals in places of public accommodation, yet not run afoul of the laws. Not knowing when service animals must be permitted can lead to embarrassment, lawsuits for violations of the Americans with Disabilities Act ("ADA") and related state laws, as well as great expense and embarrassment.

Definition

Service animals are not pets, but are companions who work, assist or perform tasks for people with disabilities. By definition, a service animal is any dog that is individually trained to *do work* or **perform tasks** for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Under California law, the definition of a "service dog" includes training to provide "minimal protection" and "rescue work." Other species of animals such as monkeys, ferrets, cats, kangaroos and donkeys, whether trained or untrained, are generally not considered service animals.

The work or tasks performed by a service animal must be *directly related to the individual's disability*. Examples of work or tasks include, but are not limited to:

- Assisting individuals with reach or hand mobility impairments operate doors, ATMs and elevators;
- Assisting individuals who are blind or have low vision with navigation and other tasks;
- Alerting individuals who are deaf or hard of hearing to the presence of people or sounds;
- Pulling a wheelchair for a person with mobility impairments;
- Guiding an individual to safety during a seizure;
- Alerting individuals to the presence of allergens;
- Retrieving items such as medicine, telephones, writing instruments or credit cards for those with reach or hand mobility impairments;
- Providing physical support and assistance with balance and stability to individuals with mobility disabilities; and
- Helping individuals with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.

Providing emotional support, well-being, comfort, or companionship are *not* considered work or tasks within the definition of a service animal under the ADA. Such animals may be required under in housing, however, as reasonable accommodations or reasonable modifications for the individual's disability. Emotional support animals, unlike service animals, are not limited to dogs.

Asking the Two Permitted Questions

To determine if an animal is a lawful service animal, a business may ask only two questions:

1. Is this animal required because of a disability? and
2. What work or task has this animal been trained to perform?

A dog owner's answer to these questions must be taken at face value, regardless of whether the dog's service status is legitimate. If a service dog is out of control or exhibits behavior that threatens the health or safety of customers, the business may ask the owner to remove the dog from the premises. Otherwise, a business can risk accusations of discrimination, as well as

charges, fines and lawsuits.

These questions *may not* be asked, however, if the need for the service animal is obvious (e.g., the dog is guiding an individual who is blind or is pulling an obviously impaired person's wheelchair).

A business *may not* ask about the nature or extent of an individual's disability or require documentation, such as proof that the animal has been certified, trained or licensed as a service animal, or require the animal to wear an identifying vest.

When and Where a Service Animal is Allowed

Individuals with disabilities can bring their service animals in all areas of a facility where members of the public, program participants, clients, customers, patrons, or invitees are allowed.

A service animal can be excluded from a facility if its presence interferes with legitimate safety requirements (e.g., from a surgery or burn unit in a hospital in which a sterile field is required).

A public accommodation is not required to accommodate a service animal when doing so would result in a fundamental alteration to the nature of the business. The following do not qualify as fundamental alterations:

- Accommodation of a service animal at a restaurant or location that serves food (even if health codes prohibit animals).
- Accommodation at a busy sports facility.

A business may ask an individual with a disability to remove a service animal if the animal is not housebroken; or if individual cannot control the animal, (this includes an incident where the animal is making excess noise in a necessarily quiet environment).

A service animal must have a harness, leash or other tether, unless the handler is unable to use a tether because of a disability or the use of a tether would interfere with the service animal's ability to safely perform its work or tasks. In these cases, the service animal must be under the handler's control through voice commands, hand signals, or other effective means.

If a service animal is excluded, the individual with a disability must still be offered the opportunity to obtain goods, services, and accommodations without having the service animal on the premises.

Miniature Horses

A business must allow a person with a disability to bring a miniature horse on the premises so long as the horse has been individually trained to do work or perform tasks for the benefit of the person with a disability, and the facility can accommodate the miniature horse's type, size, and weight. The rules that apply to service dogs, e.g. housebroken and under control, also apply to miniature horses.

Other Provisions

A public entity or private business is not responsible for the care and supervision of a service animal.

A public entity or private business shall not ask nor require an individual with a disability to pay a surcharge or deposit, even if people accompanied by pets are required to pay such fees.

If a public entity or private business normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

Relationship to Other Laws

These provisions related to service animals apply only to entities covered by the ADA. The Fair Housing Act delineates service animal requirements for residential housing situations, and the Air Carrier Access Act mandates service animal requirements for airline travel. The definition of a service animal under each of these laws is different from the definition under the ADA, as is often the case with many State laws.

The U.S. Department of Justice and HUD have in recent years been actively suing property and business owners and operators, including transportation companies, hotels and casinos that do not properly accommodate persons with service animals. Legally, federal law sides with the person claiming need of a service animal. Problems arise, however, when humans abuse the

law.

Unfortunately, pet owners who try to pass off their dogs as service animals undermine the validity of genuine service dogs. We should all help businesses comply when appropriate, and exclude the impersonators who can fully function while their pets remain home.

| Kathleen E. Finnerty is one of the top ADA defense lawyers in the country. She has represented hotel, restaurant, retail and other commercial and public property owners defend more than 500 ADA cases and has counseled some of the country's largest property owners on compliance for over a decade. In addition to defending lawsuits and governmental investigations, Kathleen's practice focuses on ADA compliance and litigation prevention, including facilities, website and operational compliance for property owners and operators. |