



SERVICE ANIMALS IN THE WORKPLACE

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Participant's Note Pad

Introduction

What is a "Service Animal?"



LITTLER ANSWERS

Dear Littler: How Do You Address Employee Service Animal Accommodation Requests Under the ADA?

OCTOBER 24, 2017

Dear Littler:

I read a *New Yorker* article about people bringing their dogs everywhere, claiming they were emotional support animals. It mentioned a dog trying to get into Carnegie Hall. But everyone knows there's only one way to get there: Practice.

Even if Carnegie Hall isn't your workplace, how do you address employee service animal accommodation requests under the ADA?

—Hounded with Questions

Dear Hounded,

Well, there are 7 fundamentals at play.

First, note that there are two different sections of the Americans with Disabilities Act, or ADA, that deal with accommodation of service animals. Title I of the ADA addresses workplace accommodations, which is the section you're probably most concerned about. Title III of the ADA governs place of public accommodation, such as a store or doctor's office. The Title III regulations on service animals don't directly translate to the workplace. The ADA's Title I employment provisions don't have the same restricted definitions of a service animal contained in Title III, which limits service animals to dogs and miniature horses. And people don't have the right to bring pure emotional support dogs to places of public accommodation. Not so under Title I. Title I is . . . fuzzier.

Second, employers can ask more questions about a request for a service animal. Title III limits the questions that can be asked of patrons with service animals in places of public accommodation. But requests for service animals in the workplace should be treated like any other employee request for a reasonable

accommodation: you engage with the employee on what the condition is, and what the animal will do to help.

Third, an employer can seek appropriate medical documentation, and of course keep medical information confidential. Bogus requests from people simply wanting to bring their pet to work ruin it for people with legitimate service animal requests. Service animals can help people with conditions varying from vision, hearing and mobility disorders, to less visible disabilities, such as seizure disorders, post-traumatic stress syndrome, and anxiety disorders. Consider seeking certification on the animal's training and qualifications, but keep in mind that not all legitimate accommodation animals are certified, and it's easy to get fraudulent certification online for pure pets.

Fourth, set appropriate boundaries and expectations if the employee is ultimately permitted to bring an animal to work. And explore alternatives.

Fifth, don't jump to the conclusion that the animal won't work out and will cause a huge disruption. Like with any accommodation, consider giving it a whirl on a trial basis. Then you'll have a better idea – and better facts.

Sixth, bone up on what you can and can't say to other employees who ask about the accommodation – because a dog or other animal at work will generate a lot more buzz than someone needing a bigger computer monitor. Under the law, you can't tell others that the animal is a reasonable accommodation for an employee's disability. The EEOC says you're limited to saying: "we're emphasizing a policy of assisting any employee who encounters difficulties in the workplace." And that's it. Don't get bitten by the ADA's confidentiality requirements.

Finally, you may have employees concerned about animals in the workplace due to allergies or a fear of animals. Those concerns usually won't justify simply saying NO to the request for an animal at work.

Employers, do you have a vexing workplace issue? Send your question to DearLittler@littler.com.

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In-Depth Discussion | June 16, 2017

DEAR LITTLER: DO I REALLY HAVE TO LET AN EMPLOYEE BRING AN “EMOTIONAL SUPPORT PIG” TO WORK?

By: Peter Petesch and Mark Phillips

Dear Littler: One of our employees here in Iowa has requested to bring a pet pig to work for “emotional support” purposes. A pig! In a factory! Do I need to entertain her request? And if so, what do I tell other employees?

-Hog Tied in Dubuque

Dear Hog Tied in Dubuque,

We are dogged, more and more, by service animal questions. This employee’s request might sound like hogwash, but both federal and state law require you to consider it, as you would any other request for a reasonable accommodation. If we assume that this employee is protected by the Americans with Disabilities Act (ADA) and/or similar state law (given that conditions such as anxiety disorders and post-traumatic stress syndrome are more likely to be covered by the ADA based on the ADA Amendments Act of 2008), you must evaluate the pig proposal as a potential reasonable accommodation.

Before jumping into the trough of legal issues, it’s worth noting that this request is consistent with a developing trend of employees—typically with psychological impairments—seeking such a comfort animal accommodation. Animals trained as emotional support pets have been proven to help alleviate symptoms of depression, social anxiety, and post-traumatic stress disorder. Given that these animals can satisfy a legitimate need, employers cannot simply dismiss requests for emotional support animal companionship. Courts and the EEOC have at times found employees’ use of emotional support animals to be a form of reasonable accommodation.

Duty to Explore Reasonable Accommodations

As most employers know, the ADA and related state antidiscrimination laws require employers to provide reasonable accommodations to qualified employees with disabilities. Generally speaking, these statutes prohibit discrimination against individuals with physical or mental impairments that substantially limit one or more major life activities.¹ “Major life activities” is defined by the ADA to include, among other things, seeing, hearing, eating, speaking, learning, thinking and working. Congress has explicitly stated that the definition of “disability” under the ADA should be interpreted as widely as possible, to expand coverage for workers with disabilities.²

The ADA has several components: Title I covers employment relationships while Title III concerns public accommodations.³ Title III has specific regulations addressing the use of service animals by customers in places of public accommodation, such as retail stores, restaurants, museums, schools, and healthcare settings. Those regulations explain that only trained dogs and miniature horses may qualify as “service animals” that must be accommodated in the public sphere.⁴ Pure emotional support animals typically are not considered “service animals” under Title III because they are not necessarily trained to perform a task for the patron that relates to his or her disability—though certain psychiatric service animals performing defined tasks make the distinction “fuzzier.”

In the workplace context, however, there are no comparable limitations. Title I does not define the term “service animal,” and there is no administrative guidance concerning an employer’s duty to accommodate an employee by permitting the use of either service or emotional support animals. As such, the usual rules governing reasonable accommodations apply by default. Assuming your employer is covered by the ADA and/or the Iowa Civil Rights Act, you must engage in the interactive process with this employee to assess the need for and reasonableness of her request.

Employers should also be aware that some states, such as California, expressly require employers to consider emotional support pets as possible reasonable accommodations. The regulations interpreting the California Fair Employment and Housing Act, for example, define “support animals” as those that provide “emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression.” The pertinent California regulation clarifies that support animals “may constitute a reasonable accommodation in certain circumstances.”⁵

Engaging in the Interactive Process

The interactive process under federal and state law is an individualized analysis, which takes into account both the nature of the essential job functions and the individual’s limitations. It involves: (1) exchanging information with the individual about his or her disability and work restrictions; (2) identifying potential reasonable accommodations; and (3) reaching a satisfactory decision about an effective accommodation. The employee’s choice is relevant, but the employee does not necessarily get his or her preferred accommodation if another effective accommodation will do.

While the emotional support pig request may seem quirky, the general principles guiding the interactive process apply equally to this scenario. The first step in this process is often determining whether the employee is protected under the relevant statute as a qualified employee with a disability. At this stage, the ADA allows employers to ask for information about the employee’s condition

¹ See 42 U.S.C. § 12102; see also Iowa Code §§ 216.2, 216.6; Iowa Admin. Code r. 161-8.26 et seq.

² 42 U.S.C. § 12102(4).

³ Title II applies to services and programs offered by state and local governments.

⁴ 28 C.F.R. §§ 36.104, 36.302(c).

⁵ Cal. Code Regs. tit. 2, § 11065(a)(3).

and needs—and about what the animal will do to help the employee perform his or her duties.⁶ To support the need for an accommodation, the employee may need to provide medical information and documentation, which, if submitted, must be maintained separately and confidentially. (State laws may affect the scope of the medical inquiry. Again, for example, California is a different animal in this regard, imposing greater restrictions on the kind of medical information that can be requested.⁷)

An employer may also gather information about the animal and any training it has completed to be useful to the employee. That being said, not all legitimate accommodation animals are “certified.” Conversely, fraudulent certification can be easily obtained online. As a result, employers should be wary about making a decision based solely on certification—or lack of it.

The interactive process provides an opportunity for an employer and employee to meet and confer about the proposal and other options. The employer may wish to inquire into various practical details, including any factors that might indicate how the animal would behave in the specific workplace. Depending on your factory setting, for example, you might investigate if noise, smells, proximity to people, or activity levels would affect the pig. You may ask questions designed to explore how the proposed accommodation would work in reality: where would the pig stay while assisting the employee, and what exactly would it be doing? Would it eat, and where? How might you handle colleague concerns about the pig, including allergies or fears? Is the animal current on all preventative health care? Your inquiry should hone in on whether the pig would pose any safety concerns or create workplace disruptions (beyond the attention and curiosity that any pig – or dog – might attract).

If the interactive process reveals that an employee’s request is reasonable, and it does not cause “undue hardship” (which is a difficult burden for an employer to bear), an employer must give it a try.⁸ Employers may set appropriate boundaries and expectations, including how the employee will care for the animal at work. Of course, bear in mind that the accommodation may involve “secondary accommodations” as well, so to speak, to enable the employee to care for the animal. For example, your employee may need an adjustment in break times to allow her to take the pig outside for its own rest break.⁹

No matter how outlandish a request may seem at first, employers are encouraged to maintain an open mind throughout the interactive process. The interactive process has taken on greater importance for employers, as the focus in recent years has shifted from whether the employee is protected to whether the employer failed to accommodate the individual. Employers should consider documenting the information exchanged, steps taken, and decisions reached. But they should try not to panic or rush to judgment, particularly because kneejerk reactions can result in ham-handed, insufficient responses.

Communications with Curious Co-Workers

As you point out, a significant concern of many employers is how to respond to inquiries or comments from co-workers about the presence of an animal companion at work. And rightly so: the sudden introduction of a pig at work will generate a lot more buzz than someone getting a bigger computer monitor.

6 Title III curtails the inquiry into whether an accommodation is needed for a patron of a public accommodation. In that context, the business may ask only: (1) whether the animal is a service animal; and (2) what task the animal has been trained to provide for the patron.

7 See, e.g., Cal. Code Regs. tit. 2, §§ 11069, 11071.

8 Under the ADA, “undue hardship” refers to an action that requires “significant difficulty or expense.” Whether an accommodation is an undue hardship is a very fact-specific question and involves consideration of several factors, such as: (1) the nature and cost of the accommodation in question; (2) the overall financial resources of the facility and impact on expenses and resources; (3) the overall financial resources of the employer; (4) the nature of the employer’s operations, including structure and functions of the workplace; and (5) the impact of the accommodation on operations, including any impact on the ability of other employees to perform their work. 42 U.S.C. § 12111(10)(A); 29 C.F.R. § 1630.2(p)(2).

9 See, e.g., Job Accommodation Network, U.S. Dep’t of Labor, Office of Disability Employment Policy, Accommodation and Compliance Series: Service Animals in the Workplace (rev. June 17, 2011), available at <https://askjan.org/media/servanim.html>.

So what if other employees go hog wild and raise a stink about Porky? Despite any swirling office drama, employers in your situation must be prepared, professional, and tight-lipped. It would be unlawful for an employer to divulge any information about an employee's disability—including its existence. For example, if the pig accommodation is approved, you cannot explain to co-workers that the animal is an accommodation for the employee's disability. According to the Equal Employment Opportunity Commission, an employer is limited to conveying only that it is "emphasizing its policy of assisting any employee who encounters difficulties in the workplace" along with its policy of respecting employee privacy.¹⁰ While this response might seem a little weaselly, at least you know where the line has been drawn and how to proceed. And, of course, the employee may voluntarily disclose her disability and/or that she is receiving a reasonable accommodation, if she chooses—just as the employee may voluntarily have the animal wear a service vest to deflect the inevitable questions.

Given the requirements of the ADA and similar state laws, the accommodation of service and emotional support animals has become increasingly commonplace and successful. Thus, Dear Hog Tied, for better or worse, the issue of emotional support animals is here to stay.

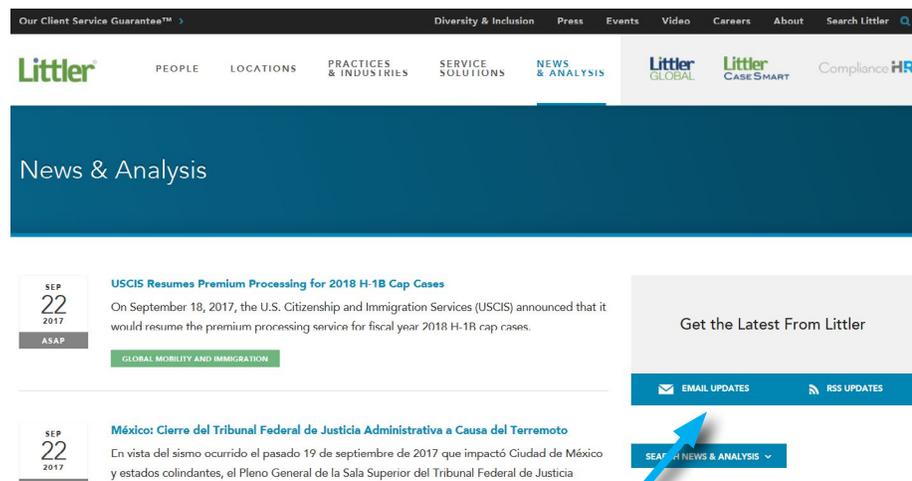
That's all Folks!

¹⁰ See EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, Question 42 (Oct. 17, 2002), available at <https://www.eeoc.gov/policy/docs/accommodation.h>

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For more information, contact: Bruce J. Sarchet, Esq. at (916) 830-7272 or bsarchet@littler.com



Guidelines and Suggestions for Communicating with Customers with Dogs

1. Approaching a customer with a dog:
 - a. “Hi there, we have noticed an increase in the number of dogs in our business we want to be clear about our policy—we welcome service dogs but do not permit emotional support or pet dogs in our stores. In order to protect the rights of people who use service dogs, we are asking all costumers with a dog to answer these two questions as outlined in the Americans with Disabilities Act (ADA):
 - i. “Is your dog a service dog required for a disability?”
 - ii. “What tasks is the dog trained to perform?”
 - b. If the customer answers both questions confirming the dog is a service dog, welcome both to the store.
 - c. If the customer is unwilling to answer:
 - i. “We have received complaints from customers with disabilities who use a service dog about the number of dogs in our establishment. Asking these two questions helps us protect the rights of service dog users in our stores.”

*Remember the dog must be under control at all times. If the service dog is not in control, refer to situation #3

2. Asking for a dog (Emotional Support/Therapy/Pet) to be removed from a business:

*Remember, if the dog does not qualify as a service dog based on Situation #1, it does not have public access rights under the ADA.

- a. “We have received complaints from customers with disabilities who use a service dog about the number of dogs in our establishment. We want to clarify that only service dogs trained in specific tasks are permitted into our business. We would be happy to serve you without your pet/ESA/therapy dog present.”

3. Asking for a service dog to be removed from a business:

*Remember, a service dog can only be removed from a business if they are out of control or posing a threat and the handler does not take sufficient action to control the dog, or if the dog is not housebroken. You **must** offer to serve the customer without the dog's presence unless the person poses a threat.

- a. If the dog poses a threat to safety (aggression):
 - i. "I understand that your dog is a service dog, but we have to ask that you remove him from the business due to its aggressive behavior. The Americans with Disabilities act requires service dogs to be safe and under control at all times in order to maintain public access rights."
- b. If the dog is behaving in an uncontrolled manner or not housebroken:
 - i. "I understand that your dog is a service dog, but we have to ask that you control your dog at all times or you will be asked to remove him from the business. The Americans with Disabilities act requires service dogs to be safe and under control at all times in order to maintain public access rights."

4. What to do if a situation escalates:

- a. Keep Calm- Don't escalate your response
- b. Refer back to pertinent laws and behavior guidelines
- c. If the situation remains escalated, request your supervisor's assistance

Need more information or a training at your workplace? Email Robert Schwinn at rschwinn@cci.org or Wallis Brozman at wbrozman@cci.org



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