

Blog Post

Service and Support Animals: What Businesses Can and Cannot Do

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By [Emily C. Ayvazian](#)

We have all seen it. The unruly lap dog brought into a restaurant, yipping away, or the big dog running through a store dragging along its owner who, of course, claims it is a “service animal,” even though it clearly is not. Many individuals need and have legitimate service animals, while others need and have emotional support animals. But the two are not the same and are not accorded the same level of protection.

Abuse of the concept of service animals is widespread, so much so that U.S. Department of Transportation (DOT) adopted new more restrictive rules in December 2020 for traveling with them by air. Airlines are permitted to treat emotional therapy animals as pets, rather than service animals, and to require passengers with a disability traveling with a service animal to complete and submit to the airline a DOT form, in advance, attesting to the animal’s training, good behavior, and health, but businesses don’t have that option. Businesses faced with employees or customers seeking to pass off pets as service animals face a tough dilemma and need to know two things: what animals are protected, and what can they do when a customer and/or employee wants to bring an animal onto their premises?

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A service animal is one 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. The work or tasks performed by a service animal must be directly related to the individual's disability. While emotional support, comfort, and/or therapy animals provide companionship, relieve loneliness, and sometimes help with depression, anxiety, and certain phobias, they do not have special training to perform tasks that assist people with disabilities.

The Americans with Disabilities Act (ADA) provides guidance on service animals. Title II, which applies to state and local government services, programs, and activities, and Title III, which applies to places of public accommodations, specifically limit a service animal to a dog and do not cover emotional support, comfort and therapy animals. Interestingly (and oddly), ADA regulations also contain a provision covering miniature horses, which states that businesses must make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

Title I of the ADA, which prohibits discrimination in the workplace, however, does not define what constitutes a service animal, nor does it distinguish between a service, emotional support, comfort and/or therapy animal.

For Customers: What Businesses Can and Cannot Do

So, a customer walks into your place of business with an animal and you have a no-pets policy. What can you do?

First, if the animal is anything other than a dog or a miniature horse, then it is not a protected service

animal under the ADA and you may ask that customer and their animal to leave.

However, assuming the animal is a dog, when the disability and service are not necessarily obvious, businesses are allowed to ask their customers two specific questions to determine if the dog is a protected service animal:

- “Is the dog required because of a disability?” and
- “What work or task has the dog been trained to perform?”

That is it. The customer cannot be asked about his or her disability, cannot be asked to show proof that the dog has been certified, trained, or licensed as a service animal, and cannot be required to demonstrate the task(s) the dog has been trained to perform. Service dogs are not required to wear a vest nor are they required to wear any form of identification.

Individuals with disabilities accompanied by service dogs must be allowed in all areas of a business where members of the public can go and may not be set apart from other customers. Further, businesses cannot ask or require an individual with a disability to pay a surcharge or deposit of any kind, even if such fees are normally required for pets. However, if the business normally charges its non-disabled customers for damages they cause (like a hotel charging for the cost of repairs to a damaged room), they can likewise impose this charge on an individual with a disability for damage caused by the service dog. Because service dogs are working animals and not pets, businesses should advise their employees to leave service dogs alone and not to pet them, talk to them or offer them treats.

Note that the service dog protection is not all encompassing. Businesses can exclude service dogs from their premises if the dog is not housebroken, poses a direct threat to the health or safety of others (such as barking, growling, or being aggressive

towards other customers), and/or is out of control (such as jumping on other people or running away from its owner), and the owner does not take effective action to control the dog. Before excluding the service dog, however, businesses should first ask the owner to get control of the animal. If a service dog is removed from the premises, the individual with a disability must still have the opportunity to re-enter the business without the animal.

Also, there are some circumstances where the presence of a service dog can be dangerous or can change the fundamental nature of the business and can therefore be excluded. This includes situations where having a service dog could jeopardize safety (a sterile environment like an operating room), violate public health rules (public swimming pools), or would change or interfere with the fundamental nature of the business (such as a zoo exhibit, where the service dog could disrupt the animal on display). Although service dogs can be excluded from limited and specific areas, the service dog should still be allowed in other areas where those same concerns don't apply, such as waiting rooms, the pool deck, or zoo dining halls, respectively.

For Employees: Service Animals As A Reasonable Accommodation

Now, let's say an employee asks to bring their service or emotional support animal in as a workplace accommodation, even though your business has a no-pets policy. Do you have to allow this? As is often the case, it depends.

As Title I does not specifically address service animals, and therefore does not limit the type of animal that an individual with a disability can take to the workplace, allowing a service or emotional support animal to accompany an individual with a disability to work may be considered a reasonable workplace accommodation. This request should be processed like any other request for a reasonable accommodation.

As with other accommodation requests, the employer may request medical documentation regarding the existence of the disability and how the animal helps the individual perform his or her job. From there, the employer and employee should engage in the interactive process to determine if there are other available alternatives and whether the requested accommodation will create an undue hardship on the employer or pose a direct threat, i.e. a significant risk of substantial harm to the health or safety of that employee or others, which cannot be eliminated or reduced by a reasonable accommodation.

Note that *potential* allergies or safety concerns may not be valid reasons to outright refuse the use of a service or emotional support animal, as seen in a recent lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC) against a national arts-and-crafts retailer. In that case, shortly after starting work at the crafts store, an employee told her manager that she needed to bring her service dog to work to help with her PTSD, anxiety, and depression. According to the EEOC, the company's human resources representative met with the employee to discuss her request but concluded the dog would present a safety concern because a coworker or customer might be allergic to or trip over the dog, or the dog might break something. Store managers were unwilling to allow the employee's service dog in the store to see whether there was an actual safety concern, and the company ultimately terminated the employee when she could not work without her service dog, the EEOC said.

As that case demonstrates, one solution may be to allow the accommodation on a trial basis, with a set plan and ground rules, to see if it works. While there are some workplaces where it would be nearly impossible to safely accommodate a service or emotional support animal, such as an emergency room or a factory floor with forklift traffic, assuming the nature of workplace environment would not pose a direct safety risk, employers should consider

all reasonable requests for these types of accommodations.

For further information or specific guidance regarding service animals or your Company's obligations under the ADA, contact your Akerman labor and employment attorney.

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