WHERE CAN ASSISTANCE ANIMALS GO?

Should a tenant’s assistance animal be allowed to go wherever the tenant goes around the community? If the tenant goes to the clubhouse, fitness room, or business center, can their assistance animal go with them? Is a tenant’s assistance animal allowed at the pool? Is a tenant’s assistance animal allowed in the pool? With community pools about to open, now is a good time to answer this question. Based on risk analysis alone, in most instances, landlords should not challenge where an assistance animal is allowed. However, as with many fair housing questions there’s not a simple yes or no answer. This month we take a deep dive to clarify this complex topic.

Because the Internet is rife with misleading information, landlords sometimes get confused about the terms assistance animal, service animal, and emotional support animal. Accordingly, before we talk about where assistance animals can go in your community, let’s take a moment to clarify some terms. Under fair housing laws, disabled tenants are entitled to assistance animals. There are two types of assistance animals. One type is a service animal. A service animal is an animal that is trained to perform a specific task. The other type of assistance animal is an emotional support animal or ESA. An ESA does not need to be trained. An ESA meets a tenant’s disability related needs by reducing disability related symptoms. The legal requirements for a tenant to have either a service animal or an ESA are identical.

While not as clear as it could be and without answering every question, HUD did issue some guidance on assistance animals in April 2013 (the “2013 Guidance”). The 2013 Guidance explains some of the obligations that a landlord has with respect to assistance animals. Under

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NEW LAW: REQUIRES COPIES OF LEASES AND RECEIPTS FOR RENT

Starting in August 2018, all Colorado landlords will be required to provide their tenants with a copy of a lease and provide tenants with a receipt for rent received. Senate Bill 18-010 was signed by the governor creating new Colorado Revised Statutes (C.R.S.) §38-12-801 and C.R.S. §38-12-802. Read a copy of the new law here tinyurl.com/THS-SB18-010. These are requirements for all landlords, there is no exception for properties managed by an individual owner. So from a big company managing one thousand units, to owners managing one unit, this new law will apply to you.

Copies of Leases C.R.S. §38-12-801

This is an example of a law that should have a minor impact on the industry, especially with regard to responsible landlords. It is difficult to imagine a situation where a landlord and tenant would execute a lease agreement and the tenant would not be provided with a copy of the agreement. However, surely a tenant ran into this scenario and voiced their concern to their legislator. A landlord is allowed to provide an electronic copy of the lease agreement to their tenant. The copy must be provided within one week of execution. The law does not address a requirement for the landlord to provide additional copies of the lease agreement later in the lease term.

Mandatory Receipts C.R.S. §38-12-802

Landlords will have to provide receipts for rent. The timing of the receipt varies by how the tenant makes their payment.

If a tenant makes an in person payment to the landlord with cash or a money order, a receipt must be provided immediately.

If a tenant makes a payment that is not delivered in person with cash or a money order, if requested by the tenant.
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the 2013 Guidance, if the tenant is granted a reasonable accommodation to have an assistance animal, then the assistance animal is allowed to go in all areas of the premises where persons are normally allowed to go.

Even though HUD’s assistance animal guidance has been out for 5 years, only three court decisions have discussed the 2013 Guidance. The most significant case was a United States District Court case in Utah (Sanzaro v. Ardiente HOA). In Sanzaro, the owner of an HOA unit was obviously disabled because she used a walker. When the owner brought her assistance animal (a Chihuahua) with her to the clubhouse, the onsite team asked the tenant how her dog assisted her in enjoying the clubhouse. The issue in Sanzaro was whether the HOA violated the law by asking the owner why she needed the assistance animal in the clubhouse. The HOA argued that under the law they were entitled to information (documentation) regarding owner’s need for the assistance animal because the owner’s need for the assistance animal was not obvious. Specifically, what was the owner’s disability related need to have the animal at the clubhouse (why was the dog necessary for the owner to use and enjoy the clubhouse on the same basis as a non-disabled individual)?

The court agreed and found that a reasonable person would be justified in asking how the assistance animal helped the owner enjoy the clubhouse. In other words, because the owner’s disability related need for the animal to be at the clubhouse was not obvious; the HOA was allowed to ask for documentation establishing the owner’s disability related need for the animal. Accordingly, the Sanzaro court confirmed under what circumstances a landlord may ask for documentation. Specifically, when a tenant’s disability related need is not obvious, a landlord may ask a tenant for documentation regarding the tenant’s disability related need for an assistance animal.

This legal principle is one of two keys to answering the question where on the property a tenant may take an assistance animal. The other key is the type of assistance animal. Remember, assistance animals are either a service animal or an emotional support animal.

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tenant the landlord must provide a receipt within seven days of the request for a receipt.

The statute goes on to define what must be included on a receipt: (1) the amount paid by the tenant (2) the recipient of the payment (3) and the date of the payment.

However, like many rules there is an exception to the receipt requirement, if there is already an existing procedure to provide the information that is required on a receipt, an additional receipt is not required. For example, if there is an online portal that provides a record of this payment, with the receipt requirements, a separate receipt is not necessary. Landlords can provide an electronic receipt unless a tenant requests a paper copy in which case the landlord must produce a paper copy.

There is no clear penalty that was adopted in this statute. That does not mean that failing to comply would be without any consequences to a landlord. A landlord that does not comply with the law of leases or receipts will not be making a positive impression on a judge in the event they have to go to litigation. In addition, the consequences for a licensed real estate broker could be more severe. An argument could be made that a licensee that fails to comply with the law regarding receipts could be subjected to discipline. Now it is unlikely that a real estate broker is going to lose their license over failing to provide receipts, but if a licensed broker is not complying with this law, chances are an investigation into their practices may reveal other more serious license violations.

There is a continued movement towards using electronic invoices, or online bill payment portals throughout the rental industry. The legislature did consider this trend and allows for providing tenants with an electronic receipt, but the law requires the production of a paper receipt upon request of the tenant. After hearing about the law several seasoned property managers pointed out some practical concerns regarding delivery of the receipt. The law is silent about whether or not a landlord has to mail a receipt to a tenant. For most multi-family complexes there is an onsite office, however most managers of single-family homes may be several miles away from the home they are managing. It appears that making the receipt available for the tenant to pick up would be acceptable, if it is not being provided in an electronic format.
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When a tenant makes a request to have an assistance animal as a reasonable accommodation, the tenant is asking for an exception to one of two rules. If the community is a no pet community, the tenant is asking for an exception to this rule. If the community allows pets, the tenant is asking for an exception to the community’s pet policies, i.e. asking for pet fee, pet deposit, and pet rent to be waived.

Assuming the tenant is disabled and needs an assistance animal, the tenant is granted an exception to the applicable rule (either no pet or community’s pet rules) and the assistance animal is allowed in the tenant’s unit and on the community property. However, just because the tenant was granted a reasonable accommodation (an exception) to have the assistance animal, it doesn’t necessarily follow the tenant should be automatically allowed to take the assistance animal everywhere on the property.

Specifically, by granting the reasonable accommodation request, the community allowed the assistance animal in general. This does not automatically mean that the community granted a further exception to the pool rules. For example, the community’s pool rules might state “no pets or animals” in the pool area. The issue now becomes whether the tenant is entitled to an exception (a reasonable accommodation) to this rule as well. As discussed in Sanzaro a critical issue now becomes, why does the tenant “need” the assistance animal in the pool area? You should note a landlord cannot re-evaluate or ask again whether the tenant is disabled (as defined by fair housing laws) because the tenant already established this when the initial reasonable accommodation request was granted.

The type of assistance animal that the tenant has might make the answer to this question immediately apparent. Specifically, if the assistance animal at issue is a Seeing Eye dog (a service animal), then tenant’s need for the animal is obvious and the community would have to allow the dog in the pool area. If the assistance animal is an ESA, then it is not obvious why the tenant needs an exception to the community’s rule that no pets or animals are allowed in the pool area. Thus, the landlord legally could inquire about the tenant’s need for the ESA in the pool area.

Landlords should use the same analysis to address the dog in the pool scenario (dog is in pool area, but tenant wants the dog to go swimming). This came up last year when a tenant took their assistance dog into one of our client’s pools. As a result, the pool had to be drained and the pool filters had to be replaced. The pool was down for more than a day, inconveniencing other tenants and taking the maintenance team away from other tasks. Unless a tenant’s need to have the animal in the pool was obvious, the client should have asked the tenant why they needed to have the animal with them in the pool. If the tenant did not provide a disability related need to have the assistance animal in the pool, then the client should have informed the tenant that the dog was not allowed in the pool.

Even if the tenant was able to prove a disability related need for the dog to be in the pool, this specific reasonable accommodation request could be denied because it is unreasonable. Allowing a dog in the pool causes an undue administrative and financial burden on the community, i.e. the damage that would result if the request is granted. Because health codes for operating pools do not allow animals to be in the pool, the request can also be denied to protect the health and safety of both the tenants and the animals. But remember, if a tenant wants to bring an assistance animal with them in the pool or, pool area, or in other areas of the community, then you have to assess each situation on a case-by-case basis.

In addition to lack of disability related need and unreasonableness, the 2013 Guidance allows you to restrict the presence of an assistance animal for two other specific reasons. You can restrict the presence of an assistance animal if the animal becomes a direct threat to the health and safety of others, or the animal would cause substantial physical damage to the property that cannot be reduced or eliminated by another reasonable accommodation.

Considering all factors, should a landlord try to challenge where an assistance animal can go? No, not in most instances. Like many other fair housing policies, regardless of the law, the best policies are driven by practicalities and risk analysis. When the law is not clear or could be significantly clearer, we can’t recommend landlords take actions that may result in legal liability. Overall, the law in this area is not clear or certainly not as clear as it needs to be to justify relying on it. For example, attorneys and judges cannot even agree on the effect of the 2013 Guidance. On the one hand, some argue that the 2013 HUD Guidance on assistance animals is just that—guidance. Accordingly, unlike HUD regulations it does not
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The Sanzaro court also pointed out something we have been saying for a long time. Specifically, the law does not provide a clear standard for what evidence establishes a disability-related need for an assistance animal. When the standard for determining need is not clear and whether a tenant needs an assistance animal in a particular area is the primary basis for challenge, we can’t recommend challenging in most instances based on risk analysis. Whenever the law is not clear, risk analysis dictates taking the path that minimizes risk.

The potential to encounter a tester also dictates for landlords not to challenge applicants on where assistance animals can go. Given the complexity of this topic, testers have exploited it and will continue to exploit it. Specifically, testers (posing as applicants) will ask landlords, if their assistance animal can accompany them everywhere on the property, including in the pool area. The response to this question should always be yes. Anything less than yes can cause problems. See Landlord News, April 2014 & October 2016.

Finally, assuming that a landlord is willing to accept the risks associated with challenging the presence of assistance animals in various parts of the community, the onsite teams would be responsible for carrying out these challenges on a day-to-day basis. THS has substantial experience in evaluating reasonable accommodation requests. Arguably, THS evaluates more reasonable accommodation requests than any law firm in the country. Based on our experience, this would be problematic. For a variety of reasons, onsite teams struggle to carry out standard reasonable accommodation SOPs for a variety of reasons including lack of training, unclear policies, lack of priority, and lack of commitment. See Landlord News September 2016. Accordingly, trying to effectively tackle this complex and nuanced issue by challenging would be difficult.

MAY 23rd is Lucky Penny Day

IMPORTANT THS MAY DATES

- MAY 8TH  EVICTIONS WORKSHOP
  THS Lower Level Conference Room
  3600 So. Yosemite St.
  Denver, CO
  1:00 p.m. - 4:00 p.m.

- MAY 16TH  NO DOUGLAS COUNTY COURT

- MAY 16TH  WEBINAR WEDNESDAY
  SUBJECT TBD
  9:00 a.m. Online

- MAY 16TH  AASC LEGAL HANDBOOK CLASS
  545 E. Pikes Peak Ave., Ste. 105
  Colorado Springs, CO
  1:00 p.m. - 4:00 p.m.

- MAY 18TH  South Client Lunch
  Dave & Busters
  2000 S. Colorado Blvd
  11:15 a.m. - 1:00 p.m.

- MAY 23RD  AAMD TRADE SHOW
  Denver Mart
  451 E. 48th Ave Denver
  8:00 a.m. - 4:00 p.m.

- MAY 28TH  MEMORIAL DAY HOLIDAY
  ALL COURTS CLOSED
  THS CLOSED