



Hot Topics in Employment Law for Massachusetts Health Care Organizations

Part 3: ADA Title III / Public Accommodation

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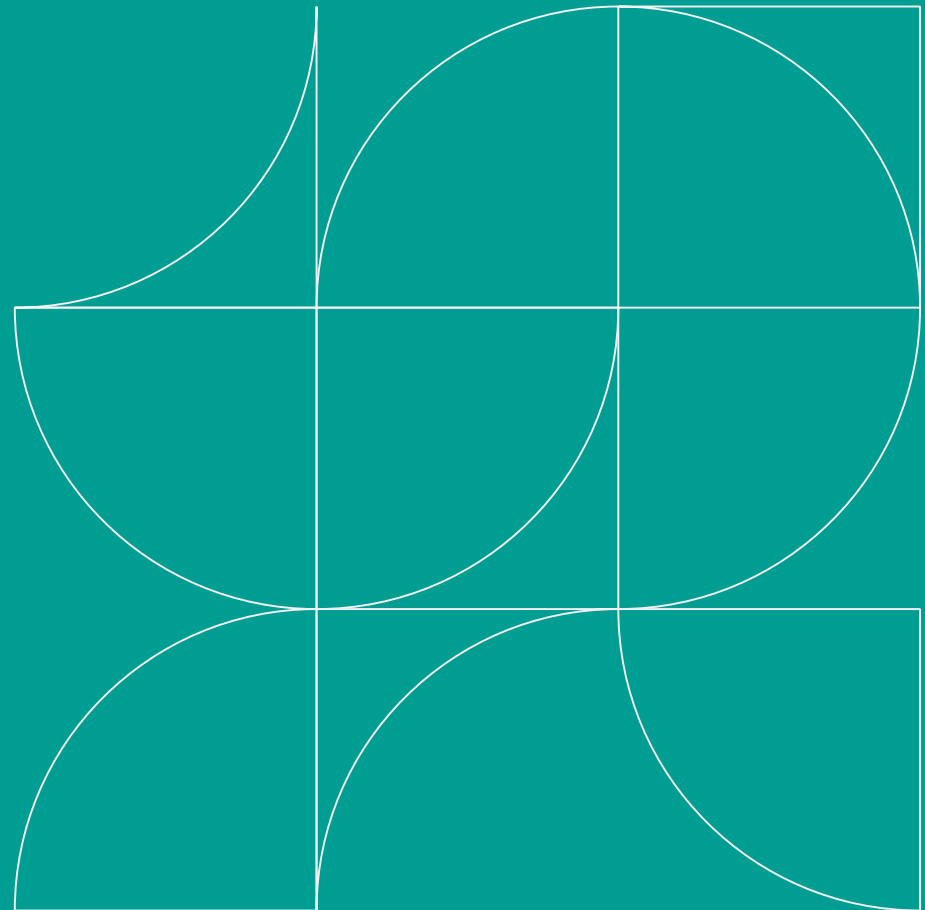


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Agenda

- 01** Overview of ADA Title III, Rehabilitation Act, and ACA Sec 1557
- 02** Websites/Mobile Apps/Telehealth
- 03** Auxiliary Aids and Services
- 04** Service Animals

Overview of Title III, Section 504, and ACA Section 1557



ADA Background

- The **Americans with Disabilities Act (ADA)** is a federal civil rights law that prohibits discrimination against individuals with disabilities.
- Signed into law by President George H.W. Bush on 7/26/90
- Covers five key areas:
 - Employment (Title I)
 - State and Local Government Activities (Title II)
 - Public Transportation (Title II)
 - **Public Accommodations (Title III)**
 - Telecommunications (Title IV)



Today's focus = Title III

ADA Background (Cont.)

- Under Title III of the ADA, public accommodations must:
 - have **facilities that are accessible** to individuals with disabilities (*i.e.*, members of the public) and maintain them;
 - make **reasonable modifications** to policies, practices, and procedures when necessary to ensure that individuals with disabilities have equal access to public accommodations' goods, services, facilities, privileges, advantages, and accommodations; and
 - ensure **effective communication** with individuals with disabilities by providing them **auxiliary aids and services** at no additional charge.
- Remedies:
 - Private party: Injunctive relief, attorneys' fees & costs (possible damages/penalties under state corollary laws)
 - DOJ Action: Penalties of \$111,614 for a first violation and \$223,229 for a subsequent violation; injunctive relief, damages



Covered Entities Under ADA Title III

A public accommodation is:

- Private
- Affects commerce
- Falls within at least one of the following 12 categories:
 - 1) Places of lodging (e.g., inns, hotels, motels)
 - 2) Establishments serving food or drink (e.g., restaurants and bars);
 - 3) Places of exhibition or entertainment (e.g., motion picture houses, theaters, concert halls, stadiums);
 - 4) Places of public gathering (e.g., auditoriums, convention centers, lecture halls);
 - 5) Sales or rental establishments (e.g., bakeries, grocery stores, hardware stores, shopping centers);
 - 6) Service establishments (e.g., laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, **professional offices of health care providers, hospitals**);
 - 7) Public transportation terminals, depots, or stations (not including facilities relating to air transportation);
 - 8) Places of public display or collection (e.g., museums, libraries, galleries);
 - 9) Places of recreation (e.g., parks, zoos, amusement parks);
 - 10) Places of education (e.g., nursery schools, elementary, secondary, undergraduate, or postgraduate private schools);
 - 11) Social service center establishments (e.g., day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies); and
 - 12) Places of exercise or recreation (e.g., gymnasiums, health spas, bowling alleys, golf courses).
- ***Must it be a physical place?***

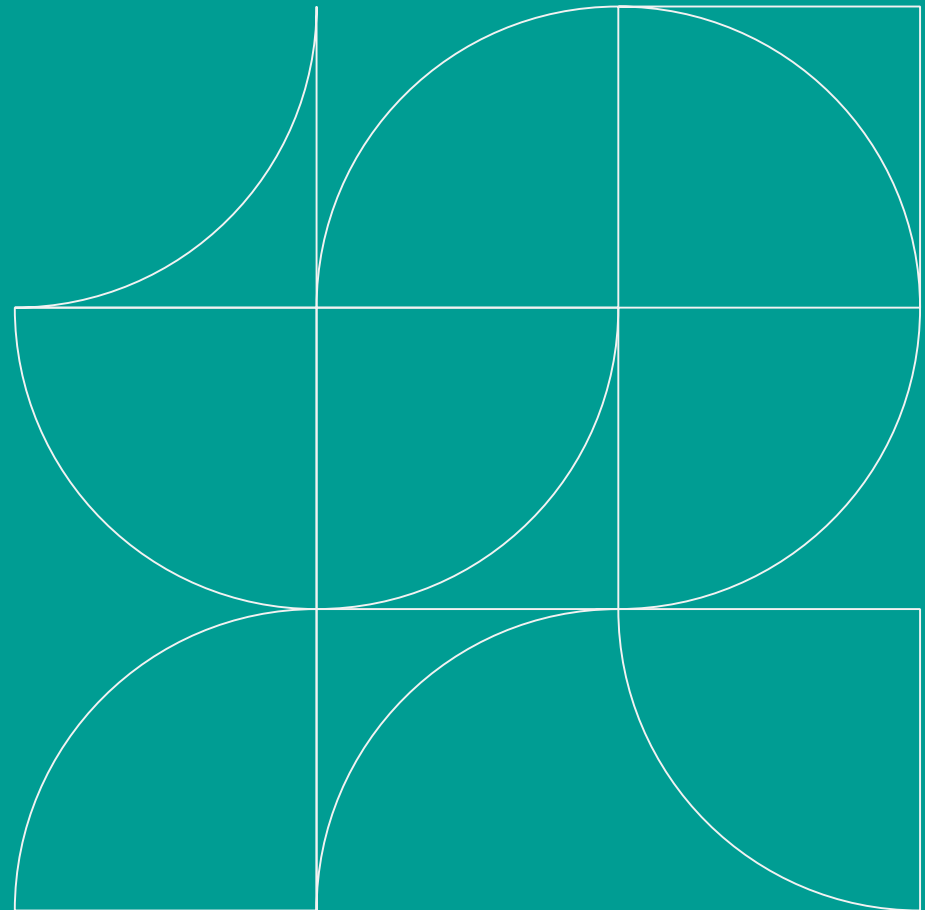
Overview of Section 504 of Rehabilitation Act

- 1973 federal civil rights law; Section 504 prohibits disability discrimination in programs or activities conducted by federal agencies, and **programs or activities receiving federal financial assistance**
 - **Healthcare facilities and organizations typically covered as programs/activities receiving federal funds**
- **Money Damages:**
 - Spending clause legislation – damages limited to remedies typically available in breach of contract cases; **no** punitive damages; **no** emotional distress damages
 - Intentional discrimination required
- **MA state public accommodations law:** G.L. c. 272, §98 – remedies provided by c. 151B (damages, injunctive relief)

Overview of Section 1557 of the Affordable Care Act

- Statute incorporates Section 504 prohibition on disability discrimination in “any health program or activity, any part of which is receiving Federal financial assistance”
- Covers all operations of entities principally engaged in the business of providing healthcare that receive federal financial assistance – includes health insurance issuers, hospitals, health clinics, physician practices, nursing homes
 - For entities not principally engaged in provision of healthcare, applies to the extent that any healthcare program or activity receives federal funds
- Regulations require accessibility of programs/activities provided by electronic means or IT
- Also prohibits discrimination on basis of race, color, national origin, sex, and age
- Incorporates enforcement mechanisms under other federal civil rights laws (e.g., Section 504 remedies for disability discrimination)

Websites, Mobile Apps, and Telehealth



What is an “accessible” website or mobile app?

- One that can be used by people with various types of disabilities.
- **Blind:** Screen reader compatibility
 - Alternative text for images
 - Properly labeled form fields
 - Proper use of headings
 - Keyboard-only access
 - Audio descriptions for videos
- **Low Vision:** Color contrast, text resizing
- **Deaf or Hard of Hearing:** Captions for audio content
- **Mobility:** Keyboard-only access; ability to slow down or turn off time outs
- **Epilepsy:** No flashing content
- **Color Blind:** Color not used as sole method of conveying information



Web Content Accessibility Guidelines (WCAG)

- Published by private group of experts, W3C
 - Adopted WCAG 2.1 AA in June 2018
 - Adds 17 Success Criteria to WCAG 2.0
 - Mobile Apps, Low Vision, Cognitive Impairments
- Not a legal standard under Title III of the ADA but a de facto standard
- Standards of accessibility are governed by ADA, Rehabilitation Act, ACA
- Biden Admin Proposed Rule – *Nondiscrimination in Health Programs and Activities* -- would require accessibility of all electronic and IT of covered entities under Section 1557

WCAG and Mobile Apps/Patient Portals

- Voiceover (iOS) and Talkback (Android) readers used for mobile devices
- Mobile app accessibility included as “tag-along” claims in website litigation
- WCAG applies broadly to digital products, including mobile apps and websites with public and password access
- Claims and recourse against inaccessible providers of third party/portal content

Regulatory Update (Digital Accessibility)

2010-2016: 2010 ANPRM pending

2017: DOJ Withdrew ANPRM

February 28, 2022: Advocacy groups ask DOJ to issue regulation by end of Biden administration

March 18, 2022: DOJ Issues Website Accessibility Guidance

- Possible response to Feb. 28, 2022 letter by 181 advocacy groups to DOJ asking for “enforceable online accessibility standards by the end of the current Administration”
- “Longstanding” interpretation that ADA applies to internet
- States that covered entities have “flexibility” in how to apply, without elaboration
- References Consent Decrees incorporating WCAG 2.0 AA

Title III Website Litigation:

Key Cases & Themes



- Federal Courts disagree on whether web-only businesses are covered public accommodations.
- Prior settlement promising to make website accessible is not a bar to subsequent suit.
- Being in the process of making your website accessible usually does not moot case, but having completed the task might.
- If the plaintiff can't ever use the services of the business whose website is inaccessible, case may be dismissed for lack of standing.
 - **SCOTUS recently granted cert to decide tester standing for website cases. First Circuit, *Laufer v. Acheson Hotels***
- Only a handful of cases have been litigated to judgment.

Title III Website Litigation:

Key Cases & Themes



Robles v. Domino's Pizza LLC (9th Cir. 2019)

- Lawsuit alleges website and mobile app not accessible to the blind.
- Federal trial court granted early dispositive motion on due process and primary jurisdiction grounds.
- 9th Circuit reversed & remanded, finding:
 - ADA applies to websites and mobile apps that have nexus to physical place.
 - Rejected due process/primary jurisdiction arguments – Domino's had notice of the general requirements under ADA Title III.
 - Telephone service as an alternative could not be decided on motion to dismiss.
- Domino's appealed to US Supreme Court; declined to review (October 7, 2019).
- On remand, partial summary judgment granted. Judge found that website is not fully accessible to plaintiff because future order can't be placed using a screen reader.
- Case settled after six years of litigation

Title III Website Litigation:
Key Cases
Merits Decisions



Few Courts Have Made Decisions on the Merits

Gil v. Winn Dixie (11th Cir. 2021)

- Bench trial verdict for plaintiff
 - Accessible website by 12/1/17 (WCAG 2.0 AA)
 - Annual training for employees on website accessibility
 - Require third party content to be accessible
 - Adopt web accessibility policy by 12/1/17
 - Fees/costs totaling \$105,271 awarded to plaintiff
- Reversed by 11th Circuit
 - Website not a public accommodation
 - Website barriers must prevent access to a good or service at the store to be actionable
- In response to Petition for Rehearing, 11th Cir. vacates both the appeal and the judgment as moot because the injunction had expired pending appeal.

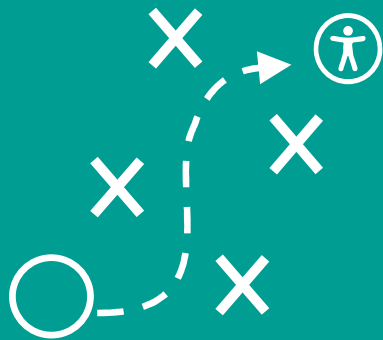
Title III Website Litigation:
**Are websites
covered by the
ADA?**



1st Circuit: Has not considered a website case but has held that a public accommodation does not have to be a physical place.

- *Carparts v. Automotive Wholesaler's Association of New England, Inc.* (1994).
- Other circuits have split:
 - 11th: Alleged website barriers must prevent access to a physical place of public accommodation (“nexus” approach)
 - 9th: Also adopts nexus approach
 - 3rd Circuit: Not considered website case but held that public accommodation must be a physical place

Strategies for Avoiding/Defending Website Litigation



- Create and maintain website/mobile apps
- Accessibility Statement
- Training
- Vendor contracts
- Third party content: service, media, user-generated
- 24/7 telephone line

Telehealth: A Hot Topic for Medical Communications

- With the COVID-19 pandemic, many health care providers and patients turned to telehealth as a way to provide and receive health care services. Application continues post-pandemic.
- Telehealth has many advantages, but it can also present challenges to those with visual, hearing, cognitive, or other disabilities (e.g., if a telehealth website/video conference platform is inaccessible).
- On July 29, 2022, the Department of Health and Human Services (HHS) and DOJ issued a joint “Guidance on Nondiscrimination in Telehealth: Federal Protections to Ensure Accessibility to People with Disabilities and Limited English Proficient Persons.”

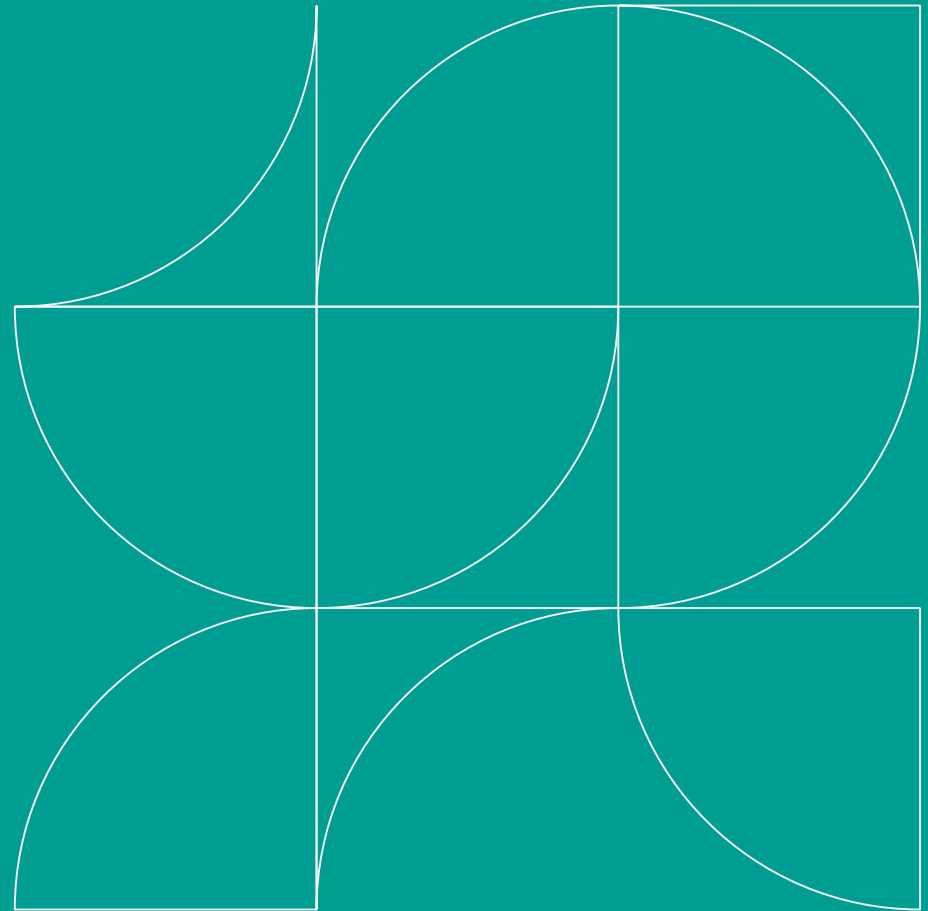
Recent DOJ/HHS Joint Guidance on Telehealth Accessibility

- What is the impact of the Guidance?
 - Guidance states that all entities subject to Section 504 of the Rehabilitation Act, the ADA, Title VI of the Civil Rights Act of 1964, and Section 1557 of the Affordable Care Act should review their telehealth systems, policies, and processes to ensure accessibility for telehealth programs for all persons with disabilities.
 - Notes that Section 1557 reg specifically requires covered health programs/activities provided by electronic means or IT to be accessible
 - The Guidance provides specific examples of actions that health care providers may need to take to ensure that health care offered via telehealth is accessible, as well as resources for providers and patients about telehealth and civil rights protections.
- What exactly falls under the umbrella of “telehealth”?
 - The Guidance defines “telehealth” to include videoconference and telephone medical appointments, as well as electronic written exchanges about a patient’s care.

Examples of Accessible Telehealth from DOJ/HHS Guidance

- Ensuring that the telehealth electronic platform is coded to support screen reader software used by blind individuals.
- Providing instructions or allowing extra time for a patient to become familiar with the telehealth platform in advance of a remote appointment.
- A provider that typically limits telehealth appointments to 30 minutes may need to schedule a longer appointment for a patient who needs additional time to communicate because of their disability.
- A mental health provider who uses telehealth to provide remote counseling to individuals may need to ensure that the telehealth platform it uses can support effective real-time captioning for a patient who is hard of hearing. The provider may not require patients to bring their own real-time captioner.
- When an interpreter is necessary, the provider will need to make sure that their telehealth platform allows the interpreter to join the session. The provider may not require patients to bring their own interpreter.

Auxiliary Aids and Services



What are Auxiliary Aids & Services to Ensure Effective Communication?

- **Must provide to facilitate “effective communication” with people with disabilities, unless undue burden or fundamental alteration would result.**
 - A fundamental alteration is modification so significant that it alters the essential nature of the goods, services, or facilities
 - Undue burden means “significant difficulty or expense”, and depends substantially on resources of the covered entity
 - Public accommodation still has obligation to otherwise communicate effectively

What are Auxiliary Aids & Services to Ensure Effective Communication?

- **Examples** of auxiliary aids and services
 - **Deaf or hard of hearing.** Qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, and exchange of written notes.
 - **Visual Disabilities.** Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, and assistance in locating items.
 - **Speech Disabilities.** TDD's, computer terminals, speech synthesizers, and communication boards.

What are Auxiliary Aids & Services to Ensure Effective Communication?

- **Examples** of providing auxiliary aids and services (continued):
 - Exchanging notes, gesturing, using printed materials to communicate with an individual with hearing disability/deaf
 - Reading written materials to individual who is blind
 - Providing closed captioned video content to individual who is deaf
 - Providing large-print copies to individual who has low vision
 - Assisting with inaccessible self-service equipment (e.g. check in kiosk, vending machines) by reading aloud visual information to guest who is blind

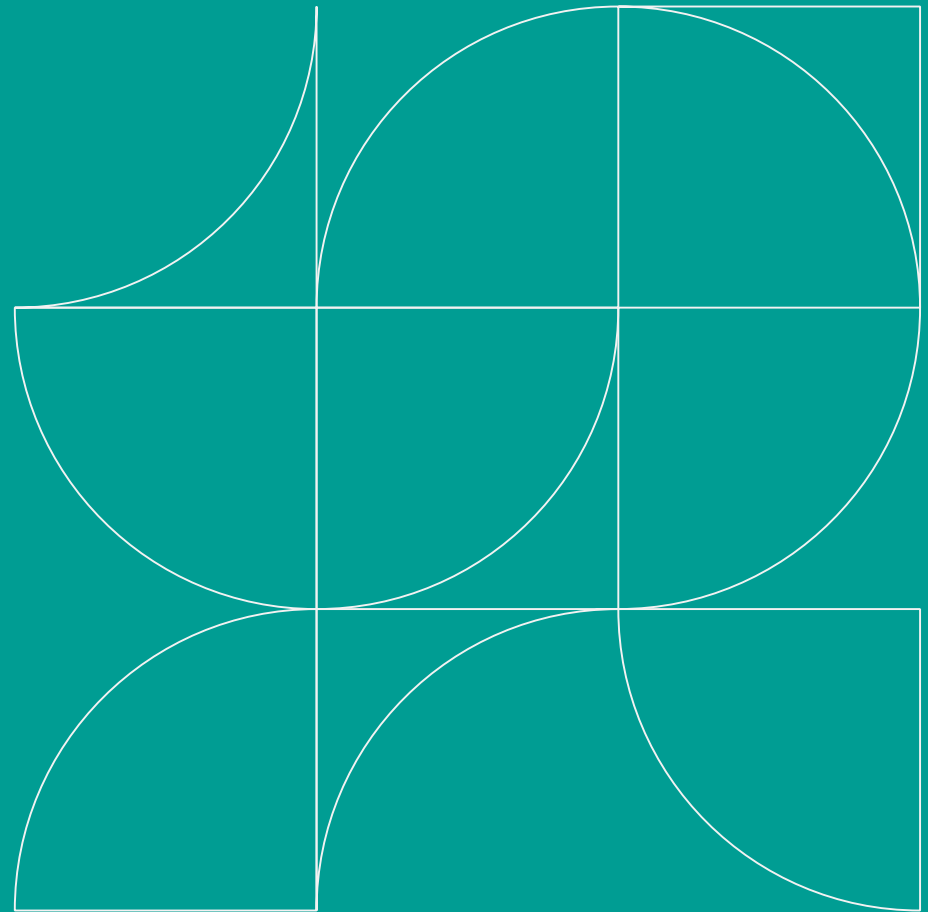
Legal Requirements for Effective Communication



How Do You Know What Auxiliary Aids and Services to Provide?

- Auxiliary aids and services must be provided in a **timely** and provided in such a way as to **protect the privacy and independence** of the person with a disability
- Appropriate method with **vary** based on factors that include **nature, length, and complexity** of the communication
- Public accommodation **must consider individual's preferred method of communication**, but has the ultimate decision-making authority in what auxiliary aid or service to provide
- Obligation also extends to **companions** of person with disability
- Publication **cannot shift the cost** of the auxiliary aid or service to the individual with a disability

Service Animals



Service Animals: What is a Service Animal?

- A “service animal” under ADA Title III is limited to any dog that is **individually trained to work or perform tasks** for individuals with physical, sensory, psychiatric, intellectual, or other mental disabilities.
 - Other species of animals, whether wild or domestic, trained or untrained, are not “service animals” (but see following slide on **miniature horses**).
 - Pets are not “service animals.”



Service Animals: What is a Service Animal?

- The ADA requires covered facilities to:
 - make reasonable modifications in policies, practices, or procedures to permit an individual with a disability to be accompanied by a miniature horse if it has been individually trained to do work or perform tasks for the benefit of the individual with a disability.
 - You are not required to provide food or special care
 - Four factors:
 - (1) whether the miniature horse is housebroken;
 - (2) whether the miniature horse is under the owner's control;
 - (3) whether the facility can accommodate the miniature horse's type, size, and weight; and
 - (4) whether the miniature horse's presence will not compromise legitimate safety requirements necessary for safe operation of the facility.



Emotional Support or Therapy Animals are NOT Service Animals

- **Emotional Support/Therapy:**

Animals whose sole function is to provide emotional support, comfort, therapy, companionship, or crime deterrence are not “service animals.”



YES



NO

Service Animals: The Two Permitted Questions

- You may **not** ask for proof that the animal has been certified, trained, or licensed as a service animal.
- However, you **can and should** ask the following two permitted questions:
 1. Do you need the animal because of a disability?
 2. What work or tasks has the animal been trained to perform?
- Should **not** ask questions if the need is obvious



Service Animal Rules

- You may **not** ask an individual to explain or verify what kind of disability he/she has (with documentation or otherwise).
- You may **not** charge a special entrance or usage fee to a guest with a service animal.
 - However, if you normally charge guests for damage that they cause to the property, you can similarly charge a guest with a service animal for any damage caused by the service animal.
- You may **not** request that the service animal demonstrate or perform training

Service Animal Rules, Continued

- **When can you exclude?**
 - If the animal is out of control and the guest is not taking corrective action
 - The animal is not housebroken
 - You should give the guest the option of remaining at the property or returning without the service animal
- Allergies and general fear of animals are **NOT** valid reasons for denying access or refusing service to individuals with service animals.
- The animal poses a direct threat to the health or safety of others – case by case

Service Animals – Massachusetts Law

- The ADA does not disturb any state or local law/regulation that provides protection for individuals with disabilities at a level greater or equal to that provided by the ADA.
- MA Law -- Service Animals in Training **Covered**
 - Cannot discriminate against a person accompanied by and engaged in the raising or training of a service dog.



Thank You

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