Pet Issues: Service & Emotional Support Animals; Preemption (Fur, Foie Gras & Declawing Bans)

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Local Legislation to Prevent Cruelty to Animals: Three and a Half Case Studies in Preemption

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"The greatness of a nation and its moral progress can be judged by the way its animals are treated." -- Mahatma Ghandi

I. Introduction

In recent years a great deal of legislation to prevent cruelty to animals has been enacted in California. Some of this activity has taken place at the state level, perhaps mostly notably in the 2012 enactment of a California law banning the sale of foie gras, that is, liver from force-fed birds. Other activity has taken place at the local level. In 2003, West Hollywood banned the non-therapeutic declawing of animals and, in 2013, banned the retail sale of fur products. These laws have not gone unchallenged. Lawsuits were filed against all three of them claiming, among other things, that they are preempted by federal law in the case of state legislation on foie gras, and by state law in the case of West Hollywood's ordinances on declawing and fur. The purpose of this paper is to examine the law of preemption through case studies of these three laws, as well as a fourth law on unattended animals in parked cars that was considered for adoption by West Hollywood. There are lessons to be learned by attorneys representing cities regarding how to draft ordinances to avoid preemption and how to defend ordinances against preemption challenges.

II. The Cases

a. Foie Gras: *Association des Eleveurs de Canards et D'Oies du Quebec v. Harris* (C.D. Cal. Jan. 7, 2015) Case No. 2:12-cv-5735-SVW-RZ, 2015 WL 191375

California enacted a sales ban on liver from force-fed birds, or fois gras, and codified it at California Health and Safety Code section 25982, in 2012. The day after the section became operative, it was challenged in a lawsuit brought by two organizations

that produce foie gras and another organization that operates a restaurant that sold foie gras. Plaintiffs filed suit for declaratory and injunctive relief against Attorney General Kamala Harris in federal district court, in the Central District of California. Plaintiffs alleged that section 25982 was preempted by federal statutory law and also violated the due process and commerce clauses of the U.S. Constitution.[1]

The court denied plaintiffs' motion for a preliminary injunction because plaintiffs failed to show a likelihood of success on the merits of their due process and commerce clause challenges. This ruling was affirmed by the Ninth Circuit. On their return to the trial court, plaintiffs amended their complaint, stating causes of action for preemption and violation of the commerce clause. Plaintiffs moved for summary judgment as to their preemption claim. As framed by the court, the issue was whether a sales ban on products containing a constituent (bird liver) that was produced in a particular manner (force feeding) is an "ingredient requirement" under the federal Poultry Products Inspection Act (the "PPIA").[2]

The court explained basic principles of federal preemption law:

> Under the Supremacy Clause of the Constitution, Congress has the power to preempt state law. Preemption may be express or implied. Express preemption arises when the text of a federal statute explicitly manifests Congress's intent to displace state law.[3]

The PPIA regulates the distribution and sale of poultry and poultry products, including foie gras. It also expressly preempts states from imposing "ingredient requirements . . . in addition to, or different than, those made under [the PPIA] with respect to articles

[1] *Association des Eleveurs de Canards et D'Oies du Quebec v. Harris* (C.D. Cal. Jan. 7, 2015) Case No. 2:12-cv-5735-SVW-RZ, 2015 WL 191375 at *1.
[2] *Id*.
[3] *Id*. at *6 (citations and internal quotation marks omitted).

prepared at any official establishment in accordance with the [PPIA's] requirements."[4] An "official establishment" is any establishment as determined by the Secretary of Agriculture at which inspection is maintained under the PPIA. The court reasoned that the PPIA preempted section 25982 if a sales ban on poultry products resulting from force feeding a bird imposes an "ingredient requirement that is in addition to or different from those imposed by the PPIA."[5]

The state argued that section 25982 did not run afoul of the PPIA because section 25982 regulates: (1) the feeding process of birds before they enter an "official establishment;" or, alternatively (2) a process, rather than an "ingredient." The court rejected both arguments. The court recognized that the line between regulating the sale of a finished product and establishing product (and process) standards will not always be easy to draw. But the court found no difficulty here: Feeding "processes" are expressly addressed by a separate California statute, Health and Safety Code section 25981. That meant section 25982 addresses the sales of products containing an ingredient. Plaintiffs' products may comply with federal law—which is silent on foie gras—but be illegal under section 25982. Therefore section 25982 imposed an ingredient requirement "in addition to or different than federal law.[6]

The state alternatively argued that a finding of preemption was foreclosed by the U.S. Supreme Court's reasoning in *National Meat Association v. Harris*.[7] There the Court held that the Federal Meat Inspection Act ("FMIA") expressly preempted a California law dictating what slaughterhouses must do with pigs that cannot walk—"nonambulatory pigs." Though the state lost the *National Meat* case, the state argued that its reasoning compelled a different result for California's ban on foie gras sales. The state argued that the *National Meat* court had embraced a "functional approach" to

[4] *Id*.
[5] *Id*. at *7.
[6] *Id*.
[7] ___ U.S. ___, 132 S.Ct. 965, 181 L.Ed.2d 950 (2012).

analyzing preemption, and that the "function" of section 25982 was not a ban on sales of products containing certain "ingredients," but rather a ban on the force-feeding of birds.[8]

The court rejected this argument.

> [T]his result would turn the Supreme Court's reasoning on its head: Instead of hindering crafty draftsmanship, this analysis would use a functional approach to enable states to creatively avoid preemption. Under this analysis, any state would be able to avoid preemption of ingredient and labeling requirements by purporting to regulate the process of producing an ingredient rather than directly regulating the ingredient's use.[9]

The court found that, if anything, *National Meat* compelled a conclusion that the state's foie gras ban was preempted.

The state was not alone in its fight to uphold the foie gras ban. Though not mentioned in the court's decision, the docket shows that no less than six non-profit animal rights organizations either filed amicus briefs or formally intervened in the action.

b. Declawing: *California Veterinary Medical Ass'n v. City of West Hollywood* (2007) 152 Cal.App.4th 536

While the litigation over the foie gras ban addressed relatively straightforward arguments regarding "express preemption," the City of West Hollywood's prohibition of declawing animals for non-therapeutic purposes addressed more complicated arguments regarding preemption by "implication." In 2003, finding that "onychetomy (declawing) and flexor tendonectomy procedures cause unnecessary pain, anguish and permanent disability to animals,"[10] the City enacted an ordinance prohibiting anyone from

[8] *Id*. at **8-9.
[9] *Id*. at *9.
[10] *California Veterinary Medical Ass'n v. City of West Hollywood* (2007) 152 Cal.App.4th 536, 542.

performing either procedure in the City "except when necessary for a therapeutic purpose."[11] The California Veterinary Medical Association ("CVMA") filed an action for declaratory and injunctive relief, claiming that the ordinance was preempted by: (1) the California Veterinary Medical Practice Act ("VMPA" or "Act"), and (2) by Business and Professions Code section 460 ("section 460"), which precludes cities and counties from prohibiting certain individuals from engaging in their business or profession "or any portion thereof."[12]

On cross motions for summary judgment, the trial court held that the ordinance was preempted by section 460, declaring the ordinance invalid and enjoining further enforcement. The court of appeal reversed. It held that the ordinance was preempted by neither the VMPA nor section 460.[13]

The court first set out general preemption principles.

> The California Constitution reserves to a county or city the right to make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws. If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. A prohibited conflict exists if the local ordinance duplicates or contradicts general law or enters an area either expressly or impliedly fully occupied by general law.[14]

The court elaborated on the standards for determining whether an "area is either expressly or impliedly fully occupied by general law."

[11] *Id*. at 543.
[12] *Id*. at 542.
[13] *Id*.
[14] *Id*. at 548 (internal quotation marks and citations omitted).

> It is well settled that local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute. Local legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested its intent to fully occupy the area, or when it has impliedly done so in light of one of the following indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.[15]

With these principles in mind, the court turned its attention to the issue of whether the City's declawing ordinance was preempted by Business and Professions Code section 460. That section provides: "No city or county shall prohibit a person, authorized by one of the agencies in the Department of Consumer Affairs by a license, certificate, or other such means to engage in a particular business, from engaging in that business, occupation, or profession or any portion thereof."[16] The City advanced three arguments before the court of appeal why its ordinance was not preempted by section 460: (1) nontherapeutic declawing procedures are inhumane, serve no legitimate medical purpose, and thus are not a "portion" of the practice of veterinary medicine; (2) because the ordinance is not directed solely at veterinarians, but rather at anyone who authorizes or

[15] *Id*. (internal quotation marks and citations omitted).
[16] *Id*. at 549.

performs such procedures, it is outside the scope of section 460; and (3) section 460 prohibits local government from imposing additional licensing conditions or qualifications as a requirement for working within their jurisdiction, but does not preclude local regulation of the *manner* in which state licensees *actually perform* their business or profession. The court rejected the City's first two arguments, but agreed with the third.[17]

That section 460 does not preclude local regulation of the manner in which state licensees actually perform their business or profession was confirmed by the legislation's plain language. Section 460 is directed solely to local legislation that that purports to prohibit *individuals* from engaging in a licensed occupation, not to the regulation of the occupation itself. Further, another part of the statute expressly authorizes the collection of business license tax by cities and counties "for the purpose of covering the cost of regulation," plainly anticipating, and thus allowing, local regulation of state-licensed businesses.[18]

The court then addressed the CVMA's alternative argument, that the City's ordinance was preempted by the VMPA. The court found that neither the VMPA nor the regulations adopted by it mandate or expressly address declawing procedures. Thus the ordinance did not directly conflict with the VMPA, or duplicate it. Regarding express preemption, the court observed that, although the VMPA specifically preempts enforcement of sanitation and hygiene requirements developed for the premises where veterinarians practice, the legislature has not expressly declared its intention to fully occupy the field of regulating the practice of veterinary medicine.

Nor was the City's ordinance preempted by legislative implication because it entered into an area "fully and completely occupied by general law."[19] In contrast to comprehensive regulatory schemes governing the availability and administration of

[17] *Id*. at 549-550.
[18] *Id*. at 553.
[19] *Id*. at 558.

psychiatric care and services, for example, the VMPA's requirements are minimal. Regarding standards of practice, it requires only that "[t]he delivery of veterinary care shall be provided in a competent and humane manner" and "performed in a manner consistent with the current veterinary practice in this state."[20] Discrete areas of veterinary practice—licensing and enforcement of sanitary standards—had been preempted, but not the entire field.[21] Further, as for "the adverse effect of a local ordinance on the transient citizens of the state," these were minimal. By definition, declawing for non-therapeutic reasons is a non-emergency procedure, and pet owners may freely go to a neighboring city to have the operation performed there.[22]

Even assuming the VMPA fully occupied the field of regulating veterinary medicine, the City's ordinance would still be valid. The purpose and scope of the ordinance was to prevent animal cruelty, an area concededly not preempted by the state. The ordinance would have only an incidental or secondary effect on the practice of veterinary medicine. For this alternative reason, the ordinance was not preempted.[23]

As with the foie gras case, the City of West Hollywood had help in defending animal-cruelty legislation against a claim that it was preempted. Amicus curiae briefs were submitted by three non-profits opposed to animal cruelty, and the City and County of San Francisco.[24]

c. Fur: *Mayfair House, Inc. v. City of West Hollywood* (L.A. Sup. Ct. July 2, 2015) Case No. SC122649

Preemption claims figure prominently in another, ongoing challenge to a West Hollywood ordinance, one banning the retail sale of fur products. In adopting the ban,

[20] *Id*.
[21] *Id*. at 560.
[22] *Id*.
[23] *Id*. at 560-61.
[24] *Id*. at 540.

the City found, among other things that "the demand for fur products does not justify the unnecessary killing and cruel treatment of animals," and that "eliminating the sale of products will promote community awareness of animal welfare and, in turn foster a consciousness about the way we live in the world and create a more humane environment in the city."[25] The lawsuit was filed by a City retailer, Mayfair House, shortly after the ordinance took effect in 2013. Stating not only preemption claims, but also claims under due process and equal protection, Mayfair's suit was first filed in federal court. The City moved to dismiss the complaint on the pleadings. The federal trial court dismissed the federal claims with prejudice. The court declined to exercise jurisdiction over the preemption claims, which were raised under state law, and dismissed them without prejudice to Mayfair refiling them in state court. Mayfair then filed a new complaint in state court, claiming that the City's ordinance was preempted by: (1) article IV, section 20 of the California Constitution ("section 20"); and (2) a number of provisions of the California Fish and Game Code. The City filed a demurrer, seeking to dismiss the state court complaint on the pleadings.

The trial court issued a written decision in July of 2015. It rejected Mayfair's claim that the City's ordinance was preempted by section 20. Section 20 gives the state legislature and the state Fish and Game Commission powers "relating to the protection and propagation of fish and game in districts or parts of districts." It further states: "The Legislature may provide for the division of the State into fish and game districts and may protect fish and game in districts or parts of districts." The legislative history demonstrated that section 20 was added to the state constitution "to clothe the state legislature with sole and exclusive control and power . . . over the fish and game of the state, and, therefore, to take from local political subdivisions of the state any right which they might have had . . . to deal with or regulate the matter of pursuing fish and game.[26]

[25] West Hollywood Mun. Code § 9.51.010, subds. (j) and (k).
[26] Order at 5-6.

The court found that this was a "textbook example" of express preemption of an entire field, and then went on to consider whether and to what extent the field occupied by section 20 and the subject matter regulated by the City's ordinance overlapped. The City's ordinance barred the sale of products made with "animal" fur. Section 20 was expressly limited to "fish and game," not all animals generally. Thus, although there was a "substantial overlap," the ordinance did not clearly fall within the expressly preempted field of "fish and game." The court also found that "game" was not intended to cover farm raised animals. [27] The City's ordinance included findings that stated, among other things, that fur farms produce eighty-five percent of the fur in the world.

In the alternative, the court rejected Mayfair's claim under section 20, following analysis from the *California Veterinary Medical Association* decision discussed above. The court held that any intrusion by the City's fur ban ordinance into the field of the protection of fish and game was "merely incidental" to "the primary purpose of the ordinance in preventing animal cruelty," which "is a valid exercise of the city's police powers."[28] The court held that Mayfair's claim for preemption by virtue of section 20 failed as a matter of law, and sustained the demurrer without leave to amend.[29]

Mayfair's other preemption claim is premised on a number of provisions in the California Fish and Game Code. Mayfair claims that the City's ordinance is "duplicative" of, "expressly or impliedly preempted" by, and "contradicted" by these state law provisions. Turning first to preemption by duplication, the court quoted the test: "Local legislation is 'duplicative' of general law when it is coextensive therewith."[30] Mayfair argued that the City's fur ban is coextensive with Fish and Game Code sections 2080 and 4800, which make it unlawful to sell any part or product of an animal listed as endangered or threatened. The sale of a fur coat made from an endangered species would

[27] Order at 8.
[28] Order at 12.
[29] Order at 13.
[30] Order at 13, citing *Sherwin-Williams Co v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.

violate both state law and the City's ordinance. But the fact that there is *some* overlap is not enough. The City's fur ban is much broader—barring the sale of products made of fur from any animal, endangered or not. "Because there are substantial differences between these laws, they are not duplicative of one another."[31]

Nor was there "express or implied" preemption. There was no express intention of the legislature to "fully occupy" the area of animal protection. There was no "clear indication" that the subject matter has been so completely covered by state law to the exclusion of local regulation, or that no further local action would be tolerated, or that any adverse effect from the ordinance outweighs the possible benefit to the locality.[32]

The court did, however find that the complaint stated a claim for preemption by contradiction. Fish and Game Code section 3039 provides:

> (a) Except as otherwise provided in this section and Sections 3087 and 4303, or any other provision of this code, or regulations adopted pursuant thereto, it is unlawful to sell or purchase any species of bird or mammal or part thereof found in the wild in California.
> (b) Products or handicraft items made from furbearing mammals and nongame mammals, their carcass or parts thereof, lawfully taken under the authority of a trapping license, may be purchased or sold at any time.

The City cited authority for the proposition that preemption by "contradiction" does not apply "unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands."[33] Just because a statute exempts from state regulation activity barred by local law is not enough to show a conflict. Instead the

[31] Order at 15.
[32] Order at 16.
[33] *City of Riverside v. Inland Empire Health and Wellness Center, Inc*. (2013) 56 Cal.4th 729, 743.

statute must "mandate that local governments authorize, allow, or accommodate" such activity.[34] The court of appeal relied on this distinction to uphold a local ordinance restricting sales of guns at gun shows, rejecting a challenge that it was preempted by a state law allowing gun show sales.[35] "Although gun shows statutes regulate, among other things, the sale of guns at gun shows, and therefore contemplate such sales, the statutes do not mandate such sales, such that a limitation of sales on county property would be in direct conflict with the statutes."[36] The City argued that, while section 3039, subdivision (b) allowed the sale of certain fur products, it had to be read in context with section 3039, subdivision (a), which barred sales generally. Subdivision (b) was an exception to subdivision (a). Subdivision (b) permitted certain sales under state law, but did not *mandate* that local government allow them, too.

The court disagreed. "State law specifically mandated that products made from fur bearing mammals that were trapped pursuant to a valid license may be purchased or sold at any time, whereas the ordinance flat out bars the sale of any fur bearing apparel within city limits."[37] The court drew an analogy to *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, where the court held that a local ordinance banning electroshock therapy was in direct conflict with state statutes permitting patients to be given a choice to have such therapy. Because Mayfair's complaint supported a preemption by contradiction theory, the court overruled the City's demurrer and allowed Mayfair's lawsuit to proceed on that theory. [38]

d. Pets Left in Cars

[34] *Id*. at 759.
[35] *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 866.
[36] *Id*.
[37] Order at 17-18.
[38] *Id*. at 18.

Preemption issues in local efforts to legislate in the area of animal cruelty continue to recur. Recently the City of West Hollywood considered adopting an ordinance that would prohibit animals from being left unattended in parked vehicles during hazardous weather conditions when the temperature exceeds 70 degrees Fahrenheit. There is state law on the subject. Penal Code section 597.7, subdivision (a) provides: "No person shall leave or confine an animal in any unattended motor vehicle under conditions that endanger the health or well-being of an animal due to heat, cold, lack of adequate ventilation, or lack of food or water, or other circumstances that could reasonably be expected to cause suffering, disability, or death to the animal." The Penal Code leaves the door open for cities and counties to legislate on this subject, with what might be called an "express *non*-preemption clause:" "Nothing in this section shall preclude prosecution under both this section and Section 597 or any other provision of law, including city or county ordinances."[39] The City concluded that it would not be preempted by section 597.7 from adopting an ordinance addressing this issue.

Enforcement, though, is a separate issue. The City had considered adopting the ordinance as an amendment to its municipal parking code, with the expectation that it would be enforced by the same officials that enforce other parking rules, such as those concerning handicapped parking spaces, parking meters, and permit parking. These local "Rules of the Road" are adopted pursuant to Division 11 of the California Vehicle Code. Upon further reflection, however, the City concluded that leaving animals unattended in vehicles was less of a parking issue than one of health, safety, and humane treatment of animals. This conclusion is reinforced by a provision in Penal Code section 597.7 that authorizes an endangered, unattended animal in a vehicle to be removed—not just by *any* government agent—but rather specifically by a "peace officer, humane officer, or animal control officer."[40]

[39] Penal Code § 597.7, subd. (d).
[40] *Id*., subd. (c)(1).

III. Lessons Learned

There are a number of lessons to be learned from these three and a half cases, not just for cities interested in legislating to prevent animal cruelty, but also for legislating in any area where there is existing state or federal law.

a. Preemptive Statutes Are Numerous and Their Preemptive Quality Is Not Necessarily Obvious

The body of federal and California statutory law is vast. Statutes that may preempt a local ordinance are numerous. In the lawsuit over West Hollywood's fur ban, it was alleged that the ordinance was preempted by the entirety of the Fish and Game Code and implementing regulations. The complaint went on to allege that the fur ban was preempted by specific statutes and regulations on a number of different subjects, including, for example, rules on the humane taking of fur-bearing animals from the wild; regulations on the trade in fur from fur-bearing and nongame mammals; regulations for the maintenance of animals; a prohibition on the sale, possession, or propagation of live mammals that are commonly found in the wild in California, for the purpose of killing such mammals for gain; and statutes that provide that products made of certain animals can be sold.[41]

Further, a constitutional or statutory provision may still be preemptive even though it is animated by a different type of policy concern than that behind the local ordinance. Laws seeking to prevent animal cruelty were found to be preempted by statutory regimes aimed primarily at food safety (foie gras) and wildlife conservation (fur). When considering the potential for preemptive statutory and constitutional provisions, those tasked with drafting ordinances should think expansively.

[41] Complaint pp. 11-12.

b. Preemption Claims Can Be More Dangerous Than Constitutional Claims

Plaintiffs challenging local laws on grounds of preemption sometimes also challenge them on constitutional grounds. Federal constitutional claims provide a basis for federal jurisdiction over the entire case, including preemption claims based on state law.[42] The foie gras case was filed in federal court, as was the fur ban case in the first instance. Plaintiffs challenging the foie gras law not only contended it was preempted, but also that it violated the commerce clause and due process clause of the federal constitution. The trial court denied plaintiffs' motion for a preliminary injunction, which was affirmed on appeal, the court holding that plaintiffs failed to show a likelihood of success on the merits of their due process and commerce clause claims. When plaintiffs filed a second amended complaint, the due process claim was dropped.[43] The court later granted plaintiffs' motion for summary judgment on their preemption claim.[44]

Similarly, the challenge to the fur ban ordinance was originally filed in federal court. Claims that the ban was preempted by state constitutional and statutory law were paired with claims that the ban violated the due process and equal protection clauses of the federal constitution. The federal claims were dismissed with prejudice. After the state law claims were refiled in state court, the trial court held that the complaint stated a cause of action for preemption by contradiction.

The comparative lack of success of the constitutional claims might be explained, of course, solely by the particular laws being challenged. But it may also be that, while preemption principles are well-developed, how any particular statute works to preempt other laws is less explored in the appellate case law. By contrast, there is a great amount of appellate authority interpreting various provisions of the federal constitution, including

[42] 28 U.S.C. § 1367.
[43] *Association des Eleveurs de Canards et D'Oies du Quebec v. Harris* (C.D. Cal. Jan. 7, 2015) Case No. 2:12-cv-5735-SVW-RZ, 2015 WL 191375 at *2.
[44] *Id*. at *1.

due process and equal protection. This makes it easier for those drafting ordinances to avoid running afoul of the federal constitution, as compared to statutory law under principles of preemption. In addition, courts may be more willing to overturn an ordinance on grounds of preemption, in order to avoid reaching constitutional claims.[45]

c. Preemption Litigation Opens the Door to Multiple Issues and Alternative Lines of Argument

Preemption law is baroque. Under California law, a given law may be preempted because of duplication, contradiction, or because it enters an area either expressly or impliedly fully occupied by general law. The question of whether a law enters an area impliedly occupied by general law in turn requires consideration of other indicia of legislative intent. From a city's perspective, this creates both a challenge and an opportunity. Because of the number of potentially preemptive statutes and bases for preemption (duplication, contradiction, etc.), a city litigating a preemption case may have to fend off attack from a number of directions. And the city will have to prevail on every preemption theory advanced by the plaintiff in order to succeed in upholding the ordinance. That is the challenge.

This very complexity of preemption law, however, creates an opportunity for cities. It encourages the use of a layered defense. In the animal declawing case, for example, the City argued that its ordinance was not preempted by Business and Professions Code section 460 for three different reasons. The court rejected the first two arguments, but agreed with the third. It concluded that the ordinance was not preempted.

[45] *Cf. Camreta v. Greene* (2011) 563 U.S. 692, 131 S.Ct. 2020, 2031, 179 L.Ed.2d 1118 (a "longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them").

d. Non-Profit Organizations Are Natural Allies to Cities Drafting Ordinances and Defending Them Against Preemption Claims

The participation of non-profit organizations in the drafting of legislation and legal challenges to legislation is not new. On issues of civil rights, civil liberties, and the environment, for example, the work of the NAACP, ACLU, and Sierra Club is well known. Their work goes back decades. More recently, new voices have emerged on issues related to animal cruelty. Non-profit organizations filed amicus briefs or intervened in both the foie gras and declawing cases. They also participated in the City's fur ban. A non-profit, Animal Legal Defense Fund ("ALDF"), helped draft the ordinance. ALDF and the Humane Society of the United States filed amicus briefs in the federal court action. They did not directly participate in the state court action. In contrast with the court of appeal, at the trial court level there are no express provisions in the California Rules of Court for the filing of amicus briefs.[46] A city drafting legislation it anticipates may be challenged should consider enlisting the help of one non-profit organization or more early in the process.

e. The Relationship Between the Legislative Process and Court Rulings Is Organic

One may be tempted to look at preemption cases as depicting a linear, one direction relationship between the legislative process and court rulings. Stage one: legislation on a subject is enacted both at the federal or state level, and at the state or local level. Stage two: a lawsuit is brought and the court decides whether there is preemption. The reality, however, is more complex. The legislative process reacts to court rulings. Courts in turn react to the legislature's reaction to prior court rulings on

[46] *Compare* Cal. R. Ct., Rule 8.200(c) ("Within 14 days after the last appellant's reply brief is filed or could have been filed under rule 8.212, whichever is earlier, any person or entity may serve and file an application for permission of the presiding justice to file an amicus curiae brief.") *with* Cal. R. Ct., titles 2 through 4 (rules specifically applicable in Superior Court).

preemption. This shows the relationship between the legislative process and court rulings to be organic. Preemption issues have the potential to evolve continuously.

One example of this lies in the area of gun control, which has been the subject of substantial local lawmaking and a number of preemption challenges over the past quarter century. The City of West Hollywood's ban on the sale of cheap handguns—"Saturday Night Specials"—was upheld by the court of appeal.[47] The court rejected the challenge based on preemption grounds, in part because of the "almost 30-year history of successive legislative responses to successive court rulings. In each case, the court held that the entire field of firearms control was not preempted by existing statutes, and the Legislature's only response was limited and circumscribed new legislation, rather than wholesale preemption."[48]

A court ruling in favor of a city ordinance is not necessarily the last word. Congress or the state legislature may respond to a court order that there is "no preemption" by simply amending the law to make it clear that preemption is in fact intended. This is what happened after the City of West Hollywood prevailed in the court of appeal on its declawing ban and the state supreme court declined to review the decision. The CVMA, who lost the case, sponsored legislation to amend Business and Professions Code section 460 to make it unlawful for any city or county to prohibit someone licensed by the Department of Consumer Affairs "from engaging in any act or performing any procedure that falls within the professionally recognized scope of practice of that licensee."[49] The amendment did not, however, affect West Hollywood's ban. It expressly exempted ordinances in effect prior to January 1, 2010.[50]

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[47] *California Rifle & Pistol Ass'n v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1306, 1308.
[48] *Id*. at 1314.
[49] 2009 Cal. Legis. Serv. Ch. 16 (S.B. 762), § 1, subd. 460(b); Bill Analysis of SB 762, ftp://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0751-0800/sb_762_cfa_20090506_100418_sen_floor.html (last visited August 28, 2015).
[50] 2009 Cal. Legis. Serv. Ch. 16 (S.B. 762), § 1, subd. 460(b)(1).

The legislative process may also be used by local government to respond to adverse court rulings. All litigation involves risk. An ordinance a city believes should withstand legal challenge may nevertheless suffer a setback in the shape of a trial court order. A trial court may indicate that the ordinance is preempted, or that the plaintiff has stated a valid claim for preemption. There are options beyond simply continuing to litigate and appeal. It may be possible to amend the ordinance in a way that continues to advance most or all of the policy aims, consistent with the court's ruling.

In the fur ban case, the court ruled that the ordinance was preempted by a single state statute that provides that products made from certain animals "lawfully taken under the authority of a trapping license, may be purchased or sold at any time." The City believes that the vast majority of fur sold in the world is produced on fur farms. Very little comes from animals taken under the authority of a trapping license. The City is considering adopting an amendment to the fur ban that would exempt fur products taken from animals lawfully taken under such authority. In this way, most of the original policy aims of the ordinance will be advanced, but in conformity to the trial court's ruling.

SERVICE VS. COMFORT ANIMALS DON'T GET CAUGHT BARKING UP THE WRONG TREE

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SERVICE VS. COMFORT/EMOTIONAL SUPPORT ANIMALS DON'T GET CAUGHT BARKING UP THE WRONG TREE

1. INTRODUCTION

The law as it pertains to Service Animals is far from clear. There are numerous laws that address the issues related to service animals. Complicating the issue are the considerations related to comfort/emotional support animals. The combination of these two considerations can lead to severe problems for entities whose employees, although well meaning, may inadvertently violate the law. In the following pages I will attempt to shed some light on some of the potential pitfalls and hopefully offer some guidance on how to avoid the problem(s), or to deal with them once they have arisen. The starting point for this discussion is the Americans with Disabilities Act (ADA), which under Title II requires that all programs, services and activities of the public entity must be accessible for individuals with disabilities. An important point to remember when dealing with the issue of service animals; is that the focus is not on the animal but on the individual with the disability.

2. LEGAL STANDARDS

The accommodation provisions for service animals are contained in a number of Federal, State and even some local ordinances. The laws apply to various government actions and differ in their approach and application, as discussed below.

A. Section 504 of the Rehabilitation Act of 1973

The Rehabilitation Act prohibits discrimination on the basis of disability: (i) in programs conducted by Federal agencies; (ii) in programs receiving Federal financial assistance; (iii) in Federal employment: and (iv) in the employment practices of Federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in Title I of the Americans with Disabilities Act.

B. Americans with Disability Act of 1990 (ADA)

The ADA prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications. It also applies to the United States Congress.

The ADA requires a public entity to make reasonable accommodations for service animals. Under the ADA a service animal is "any dog that is individually trained to do the work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability."[1] This definition of service animal expressly

[1] 28 C.F.R. Sec 35.104, 36.104, 35.136(i) 2010

excludes any other species of animal from being included in the definition of a service animal under the ADA.

C. Fair Housing Act (FHA)

The Federal Fair Housing Act requires "reasonable accommodation" to handicapped persons in housing. 24 C.F.R. Sec. 100.24 (1990)

D. Air Carriers Access Act (ACAA)

The ACAA prohibits discrimination on the basis of disability in air travel. The act broadly defines the term disability to include anyone who is "regarded as having an impairment."[2]

E. California Fair Employment and Housing Act (FEHA)

FEHA prohibits discrimination on the basis of disability in employment and housing; which includes reasonable accommodation in both rental/leasing and construction of housing.[3]

F. California State Law (CSL)

State law provides for standardized identification tags for "assistance dogs" which is defined as "guide dogs, signal dogs or service dogs."[4]

Additional rights are afforded to Blind and Other Physically disabled Persons, including the right to be accompanied by a guide dog, signal dog, or service dog, especially trained for the purpose, in/on public conveyance, place of public accommodation, amusement or resort, and housing accommodation without being required to pay an extra charge or security deposit for the guide dog, signal dog, or service dog.[5]

G. Municipal Laws

In general cities and counties throughout California require licenses for all pets. In most, if not all of the cities and counties fee waivers are granted for service animals. The fee waiver ordinarily does not eliminate the requirement to obtain the license in the first instance.

3. Service Animals

Except as noted below, the ADA specifically excludes any animal other than a dog from the definition of service animal. The work or tasks performed by the animal must be directly related to the individual's disability.

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[2] 14 C.F.R. Sec. 382.3 (2010).

[3] Cal. Gov't Code Sec. 12927 (2010, Cal Gov't Code Secs. 12955-12955.1 (2011).

[4] Cal. Food and Agriculture Code Sec. 30850 (2004)

[5] Cal Gov't Code Secs. 54.1 and 54.2.

The initial regulations under the ADA limited service animals to dogs. However, recent revised regulations have added a new separate provision about miniature horses that have been individually trained to do work or perform tasks for people with disabilities. The regulations provide specific guidance on what qualifies as a miniature horse. The horse generally ranges in height from 24 to 34 inches measures to the shoulders and generally weighs between 70 and 100 pounds.

Entities covered by the ADA must modify their policies to permit miniature horses where reasonable. The regulations set out four assessment factors to assist entities in determining whether miniature horses can be accommodated in their facility. The assessment factors are (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.

Service animals have mandatory characteristics. A service animal must work and perform tasks that directly benefit the individual with a disability. It must be able to recognize and respond to the individual's distress. The response requirement is significant because it is what distinguishes an animal (dog) as a service animal. Animals that provide comfort and emotional support cannot satisfy the requirements of a service animal because they cannot respond to an individual with a disability who is experiencing a type of distress.

Service animals enjoy additional freedoms that benefit their handlers. They are not subject to size or weight limitations. They are exempt from the limitations imposed by some places of lodging and the owners of rental property. The rationale behind this is that such a restriction may cause difficulty for the handler in choosing a service animal because they correlate to the needs of the handler. For example, a small service may not be suitable to a larger handler because of the handler's needs, such as pulling his or her wheelchair.

Service animals are not subject to breed restrictions because the ADA already provides significant protection/authority to exclude a service animal for inappropriate behavior and not based on generalized fears and speculation.[6] For example, a properly trained pit bull can qualify as a service animal despite the generalized perceptions about the breed.

Though service animals enjoy many freedoms, and public entities are required to make reasonable modifications in its policies, procedures and practices, they are not without regulations, controls, or restrictions. A public entity has the authority to remove and/or deny a service animal access if it is out of control and acting unreasonably and it may be excluded from access if it is not house-broken. When deciding to remove or deny access, a public entity should consider all the facts before making a determination to ensure that the decision is warranted.

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[6] U.S. Department of Justice Civil Rights Division Disability Rights Section Frequently Asked Questions about Service Animals and the ADA

A public entity may inquire whether an animal constitutes a service animal. However, the inquiry must be limited to extracting essential information without intruding upon confidential disability related information. For example, the public entity may ask if the animal is required because of a disability and what task(s) or work is it trained to do.[7]

Under the ADA, State and local governments, businesses and nonprofit organizations that serve the public generally must allow service animals to accompany people with disabilities in all areas of the facility where the public is normally allowed to go. For example, in a restaurant it would be inappropriate to exclude a service animal from the dining area. However, it may be entirely appropriate to exclude a service animal from the food preparation areas of the restaurant. An individual with a service animal cannot be placed in an area that is separated from the general public. There are regulations that apply to service animals that can be enforced. Service animals must be harnessed, leashed or tethered, unless these devices interfere with the service animal's work or the individual's disability prevents these devices. If that is the case the individual must maintain control of the animal through voice, signal or other effective controls.

A question often arises about service animals who are being trained. The training of a service animal is traditionally accomplished by a person without a disability before they are placed with a disabled individual. An integral part of the training involves socializing the animal by taking it to public places. The ADA does not require governments or public accommodations to allow persons who do not have a disability to take these service animals-in-training into their buildings or facilities. However, there may be some state law that protects the rights of handlers or trainers of service animals.

A. Examples of Types of Service Animals

Examples of animals that fit the ADA"s definition of "service animal" because they have been specifically trained to perform a task for the person with a disability:

- **Guide Dog or Seeing Eye Dog** – is a carefully trained dog that serves as a travel tool for persons who have severe visual impairments or are blind;
- **Hearing or Signal Dog** – is a dog that has been trained to alert a person who has significant hearing loss or is deaf when a sound occurs, such as a knock on the door;
- **Psychiatric Service Dog** – is a dog that has been trained to perform tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and lessen their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine, providing safety checks or room searches, or turning lights on for persons suffering from Post-Traumatic Stress Disorder (PTSD), interrupting self-mutilation by persons with dissociative disorders, and keeping disoriented individuals from danger;
- **Sensory Signal Dog or Social Signal Dog (SSigDOG)** – is a dog that has been trained to assist a person with autism. The dog alerts the handler to distracting repetitive

[7] Appendix A, 28 C.F.R. 35.

movements common among those with autism, allowing the person to stop the movement (e.g., had flapping).

- **Seizure response Dog** – is a dog trained to assist a person with a seizure disorder. How the dog serves the person depends on the person's needs. The dog may stand guard over the person during a seizure or the dog may go for help. A few dogs have learned to predict a seizure and warn the person in advance to sit down or move to a safe place.
- Miniature Horses – who have been trained to do work or perform tasks for individuals with disabilities.

B. Statutes Applicable to Service Dogs in California

"Individuals with disabilities shall be entitled to full and equal access, as other member of the general public, to accommodations, advantages, facilities, medical facilities, including hospital clinics, and physicians' offices, and privileges of all common carrier, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons."[8]

Every individual with a disability has the right to be accompanied by a guide dog, signal dog or service dog, especially trained for the purpose, in any of the places specified in Section 54.1, without being required to pay an extra charge or security deposit for the guide dog, signal dog, or service dog. However, the individual shall be liable for any damage done to the premises or facilities by his or her dog.[9]

Individuals who are blind or otherwise visually impaired and persons licensed to train guide dogs for individuals who are blind or visually impaired pursuant to Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or as defined in regulations implementing Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336), and individuals who are deaf or hearing impaired and persons authorized to train signal dogs for individuals who are deaf or hearing impaired, and individuals with a disability and persons who are authorized to train service dogs for the individuals with a disability may take dogs, for the purpose of training them as guide dogs, signal dogs, or service dogs in any of the places specified in Section 54.1 without being required to pay an extra charge or security deposit for the guide dog, signal dog, or service dog. However, the person shall be liable for any damage done to the premises or facilities by his or her dog. These persons shall ensure the dog is on a leash and tagged as a guide dog, signal dog, or service dog by an identification tag issued by the county clerk, animal control department, or other agency, as

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[8] Cal Civil Code Section 54.1(a)(1),

[9] Cal Civil Code Section 54.2(a),

authorized by Chapter 3.5 (commencing with Section 30850) of Title 14 of the Food and Agricultural Code.[10]

A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section, and nothing in this section shall be construed to limit the access of any person in violation of that act.

Any person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in Sections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under Sections 54, 54.1 and 54.2 is liable for each offense for the actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than one thousand dollars ($1,000), and attorney's fees as may be determined by the court in addition thereto, suffered by any person denied any of the rights provided in Sections 54, 54.1, and 54.2. "Interfere," for purposes of this section, includes, but is not limited to, preventing or causing the prevention of a guide dog, signal dog, or service dog from carrying out its functions in assisting a disabled person.[11]

C. Service Animals in the Workplace

Title I of the ADA prohibits private employers, State and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. However, there are no specific definitions of a service animals under the provisions of Title I, and title II and title III regulations do not apply to questions arising under title I.

So where does that leave us? The lack of a definition may require employers to consider allowing an employee to bring in an animal that does not meet the title III definition of a service animal, such as a therapy or emotional support animal. Employers are not required to allow an employee to bring an animal into the workplace if it is not needed because of a disability or of it disrupts the workplace. One example would be that a person with diabetes may want to bring in their small dog who helps to alert them when they need to take their medication. In this case the employer is providing a reasonable accommodation to the employee.

What can the employer request from the employee? The ADA allows the employer to request reasonable documentation that an accommodation is needed. According to Informal guidance from the EEOC, employers need to be aware that sometimes reasonable documentation is not always going to be from a doctor or some other health care professional. In some cases the documentation should come from the appropriate provider of the service. In the case of a service animal, the appropriate documentation might be from whoever trained the service animal. The employer has a right to require that the service animal be fully trained and capable of functioning appropriately. While the disabled employee has the right to have the service animal with her/him, that right is subject to the service animal being under control and not disruptive to the working environment.

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[10] Cal Civil Code Section 54.2(b)

[11] Cal Civil Code Section 54.3(a),

Personal Medical Needs - According to the EEOC, if the service animal has been trained to assist with the employee's medical needs, the employee has a right to ask that, as a reasonable accommodation, the service animal be allowed to accompany her/him to work.

The employer, conversely, has the right to know that the animal is actually trained and what the animal does for the employee, However, the employer probably cannot insist that the person take care of her/his medical needs in a different manner if this is the manner the employee usually does it; under the ADA an employer cannot require employees to use other medical treatments or procedures.

Issues of the us of service animals in the workplace will most often arise as a request for a reasonable accommodation. It is extremely important for the employer who receives such a request to make a good faith effort to engage in the interactive process with the employee. Also, remember to be sure that you document all that you are doing to make the accommodation for the employee.

4. Comfort/Emotional Support Animals

The major difference between service animals and comfort/emotional animals is that the former are protected under the ADA and the latter are not. A comfort/emotional support dog is a pet that is not trained to perform specific acts directly related to an individual's psychiatric disability. Instead the pet's owner, simply derives a sense of well-being, safety, or calm from the dog's companionship and physical presence. An emotional support animal is a companion animal that provides therapeutic benefit to an individual with a mental or psychiatric disability. The person seeking to use the emotional support animal must have a verifiable disability (the reason cannot be just a need for companionship). The animal is viewed as a "reasonable accommodation" under the Fair Housing Amendments Act of 1988 (the FHA) to those housing communities that have a "no pets" rule. In other words, just as a wheelchair provides a person with a physical limitation the equal opportunity to use and enjoy a dwelling, an emotional support animal provides a person a sense of well-being with a mental or psychiatric disability the same opportunity to live independently. Most times, an emotional support animal will be seen as a reasonable accommodation for a person with such a disability. Failure to make reasonable accommodations by changing rules or policies can be a violation of the FHA unless the accommodation would be an undue financial burden on the property owner or cause a fundamental alteration to the premises. The same can be said for making accommodations in the employment setting.

To qualify, a person must have a disability that meets the federal definition, and must have a note from a physician or other medical professional stating that she/he has a disability and that the reasonable accommodation (here the emotional support animal) provides benefit for the individual with the disability. The emotional support animal alleviates or mitigates some of the symptoms of the disability. Importantly, as with service animals, no inquiry can be made as to the nature of the disability. It is sufficient that the individual is disabled and the animal provides assistance with the disability. An example of the type of information that can be requested is illustrated in the letter from Service Provider attached as " "

The key distinction to remember is that a psychiatric service animal is actually trained to perform certain tasks that are directly related to an individual's psychiatric disability. The dog's primary role is not to provide emotional support. It is to assist the owner with the accomplishment of vital tasks they otherwise would not be able to perform independently. In addition, a psychiatric service dog must not only respond to an owner's need for help, the dog must also be trained to recognize the need for help in the first place. A dog must be able to respond *and* recognize to be a service dog.

The animal companionship of an emotional support dog can have genuine therapeutic benefits for individuals with psychiatric disabilities and less severe mental impairments. But unless the dog is also trained to work—to independently recognize and respond to its owner's psychiatric disability—the dog does not qualify as a psychiatric service dog and does not receive the protections of the ADA.

For example, people with social phobia might only feel safe enough to leave their homes for food or medication if their dog accompanies them. Such a dog would be considered an emotional support animal. If, however, the same person is prone to dissociative episodes when they leave home, and their dog is trained to recognize and respond to the onset of such an episode by nudging, barking, or removing the individual to a safe location, then the dog would be considered a psychiatric service dog.

Under the Air Carrier Access Act (ACAA), a commercial airline must permit emotional support dogs and other animals to accompany qualified passengers with a disability on a flight. Airlines cannot require that a passenger traveling with a service animal provide written documentation that the animal is a service animal, but the same is not true for an emotional support animal. In both the housing and airline context, an individual with a disability will likely need to acquire a special letter from a licensed mental health professional documenting the individual's need for an emotional support animal.

5. Recent Developments

Effective January 1, 2015, new legislation went into effect covering the presence of dogs in restaurants. AB 1926, signed by Governor Brown provides as follows:

Section 113709 of the Health and Safety Code is amended to read:

113709.

This part does not prohibit a local governing body from adopting an evaluation or grading system for food facilities, from prohibiting any type of food facility, from adopting an employee health certification program, from regulating the provision of consumer toilet and handwashing facilities, from adopting requirements for the public safety regulating the type of vending and the time, place, and manner of vending from vehicles upon a street pursuant to its authority under subdivision (b) of Section 22455 of the Vehicle Code, or from prohibiting the presence of pet dogs in outdoor dining areas of food facilities.

Section 114259.5 of the Health and Safety Code is amended to read in relevant part:

114259.5.

(a) Except as specified in this section, live animals may not be allowed in a food facility.

(b) Live animals may be allowed in any of the following situations if the contamination of food, clean equipment, utensils, linens, and unwrapped single-use articles cannot result:

#* * *

(5) Pets in the common dining areas of restricted food service facilities at times other than during meals if all of the following conditions are satisfied:

(A) Effective partitioning and self-closing doors separate the common dining areas from food storage or food preparation areas.

(B) Condiments, equipment, and utensils are stored in enclosed cabinets or removed from the common dining areas when pets are present.

(C) Dining areas including tables, countertops, and similar surfaces are effectively cleaned before the next meal service.

(d) Pet dogs under the control of a person in an outdoor dining area if all of the following conditions are satisfied:

(1) The owner of the food facility elects to allow pet dogs in its outdoor dining area.

(2) A separate outdoor entrance is present where pet dogs enter without going through the food establishment to reach the outdoor dining area and pet dogs are not allowed on chairs, benches, seats, or other fixtures.

(3) The outdoor dining area is not used for food or drink preparation or the storage of utensils. A food employee may refill a beverage glass in the outdoor dining area from a pitcher or other container.

(4) Food and water provided to pet dogs shall only be in single-use disposable containers.

(5) Food employees are prohibited from having direct contact with pet dogs while on duty. A food employee who does have that prohibited direct contact shall wash his or her hands as required by Section 113953.3.

(6) The outdoor dining area is maintained clean. Surfaces that have been contaminated by dog excrement or other bodily fluids shall be cleaned and sanitized.

(7) The pet dog is on a leash or confined in a pet carrier and is under the control of the pet dog owner.

(8) The food facility owner ensures compliance with local ordinances related to sidewalks, public nuisance, and sanitation.

(9) Other control measures approved by the enforcement agency.

Before you clip on your pup’s leash and head out to your favorite eatery, make sure the proprietor is amenable to accommodating your pet. The new bill allows restaurant owners to admit or prohibit dogs at their discretion.1 And while the law applies to all restaurants with outdoor seating in the state, individual cities and counties can still pass local regulations that prohibit the practice.

Establishments that do allow dogs must have a separate entrance to the patio or outdoor area so pets aren't required to walk through the restaurant to get there. Dogs should also be leashed, well-behaved, and they must stay off the furniture.

Restaurant employees can't pet dogs, and if they do come in physical contact with a four-legged patron, they must sanitize their hands. Pets aren't allowed in the food prep area.

6. Conclusion

The following quote is illustrative of the government's view of the distinction between service and emotional support animals.

> "The way we look at it is what the regulation says is that a service animal is an animal that is trained to provide services for a person. So something that is just a pet is not, and we try to be very broad, because there could be a whole range of services that an animal can be trained to provide, but it has to be trained to do it and it has to be doing services. Because there has been a great deal of misunderstanding and we are told by a number of guide dog users around the country of abuses that are occurring and a backlash that's happening to people with service animals because of it. When we do the regulations that I am talking about in the fall, we're going to ask questions about this issue and be specific about this. Should emotional support animals be covered by the ADA? Should they be required to be in restaurants? Should they be require to be in public transportation? In our view they are not covered now unless they are providing a service to the person."[12]

Clearly the Federal Government sees a distinction between service and emotional support/comfort animals as the latter has not been afforded the protections of the ADA.

[12] John Wodatch, retired Chief, Disability Rights Section, Office of Civil Rights U. S. Department of Justice, and the author of the ADA,(July 7, 2001.

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SERVICE ANIMAL LAWS: COMPARISON CHART

	ADA[1]	**FHA**[2]	**ACAA**[3]	**Cal State Law**	**FEHA**[4]	**Municipal**
What is protected?	Requires reasonable accommodation by public entities and accommodations for "service animals," where this means "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability." In some circumstances, this can also extend to miniature horses. Explicitly does not apply to emotional support animals. 28 C.F.R. §§ 35.104, 36.104, 35.136(i) (2010)	Requires "reasonable accommodation" to handicapped persons in housing. 24 C.F.R. § 100.204 (1996) Covers all "assistance animals," including those needed for emotional support, to the same extent.	Prohibits discrimination on the basis of disability in air travel. Broadly defines disability, includes anyone "regarded as having an impairment." 14 C.F.R. § 382.3 (2010)	Provides for standardized identification tags for "assistance dogs" which it defines as "guide dogs, signal dogs, or service dogs." Cal. Food and Agriculture Code § 30850 (2004)** Protects those using guide dogs, signal dogs, or service dogs from additional fees (such as a standard pet fee) for bringing their assistive animal into their residence. Cal. Civil Code § 54.3 (1996)	Prohibits discrimination on the basis of disability in employment and housing; this includes reasonable accommodation in both rental/leasing and construction of housing. Cal. Gov't. § 12927 (2010), Cal. Gov't. §§ 12955-12955.1 (2011)	Generally, CA counties or cities require licenses for all pets or animals. In most of these counties, service animals receive a fee waiver (though must still license their animal with the city/county). *See*: Sacramento, Cal., City Code § 9.44.510 (2013); Los Angeles, Cal., Municipal Code §§ 53.15(b), 53.15.3 (2011); San Jose, Cal., Municipal Code § 7.20.550 (2007); S.F., Cal., Health Code Art. 1 § 41.23(b)(3)(1992).
Additional requirements	No size, weight, or breed restrictions allowed. 28 C.F.R. Pt. 36, app. a (2011)	No size, weight, or breed restrictions allowed; determination of	May require 48-hours notice for an emotional support animal, or for a	Makes falsely claiming an animal to be a service animal a	N/A	N/A

	May ask ONLY (1) if animal is required due to disability and (2) what tasks it is trained to perform. *May not* require documentation or proof of certification or licensing. 28 C.F.R. § 35.136(f) (2010) For public accommodations: allows private civil suit, or Atty. General suit, if violations occur; injunction and/or fines of up to $55,000 for a first violation and $100,000 for subsequent violations. 28 C.F.R. §§ 36.501-.505 (2010)(asking additional questions or refusing access is a violation)	reasonableness based on specific animal in question.	service animal on a flight of 8 hours or more. 14 C.F.R. § 382.27(c) (2010)	misdemeanor, punishable by imprisonment in a county jail for six month or a fine up to $1000 or both. Cal. Penal Code § 365.7 (1994), Cal. Food & Agriculture Code § 30850(b) (2004) Makes "interfering" with rights of a disabled person (such as disallowing them access) a misdemeanor punishable by a fine not exceeding $2500. Cal. Penal Code § 365.5(c) (1996)		
Emotional Support Animals?	No, under Article II and III. Unclear under Article I, which requires "reasonable accommodation" and does not	Yes, with "reasonableness" determined on a case by case basis. Requires evidence	Yes, with letter from a mental health professional stating that (1) the passenger has a mental health	No.* *Unruh Civil Rights Act includes by reference FHA protections re:	It depends. In the workplace, FEHA demands that an employer to "engage in a timely,	Generally, no. Sacramento allows for animals classified as "livestock" to be kept as pets, as an

	explicitly mention service animals or limit the scope of what is "reasonable," though they do name service animals as an example of a "reasonable accommodation" in explanatory documents.	of disability and that animal's presence will alleviate this in order to waive "no pets" policy. Can still deny access if evidence that *specific* animal will cause harm or endanger health and safety of others.	related disability, (2) that having the animal accompany the passenger is necessary to the passenger's mental health, and (3) the individual providing the assessment of the passenger is a licensed mental health professional and the passenger is under his or her professional care. 14 C.F.R. § 382.117 (2008) Can ONLY request this if they identify animal as a support animal (rather than service) or if their statement that it is a service animal does not qualify as a "credible verbal assurance" and there is no physical evidence of the animal's status. *See* 1 Americans with Disabilities: Practice & Compliance Manual § 3:348	animals as applied to housing for senior citizens. Cal Civ. Code § 51.2 (2010)	good faith, interactive process with the employee or applicant to determine effective reasonable accommodations" for a disability "or known medical condition." Cal. Gov't. Code § 12940(n) (2012). Thus, it is likely a case-by-case analysis. In housing, prohibits discrimination based on "disability" only. The absence of "medical condition" in this section tends to indicate that they were not intending to include non-service animals in "reasonable accommodation" provisions. Cal. Gov't. Code § 12955 (2011)	exception to the limitation of pets to "domestic" animals, if certified as therapeutic. It is unclear whether this acts as a waiver to a no-pets policy. Sacramento City Code 9.44.350. However, this does not extend to public accommodations/buildings. *See* Sacramento, Cal., City Code § 9.44.300 (2013)
Apply to	No, unless	Yes.	No.	Yes.	Yes.	N/A (goes to FEHA)

housing?	government provided					
Apply to employment?	Yes. "Reasonable Accommodations" are required; service animals are not explicitly mentioned in Article I, and the EEOC has not issued any limiting instructions. However, with no indication to the contrary, it is logical to assume a consistent definition of "service animal" that must be accommodated throughout the ADA.	No.	No.	N/A (goes to FEHA)	Yes.	Unclear
Exemptions & Defenses	A public accommodation may remove a service animal from its premises if (1) the animal is out of control and effective remedial action is not taken, or (2) the animal is not housebroken. 28 C.F.R. § 35.136(b) (2011)		Not required to accommodate "certain unusual service animals" – snakes, reptiles, ferrets, rodents, and spiders. 14 C.F.R. § 382.117 (2010)	Service Animals are allowed in dining and sales areas "not used for food preparation" only, and employees with service animals must wash their hands after handling the animal. Cal. Health and Safety Code §§114259.4-.5 (2007)	Accommodations can be denied by employers only if they can "demonstrate… that the accommodation would impose an undue hardship," where this means that the accommodation would require "significant difficulty or expense incurred	

	Employees with service animals in food service: “FDA Food Code Section 2-403.11 prohibits handling of animals, but allows employees to use service animals. Section 6- 501.115 states that service animals may be permitted in areas not used for food preparation. Employees may handle their service animals if, after handling a service animal, the employee washes his hands for at least 20 seconds using soap, water, and vigorous friction on surfaces of the hands, followed by rinsing and drying as per Section 2-301.12.” The Food Code is not binding but provides the basis for interpretation of a business’ obligations. *How to*				by an employer or covered entity, when considered under the totality of circumstances.” Cal. Civ. Code §§ 11065(r), 11068 (2013) Valid defense if any possible accommodation would endanger the health and safety of the disabled party or others, but risk of future harm is not a defense. Cal. Civ. Code § 11067 (2013)	

	Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (January 19, 2011), http://www.eeoc.gov/facts/restaurant_guide.html					
Issues to address	ADA is a FLOOR and preempts any state or local law that puts an additional burden on disabled persons. Thus, cannot require certification/identification to accommodate claimed service animal, nor ask for details of disability. Violations of ADA's accommodation provisions are also violations of the Unruh Civil Rights Act. Cal. Civ. Code § 51(f) (2011)			** This does not exist. Per Dept. of Public Health, done locally through each county's animal control. Descriptions of tag, and processes for obtaining tag, of each county vary widely. (Information from calls to SF, San Jose, SD, LA and OC Animal Control licensing centers, and CA Dept. of Public Health).		ADA requires that local animal licensing requirements be met; however, these vary drastically by county. Provisions *requiring* certification or identification tags are preempted by the ADA (cannot place any additional burden on disabled persons); while a person can choose to get the tag, in order to avoid being questioned about their animal's status, the tags/certification

						cannot be required. The best way around this seems to be by standardizing the tag and integrating the licensing of service animals into the standard licensing procedure in each county, with them providing the uniform tag.

[1] Americans with Disabilities Act.
[2] Fair Housing Act.
[3] Air Carriers Access Act.
[4] California Fair Employment and Housing Act.

Sample Letter from a Service Provider

[date]

Name of Professional (therapist, physician, psychiatrist, rehabilitation counselor)
XXX Road
City, State Zip

Dear [Housing Authority/Landlord]:

[Full Name of Tenant] is my patient, and has been under my care since [date]. I am intimately familiar with his/her history and with the functional limitations imposed by his/her disability. He/She meets the definition of disability under the Americans with Disabilities Act, the Fair Housing Act, and the Rehabilitation Act of 1973.

Due to mental illness, [first name] has certain limitations regarding [social interaction/coping with stress/anxiety, etc.]. In order to help alleviate these difficulties, and to enhance his/her ability to live independently and to fully use and enjoy the dwelling unit you own and/or administer, I am prescribing an emotional support animal that will assist [first name] in coping with his/her disability.

I am familiar with the voluminous professional literature concerning the therapeutic benefits of assistance animals for people with disabilities such as that experienced by [first name]. Upon request, I will share citations to relevant studies, and would be happy to answer other questions you may have concerning my recommendation that [Full Name of Tenant] have an emotional support animal. Should you have additional questions, please do not hesitate to contact me.

Sincerely,

Name of Professional

Bibliography

Provided by The Delta Society, http://www.deltasociety.org

Ahmedzai, S. (1995). Individual quality of life: Companion animals affect categories nominated. Paper presented at the 7th International Conference on Human-Animal Interactions, Geneva.

HUMAN RESOURCES MANAGEMENT DEPARTMENT

City of Richmond

August 24, 2015

Via Personal Delivery and US Mail

[redacted]

RE: Invitation to Engage in the Interactive Process

Dear Mr. [redacted]

I am writing in response to your request for a job-related accommodation.

The City of Richmond is willing to consider providing you with an accommodation consistent with federal, state, and local law. In particular, we will consider providing you with an accommodation that is medically-necessary, reasonable, feasible, and likely to enable you to perform the essential functions of your position, and so long as it does not impose an undue hardship on the City of Richmond. This may include leave or other accommodations which might enable you to perform the essential functions of your [redacted]

To determine whether possible accommodations are feasible, the City needs to first determine whether your condition qualifies as a potential disability within the meaning of the Americans with Disabilities Act and/or the Fair Employment and Housing Act. If so, then we need to engage in an interactive process with you to determine if any reasonable accommodations will permit you to perform the essential functions of your job. As part of this process, we need information from your health care provider regarding your current medical restrictions and your functional capabilities. As part of this process, we would welcome any suggestions your health care provider has on how your medical condition might be accommodated to allow you to perform the essential functions of your position.

So that we can begin this process and move forward with evaluation your request for an accommodation, an interactive process meeting has been scheduled for you on [redacted] in the Human Resources Department. This meeting is not disciplinary. However, you may have a representative present, but limited to only one.

450 Civic Center Plaza, P.O. Box 4046, Richmond, CA 94804-1630
Telephone: (510) 620-6602 Fax: (510) 620-6560 www.ci.richmond.ca.us

In addition, so that we can have a productive meeting, enclosed is a questionnaire to be completed by your treating health care provider. The attached questionnaire only seeks information regarding your functional limitations and does not request any confidential medical information. Please provide the completed questionnaire before the meeting time identified above, and **no later than** [redacted] The completed questionnaire should be sent to my attention. You can bring the completed questionnaire to the Human Resources Department or fax the document to the Human Resources' confidential fax line at [redacted] If a completed questionnaire is not timely provided, our attempts to engage in an interactive process about possible accommodations may be delayed.

If you have any questions or are unable to provide a completed questionnaire by [redacted] please contact me at [redacted]

Sincerely,

[redacted]

Risk Manager

Encl: Physician Questionnaire (including employee job description)

[redacted]

City of Richmond

REASONABLE ACCOMMODATION REQUEST – PHYSICIAN QUESTIONNAIRE

QUESTIONS REGARDING EMPLOYEE'S RESTRICTIONS AND CAPABILITIES
[Do Not Disclose Information Regarding Medical Cause – Disclose Only Non-Medical Information Regarding Employee's Functional Limitations and Capabilities]

Re: Employee (Patient) Name: [redacted]

Dear Treating Physician:

The City of Richmond ("City") has received a request for an accommodation from the employee identified above. Pursuant to the Americans with Disabilities Act ("ADA") and the California Fair Employment and Housing Act ("FEHA"), the City requests that you to examine whether the employee identified above, is fit for duty in the position of [redacted]

To assist you in responding to the questions below, enclosed is a job description for the Position. Please make your assessment based upon the job duties listed in the attached job description, the information contained in this questionnaire and pursuant to the requirements of the ADA and the FEHA.

To that end, please respond only to the following questions. The City seeks only information regarding the employee's functional limitations, if any, that may limit the employee's fitness to perform the duties of the Position. In responding to the following questions, please do **not** disclose any information regarding medical cause or the medical history.

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, the District asks that you **not** provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Please use the information contained in the attached job description in responding to the following questions:

1. Does the employee have a physical or mental disability which limits a major life activity? A condition can be said to "limit" a person if the condition makes the achievement of the major life activity more difficult. (Definitions of physical disability, mental disability, limits and major life activity are attached to this questionnaire.)

   Yes___No____

   Life Activity that is Limited:_____

   _____

   _____

   If you respond "NO" to question Number 1, please sign and return this questionnaire; there is no need to answer the remaining questions.

2. Does the employee's medical condition impair his/her ability to perform any or all of the tasks and duties as described in the attached job description for the Position?

   Yes_____ No_____

   If yes, please identify each task/duty that is affected and in what way:

   _____

   _____

   _____

   _____

   _____

   _____

   _____

   How long do you expect the restrictions on the performance of the tasks and duties resulting from the employee's medical condition to continue?

   _____

   _____

   _____

   What possible accommodations might be provided to the employee that would permit him to perform the essential functions of his position?

   _____

   _____

   _____

   _____

   _____

For each possible accommodation listed, how would it affect any current restrictions?

_____

_____

_____

_____

3. Does the employee's medical condition prevent him/her from being at work?

Yes ____ No_____

If the answer is "Yes," please identify possible reasonable accommodations that may allow the employee to return to work at this time.

_____

_____

_____

_____

_____

4. If the employee is able to work or if there are no possible reasonable accommodations that may allow the employee to return to work at this time, is additional leave from work reasonably likely to enable the employee to return to work in the foreseeable future and perform the essential functions of his/her job with or without reasonable accommodations?

Yes ____ No_____

If the answer is "Yes," please provide a definitive/certain date on which the employee is likely to be able to return to work and perform the essential functions of his/her job with or without reasonable accommodation:

_____

_____

If you are unable to provide a definitive date on which the employee will be able to return to work, is it your opinion, based on your knowledge of the employee's medical condition and your professional expertise, that the employee's need for medical leave will continue indefinitely?

Yes ____ No_____

Comments:_____

_____

_____

5. Does the employee's medical condition cause him/her to pose a threat to his/her own safety while performing the essential functions of the job?

Yes_____ No_____

If yes, what possible accommodations may reduce the threat to employee:

_____

_____

_____

_____

6. Does the employee's medical condition cause him/her to pose a threat to the safety of co-workers, supervisors, customers, and/or vendors whom he/she will come into contact with while performing the essential functions of the job?

Yes_____ No_____

If yes, what possible accommodations may reduce any threat to others?

_____

_____

_____

_____

Physician's Name: _____

Practice Name: _____

Address: _____

_____

Telephone Number: _____

Fax Number: _____

_____ _____

Physician Signature Date

DEFINITIONS TO ACCOMPANY MEDICAL RESTRICTIONS AND CAPABILITIES QUESTIONS (Americans with Disabilities Act as Amended)

"Physical disability" includes, but is not limited to, all of the following:

A. Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that limits a major life activity and affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

Physical disability does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

"Mental disability" includes, but is not limited to, all of the following:

A. Having any mental or psychological disorder or condition, such as intellectual disability (formerly mental retardation), organic brain syndrome, emotional or mental illness, or specific learning disabilities.

Mental disability does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

"Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. A mental or psychological disorder or condition or a physical disorder or condition limits a major life activity if it makes the achievement of the major life activity more difficult.

"Major life activities" shall be broadly construed and shall include physical, mental, and social activities. Major life activities include, but are not limited to, walking, speaking, breathing, learning, reading, performing manual tasks, seeing, hearing, caring for oneself, eating, sleeping, standing, lifting, bending, concentrating, thinking, communicating, working, and the operation of major bodily functions; and the operation of major bodily functions, including functions of the immune system, special sense organs, and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.

CITY OF RICHMOND

TEMPORARY BRIDGE ASSIGNMENT

Bridge Assignments are designed to be performed by injured workers who cannot do their regular jobs. They are temporary, productive work assignments specifically developed to help employees safely continue working during their recoveries. For injuries requiring longer recovery periods, employees may be moved through a series of Bridge Assignments with physical requirements matching each stage of their recovery. This process accelerates their return to their usual and customary position while benefiting the organization.

TITLE: Special Projects

All work is to be performed in a safe and careful manner.

DESCRIPTION

Worker may perform any combination of the following or similar tasks as directed: This is an at-large position to be utilized among departments as demand dictates. At the request and direction of the department heads, updates website information, manuals, and training materials. Researches possible grant opportunities, best practices, new rules and guidelines for public policies, and other research related requests. Assists with quality control review of files, reports, applications, and records. If placed in Housing Authority, may conduct calls to landlords or renters to ensure that required maintenance and related issues were completed and/or addressed. May also make senior service courtesy calls. May help with processing and quality control of Housing applications. If placed in Planning and Building, may make appointments for inspectors and/or respond to calls regarding permit inquiries, within scope of knowledge. If placed in Emergency Services, may review and/or update Emergency Operations Plans.

If approved for use of both hands for repetitive motion, performs general data entry, writing and typing of grant proposals, process and best practices guidelines, etc.

MACHINES AND/OR TOOLS USED

Computer, telephone, photocopier, standard office equipment.

VEHICLES AND/OR EQUIPMENT DRIVEN

None.

REQUIRED TRAINING, LICENSING AND/OR CERTIFICATIONS

None.

TEMPORARY BRIDGE ASSIGNMENT ANALYSIS

Endurance	Minutes at One Time	Total Hours in an 8 Hour Day
Sit	0 - 5 min.	May sit or stand at will.
Stand	0 - 5 min.	May sit or stand at will.
Walk	0 - 5 min.	0 - ½
Drive	0	0
Keyboarding	0 - 5 min.	0 - 3

STRENGTH	Nvr	Rare	Seld	Occas	Freq	Cont
Time in an 8 hour day	0	up to 30 min.	31 to 90 min.	1.5 to 2.5 hrs.	2.5 to 5 hrs.	5 to 8 hrs.
LIFT						
01 - 10 lbs.						X(1)
11 - 20	X					
21 - 35	X					
36 - 50	X					
CARRY						
01 - 10 lbs.						X(1)
11 - 20	X					
21 - 35	X					
36 - 50	X					
PUSH						
01 - 10 lbs.				X(1)		
11 - 20	X					
21 - 35	X					
36 - 50	X					
PULL						
01 - 10 lbs.				X(1)		
11 - 20	X					
21 - 35	X					
36 - 50	X					

ACTIVITIES	Nvr	Rare	Seld	Occas	Freq	Cont
Time in an 8 hour day	0	up to 30 min.	31 to 90 min.	1.5 to 2.5 hrs.	2.5 to 5 hrs.	5 to 8 hrs.
PHYSICAL ACTIVITIES						
Bend/Stoop	X					
Twist	X					
Crouch/Squat	X					
Kneel	X					
Crawl	X					
Walk-Level		X				
Walk-Uneven	X					
Climb Stairs	X					
Climb Ladder	X					
Reach Above Shldr	X					
Use of Arms						X(1)
Use of Wrists						X(1)
Use of Hands						X(1)
Grasping						X(1)
Fingering			X(1)			
Foot Control	X					
ENVIRONMENT						
Inside						X
Outside	X					

SPECIAL NOTES/POSSIBLE HAZARDS/POSSIBLE ACCOMMODATIONS:

1. Items weighing up to 3 lbs.; may be performed with one hand.

Nature of assignment allows self-pacing of tasks.

Office of Emergency Services

1. EOP Completion:
    a. Review,
    b. printing coordination,
    c. downloading onto thumb drive and
    d. distribution to EOC Committee and outside agencies

2. PWD AFN (People with Disabilities and Others with Access & Functional Needs) Plans
    a. Review EOP Annex for Mass Care & Shelter for PWD for accuracy
    b. Review in terms of how we can develop a transportation plan for evacuation
    c. Attend PWD AFN Meetings and presentations as available
    d. Assist with training materials when possible

3. EOP Transportation Plan
    a. Review and revise transportation and Utility Contacts lists for accuracy
    b. Ensure that the plan is consistent and can be implemented

4. Evacuation Plan
    a. Review and revise transportation response plan for accuracy
    a. Ensure that the plan is consistent and can be implemented especially considering PWD AFN needs and resources
    b. Look for any gaps in planning that may need attention
    c. Help Develop a table top exercise to test the plan

5. General office duties, copy, phones, etc.