MERCERTRIGIANI

REASONABLE ACCOMMODATIONS AND MODIFICATIONS UNDER FAIR HOUSING LAWS

WHAT ARE REASONABLE MODIFICATIONS AND ACCOMMODATIONS?

The federal Fair Housing Act ("FHA") prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, as well as *disability*. More specifically, the FHA prohibits "housing providers" – which includes community associations – from engaging in prohibited, discriminatory conduct against individuals on the basis of any protected class. Although the Virginia Fair Housing law is substantially equivalent to the federal FHA, additional protected classes – sexual orientation, gender identity, elderliness, military status and source of income – are included as of 2021.

Among other things, federal and state fair housing laws require housing providers to make *reasonable accommodations* in rules, policies, or practices and *reasonable modifications* of existing premises occupied by disabled individuals, if such accommodations or modifications are necessary to afford the disabled individual an **equal opportunity** to use and enjoy a dwelling. Housing providers are required to provide a reasonable accommodation or modification *only if* a reasonable accommodation or modification is requested. Requests for reasonable accommodations or modifications *may* be in writing, but are not required to be, and need not refer specifically to the fair housing law.

ASSISTANCE ANIMALS

A request for a reasonable accommodation may relate to use of an assistance animal in a community where prohibitions, restrictions or conditions relating to pets and other animals are imposed on owners and residents. ***An assistance animal is not a pet***. An assistance animal is an animal that works, provides assistance or performs tasks for the benefit of a disabled individual, or provides emotional support that alleviates one or more identified symptoms of a person's disability. There are **two** types of assistance animals: (1) service animals and (2) support animals (other animals that do work, perform tasks, provide assistance, or provide therapeutic emotional support for disabled individuals).

Service Animals vs. Support Animals

A service animal is defined by the Americans with Disabilities Act ("ADA") as "any **dog** that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability." The provision of emotional support, well-being, comfort or companionship do not constitute work or tasks for purposes of the definition of a service animal. Thus, **trained dogs** are the only kind of animal that may qualify as *service animals* under the ADA,[1] and emotional support animals are ***expressly precluded*** from qualifying as service animals under the ADA.

[1] However, there is a separate provision regarding trained miniature horses.

Unlike the requirements for service animals, the FHA does not require a *support animal* to be individually trained or certified. And while dogs are the most common type of support animal, other animals commonly kept in households – cats, small birds, rabbits, hamsters, gerbils or other rodents, fish, turtles, or other small, domesticated animals – can also qualify as support animals. Housing providers must evaluate a request for a reasonable accommodation to possess an ***assistance animal*** in a dwelling using the general principles applicable to all reasonable accommodation requests.

Because the ADA requirements for **service animals** differ from the FHA requirements for **support animals**, an individual's use of a service animal in an ADA-covered facility *must not be handled* as a request for a reasonable accommodation under the FHA. In facilities covered by the ADA, an animal need only meet the definition of *service animal* to be allowed.

WHO IS ENTITLED TO AN ACCOMMODATION OR MODIFICATION?

A housing provider is required to provide a reasonable accommodation or modification only for disabled individuals *upon request*. Fair housing laws define a person with a disability as (1) individuals with a physical or mental **impairment** that substantially limits one or more major life activities; (2) individuals who are **regarded as having** such an impairment; and (3) individuals with a **record** of such an impairment.

The term "physical or mental impairment" includes, but is not limited to, diseases and conditions which include orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, drug addiction, and alcoholism.

But the requested accommodation or modification must have an ***identifiable relationship***, or *nexus*, with the individual's disability. Under fair housing laws, a housing provider can deny a request for a reasonable accommodation or modification if there is no disability-related need for the accommodation or modification.

Prior to determining whether to provide a requested accommodation or modification, the housing provider should evaluate the relationship between the requested accommodation or modification in relationship and the disability. The housing provider may need to request information from the resident in order to evaluate the nexus.

WHAT INFORMATION CAN A HOUSING PROVIDER REQUEST?

Requests not Involving Assistance Animals

Questions about fair housing laws relate most often to what – if any – additional information about a disability (or disability-related need) can be required by an association when evaluating an accommodation or modification request. The general rule is that the housing provider is entitled to obtain information necessary to evaluate whether a requested accommodation or modification is essential because of the disability and disability-related need. However, the housing provider may **not** ordinarily inquire about the nature or severity of an individual's disability.

- If a person's disability is *obvious* or *otherwise known* to the housing provider and the need for the accommodation or modification is *readily apparent or known*, the association may not request additional information about the requestor's disability or the disability-related need for the accommodation or modification.

- If the person's disability is *readily apparent or known* but the need for the accommodation or modification is not readily apparent or known, the housing provider may request only information that is necessary to evaluate the **disability-related need** for the accommodation/modification (see requests 2 & 3 below).

- If a disability is *not obvious or otherwise known* to the housing provider, in response to a request for a reasonable accommodation or modification, the housing provider may request reliable **disability-related information** that:

    1. Is necessary to verify that the person meets the fair housing law definition of disability (has a physical or mental impairment that substantially limits one or more major life activities);

    2. Describes the accommodation or modification needed; and

    3. Shows the relationship between the disability and the need for the requested accommodation or modification.

The housing provider is also limited in the *type of information* that may be requested – even if a disability is *not obvious or otherwise known*. In almost all cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary and may not be requested. Depending on facts and circumstances, information verifying the requesting party meets the fair housing law definition of disability may be provided by any of the following:

- The *individual* (e.g., proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits or a credible statement by an individual);

- A doctor or other medical professional;

- A peer support group;

- A non-medical service agency; or

- A reliable third party who is in a position to know about the disability.

Requests Involving Assistance Animals

1. Support Animals. If the request pertains to a support animal, and the disability-related need for the support animal is *not obvious*, the housing provider may request that the individual provide information to reasonably support that the individual has a disability – including documentation from a health care professional such as a physician, optometrist, psychiatrist, psychologist, physician's assistant, nurse practitioner, or nurse.

If the requesting individual does not provide information which reasonably supports that the animal does work, performs tasks, or provides assistance or therapeutic emotional support with respect to the individual's disability, the housing provider *may request* information from a licensed health care professional *general to the condition* but *specific to the individual* with a disability and the assistance or emotional support provided by the animal. In other words, such documentation is sufficient if it establishes that an individual has a disability and the animal in question will provide some type of disability-related assistance or emotional support.

2. Service Animals. ADA-covered facilities may not ask about the nature or extent of a person's disability, but may ask the following **two questions** (if the individual's disability and the work or tasks performed by the service animal are *not readily apparent*) to determine whether an animal qualifies as a service animal:

(1) Is this a service animal that is required because of a disability?

(2) What work or tasks has the animal been trained to perform?

An ADA-covered housing provider may not ask about the nature or extent of the person's disability and may not require proof that the animal is certified, trained or licensed as a service animal or other documentation. If the disability or the training of the animal *is readily apparent*, the housing provider may not make the above inquiries.

All information collected must be kept **confidential** and must not be shared with other persons – unless the information is needed to assess whether to grant or deny a reasonable accommodation request *or* unless disclosure is required by law or expressly authorized. Care should be taken in the maintenance of these records.

WHAT IS REASONABLE?

Fair housing laws permit the housing provider to deny accommodation or modification requests that are *not reasonable*. What constitutes a "reasonable accommodation" or "reasonable modification" is determined by a consideration of the facts and circumstances, such as the *cost* of the requested accommodation or modification, the *financial resources* of the housing provider, the *benefits* that the accommodation or modification would provide to the requester, and the availability of *alternative accommodations* or *modifications* that would effectively meet the requester's disability-related needs.

Courts have generally held that an accommodation or modification is ***reasonable*** if the accommodation or modification would not impose an *undue hardship* or *burden* upon the housing provider nor *fundamentally alter* the nature of the provider's operations (i.e. would not change the essential functions and operations of the housing provider).

When the housing provider denies a request for being unreasonable, the provider should discuss with the requester whether an alternative accommodation or modification would effectively address the requester's disability-related needs *without* imposing an undue burden on or fundamentally altering the provider's operations.

WHO PAYS?

As a general rule, the housing provider is responsible for the costs to make reasonable *accommodations*. Courts have ruled that the FHA may require a housing provider to grant a reasonable accommodation that involves costs – again, *so long as* the reasonable accommodation does not pose an **undue** financial or administrative burden and the requested accommodation does not constitute a fundamental alteration of the provider's operations.

As of 2021, housing providers are required to provide and **pay** for structural modifications – *unless* the request poses an undue financial or administrative burden or constitutes a fundamental alteration to the community. If an undue burden or fundamental alteration exists, the housing provider is *still required* to provide another reasonable accommodation to the point that would not result in an undue financial and administrative burden or constitute a fundamental alteration of the community.

Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition for submitting requests for reasonable accommodations or modification, nor may housing providers condition approval of a reasonable modification on the requester obtaining special liability insurance.

FAILURE TO COMPLY WITH FAIR HOUSING LAWS

Courts consider discrimination cases very seriously and penalties for violations can be severe. The provisions of the FHA may be enforced by the Department of Housing and Urban Development ("HUD") and in Virginia, by the Virginia Fair Housing Board because Virginia law has been determined to be substantially equivalent to the federal statutes.[2] A person who alleges discrimination may file a complaint with HUD or with the Virginia Fair Housing Office. If HUD believes the claim has merit, the matter will be referred to an administrative law judge for a hearing. The judge is empowered to award actual damages, injunctive or other equitable relief, and attorneys' fees to the prevailing party. The judge also may assess civil penalties against the violators, which can range from $10,000 to more than $50,000. The judge may not award punitive damages. Or a complaint may be filed with, or referred for investigation to, a locality's human rights commission or similar agency.

Also, the Attorney General may file a civil lawsuit when there is evidence of a pattern or practice by the alleged violator that extends beyond one or two victims. When the Attorney General prevails in these types of lawsuits, the FHA allows the award of injunctive relief and monetary and punitive damages to the aggrieved party. In addition, the court may assess attorneys' fees to the aggrieved party and additional civil penalties against the violator up to $100,000.

If the complaint is referred to the Virginia Fair Housing Office, the matter will be investigated by the staff of the Virginia Department of Professional Occupation Regulation and the parties will be invited to conciliate the complaint. Conciliation is a dispute resolution process very similar to mediation. A trained conciliator works with the parties to find a resolution.

[2] Because the Virginia fair housing law added new protected classes, effective 2021, it is not yet clear whether Virginia courts will continue to determine that the federal and state fair housing laws are substantially similar.

If the parties *decline to conciliate* or conciliation is *not successful*, the Virginia Attorney General's office can prosecute after a determination of probable cause. The complaining party can initiate a civil lawsuit in state or federal court against the alleged violator of the fair housing law. Damages available under the Virginia Fair Housing Law include actual damages, punitive damages, injunctive relief and attorneys' fees and costs.

For these reasons, actions should be taken to **respond promptly** to fair housing-related requests and inquiries. It is well-advised for communities to have developed and implemented policies that detail review procedures for reasonable accommodation and modification requests – to ***ensure timely and consistent consideration***.

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