

Legal Stew for the Hospitality Industry

Issues with OSHA, Transgender Bathrooms
and Service Animals

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Agenda

1. Service/Assistance Animals
2. Transgender Bathrooms
3. Dealing With OSHA
4. Questions?

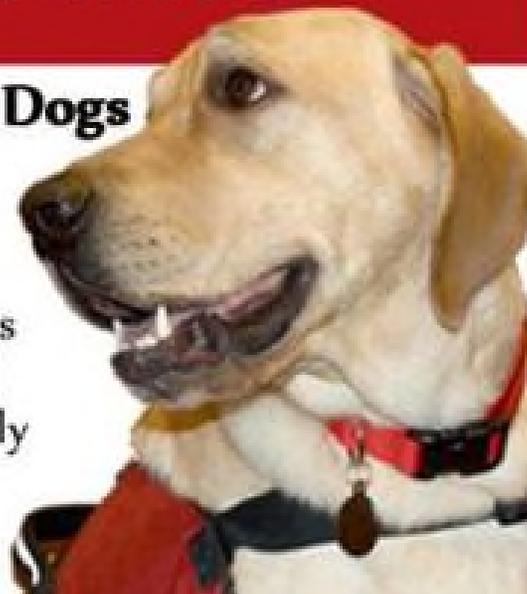
“Service Animals”



Please don't try to
pass your pet off as
a service animal

Fake Service Dogs

can hurt the
reputation and
acceptance of
valid service dogs
and the disabled
persons who truly
need those dogs
to assist them.



Service/Assistance Animals

- The Americans with Disabilities Act (“ADA”) prevents discrimination against individuals with disabilities in “any place of public accommodation.” 42 USC § 12182.
- It is a discriminatory practice to refuse to allow service animals in such places of public accommodation. 28 CFR 36.302(c).
- “Places of public accommodation” include **places of lodging, including inns, hotels, or motels and a restaurant, bar or other establishment serving food or drink.** 28 CFR 36.104.
- Oregon law similarly prevents discrimination in “places of public accommodation” against individuals with disabilities, which also includes allowing service animals (called “assistance animals” under Oregon law) into such places. ORS 659A.142(4); ORS 659A.143.

Service/Assistance Animals

- Under the ADA, a “service” animals is defined generally 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.” 28 CFR 36.104. Only dogs qualify as service animals under the ADA (there is a very limited exception for certain “miniature horses.” 28 CFR 36.302(c)(9)).
- Oregon law, however is broader, and does not limit the definition of “assistance animals” to dogs. Instead, “**a dog or other animal designated by administrative rule** that has been individually trained to do work or perform tasks for the benefit of an individual” is an assistance animal, and “trainee” assistance animals are also within the protections of the law. ORS 659A.143(1)(a).
 - There is no Oregon administrative rule designating “other” animals.

Companion Animals

- “Companion” or “support” animals, on the other hand, are covered by the Fair Housing Act (“FHA”).
- Companion animals can include virtually any type of animal and do not require any training.
- Generally, the FHA requires that companion animals be allowed as a “reasonable accommodation” wherever possible. 24 CFR 100.204.
- However, the FHA does not apply to “lodging for transient guests such as hotels.” *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1327 (D. Or. 1996).

Can a Fee be Charged for a Service or Assistance Animal?

- Both the ADA and Oregon law expressly prohibit charging a fee to permit a service or assistance animal. 28 CFR 36.302(c)(8); ORS 659A.143(2)(c). Under law, they are not “pets.”
- However, if the service or assistance animal causes damage, the owner can be charged for the damage, so long as a public accommodation normally charges individuals for the damage they cause.
- A place of public accommodation is not required to provide care or supervision for an assistance animal or assistance animal trainee.

Appropriate Inquiries

- A public accommodation shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal:
 1. Is the animal required because of a disability?
 2. What work or task the animal has been trained to perform?
- A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.
- Generally, a public accommodation may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

Excluding Service/Assistance Animals

- The person must maintain control of the service animal, either through use of a leash, harness, etc., or voice commands, signals or other means if the leash, etc. would interfere with the service animals ability to perform its tasks.
- A public accommodation may ask an individual with a disability to remove a service animal from the premises if:
 - The animal is out of control and the animal's handler does not take effective action to control it; or
 - The animal is not housebroken. 28 CFR 36.302(c)(2).
- If a public accommodation properly excludes a service animal, it shall give the individual with a disability the opportunity to obtain goods, services, and accommodations without having the service animal on the premises.

Modifying Your Business

- A place of public accommodation shall make **reasonable modifications** as necessary to allow an opportunity for a person with a disability who is benefited by the use of an assistance animal to obtain goods, services and the use of the advantages, facilities and privileges of the place. In addition to any other applicable accommodation requirement, **allowing the presence of the assistance animal is a reasonable modification.**

Protecting Your Other Guests?

- A place of public accommodation may impose legitimate requirements necessary for the safe operations of the place of public accommodation. The safety requirements must be based on actual risks, not on speculation, stereotypes or generalizations about persons with disabilities.
- Places of public accommodation may refuse to permit an individual with a disability to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation if the individual with a disability poses a direct threat to the health or safety of others. Direct threat means significant risk of substantial harm that cannot be eliminated or reduced below the level of significant risk of substantial harm by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.

Protecting Your Other Guests?

- In determining whether an individual with a disability poses a direct threat to the health or safety of others, places of public accommodation must make an individualized assessment, based on reasonable judgment that relies on the most current medical knowledge, or on the best available objective evidence, to ascertain:
 - (a) The duration of risk;
 - (b) The nature and severity of potential harm;
 - (c) The likelihood that potential harm will occur;
 - (d) The imminence of potential harm; and
 - (e) Whether reasonable modifications of policies, practices or procedures will mitigate the risk.

Transgender Bathrooms



Transgender Bathrooms

-For Employees-

- The Oregon Equality Act prohibits employers from discriminating against employees in the **terms and conditions of employment** because of **sexual orientation**, **gender identity**, or **gender expression**.
 - Limited exception for bona fide church or religious institutions based on a bona fide religious belief.
 - **Sexual orientation** is an individual's heterosexuality, homosexuality, bisexuality, gender identity, regardless of assigned sex at birth.
 - **Gender identity** is an individual's internal sense of gender, which may differ from the person's sex assigned at birth, and can include a gender identity that is transgender or androgynous.
 - **Gender expression** is the manner in which a person expresses gender, such as through dress, appearance, manner, or speech.

Transgender Bathrooms

-For Employees-

- Equal **terms and conditions of employment** includes bathrooms, meaning employers are required to allow employees to use restroom consistent with gender identity. *See* OAR 839-005-0003 (religious freedom rule does not “excuse a failure to provide reasonable and appropriate accommodation permitting all persons access to restrooms consistent with their gender expression.”)
- **No “separate but equal” rule** - Requiring the employee to use a “gender neutral” or separate bathroom, when other employees are allowed to use traditional men’s and women’s restrooms, is discriminatory.
- **No “prove it” rule** - Employer’s can’t require the employee to provide proof of gender identity.
- Treat gender identity like confidential medical information – don’t discuss it with others unless the employee consents to disclosure

Transgender Bathrooms

-For Employees-

- OSHA Considers Restroom Access a Safety Issue:
 - Employers must provide employees with sanitary and available toilet facilities and may not impose unreasonable restrictions on employee use:
 - Adverse health effects can result if toilets are not available when needed
 - Restricting employees to using restrooms that are inconsistent with gender identity, or segregating them from other workers by requiring specific restrooms, **singles them out** and **can result in avoidance leading to injury or illness**.

Transgender Bathrooms

-For Employees-

- OSHA Model Practices
 - All employees should have **prompt access** to appropriate sanitary facilities and **be permitted to use facilities that correspond with their gender identity**:
 - **Employees** should determine the most appropriate and safest options.
 - **Employees** should not be asked to provide documentation.
 - **No segregated facilities** apart from other employees because of gender identity.
 - No **unreasonable distance or travel time**.
 - Best Practices (if possible):
 - Single occupancy gender neutral (unisex) facilities for all employees.
 - Multiple occupant gender neutral facilities with lockable single occupant stalls for all employees.

Transgender Bathrooms

-For Guests-

- Oregon's Public Accommodation Law requires places of public accommodation to permit guests to use the bathroom that corresponds with their gender identity.
- ORS 659A.403 prohibits a **place of public accommodation** from denying full and equal accommodations, advantages, facilities and privileges of any place of public accommodation because of a person's **sexual orientation, gender identity, or gender expression**.
- A **place of public accommodation** is any place or service offering to the public accommodations, advantages, **facilities** or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise. ORS 659A.400(1),

Transgender Bathrooms

-For Guests-

- The **Private Club Exception**
 - A “place of public accommodation” does not include “an institution, bona fide club or place of accommodation that is **in its nature distinctly private.**” ORS 659A.400(2).
 - This is a very narrow exception that probably doesn’t apply to your organization. “Distinctly private” is the key.
 - *Lloyd Lions Club of Portland v. Int’l Ass’n of Lions Clubs*, 81 Or.App. 151 (1986) - Lions Club was found to be a place of public accommodation even though it screened members based on set criteria because it marketed and sold memberships to the public at large. Denying membership to women violated the law.

What to do When OSHA Arrives:

Understanding Your Options and Rights During an Inspection



What is OSHA?



What is OSHA?

- Occupational
 - Safety &
 - Health
 - Administration
-
- A state run plan must be “at least as” effective as Federal OSHA. They can also be more strict than Federal OSHA.
 - Oregon runs its own safety and health program (Oregon OSHA)
 - Washington also runs its own safety and health program (Division of Occupational Safety & Health – DOSH)

Oregon OSHA's Enforcement Responsibility

- Oregon OSHA must provide an effective program to enforce statutes, regulations, rules, standards or orders for the protection of the life, safety and health of employees.
- To carry out its responsibilities, Oregon OSHA does the following:
 - **Inspects places of employment**
 - Investigates industrial accidents, fatalities or catastrophes
 - **Issues citations for violations**
 - Identifies safety and health hazards which may or may not be violations and brings them to the attention of employers and employees
 - Issues reasonable correction orders
 - Assists employers and employees in safety and health matters
 - **Assesses and collects civil monetary penalties for violations**
 - Holds informal conferences with employers or employees to discuss citations, penalties or correction orders and other safety and health matters without limiting or extending the employer's appeal rights
 - Grants or denies extensions of the times set by correction orders and citations.

Inspections

- Why are we being inspected?
 - Oregon OSHA has specific rules in place that prioritize inspections.
- Priority of Inspections
 1. Imminent Danger - An inspection should be made as soon as possible after the Division becomes aware of the condition, practice, or act that could reasonably be expected to immediately cause death or serious physical harm.
 2. Fatality, Catastrophe or Accident - An inspection, if appropriate, should be made as soon as possible after the Division becomes aware of a fatality, catastrophe, or accident.
 3. Complaint - An inspection may be initiated when the Division receives a complaint, based on the nature and credibility of the allegations.
 4. Referral – An inspection may be made if safety or health violations were observed and referred by a Division employee; federal, state, or local government representative, or the media, based on the nature and credibility of the allegations.
 5. Programmed Inspections

Scope of Inspection

- Comprehensive Inspection – Complete and thorough inspection of all potentially hazardous areas of the establishment, and includes review of all required safety and health programs.
 - These are typically programmed inspections.
- Partial Inspection – Limited to certain potentially hazardous areas, operations, conditions, or practices at the establishment.
 - Partial inspections arise out of reports of accidents, complaints, or referrals.
 - A partial inspection may be expanded if (1) a planned inspection would occur soon anyway; (2) there is a history of significant violations; or (3) serious hazards are observed that are not within the scope of the original inspection.

What happens during an OSHA inspection?

- Opening Conference
 - Conducted with a designated Employer Representative.
 - Employers can request the presence of an employer representative and the inspector should wait if the representative can be present within a reasonable period of time. Typically this is about 45 minutes to an hour.
 - Will tell you the reason for the inspection (complaint, referral, scheduled) and the scope of the inspection.
- Walkthrough
 - Scope of inspection will determine where the inspector goes.
 - OSHA inspectors have a right to privately interview employees.
 - Employees have a right to an employee representative. Not union rep unless member of union.
 - Employees are not encouraged to decline to provide an interview. This will only raise more red flags with OSHA and will lead to more inspections.
 - Employees have a right to a certified interpreter.
 - What to say during an interview?
- Closing Conference
- Follow-up to confirm compliance

What is an OSHA Inspector Looking For?

	STANDARD	TOTAL VIOLATIONS
1	Fall Protection (1926.501)	5,635
2	Hazard Communication (1926.1200)	3,544
3	Scaffolding (1910.451)	3,535
4	Lockout/Tagout (1910.147)	3,414
5	Respiratory Protection (1910.134)	2,421
6	Ladders (1926.1053)	2,365
7	Machine Guarding (1910.212)	2,147
8	Powered Industrial Trucks (1910.178)	2,043
9	Electrical – Wiring Methods (1910.305)	1,424
10	Fall Protection Training (1926.503)	1,285

*Data current as of Oct. 11

- Violations
- Hazards
- Employee Exposure
- Employer Knowledge

Identifying Hazards

- What is a Hazard?
 - An unsafe condition or practice that could cause an injury or illness to an employees
- Whose job is it to identify a hazard?
 - Everybody!
- Ways to reduce jobsite hazards:
 - Job Hazard Analysis
 - Team Effort
 - Speak up!
 - Regular walkthroughs will help identify new hazards of a fluid work environment.
- If there is a hazard, ask yourself, will I or my co-workers be exposed to that hazard?
 - When someone is within the “danger zone.”
 - If the answer is yes, the hazard should be corrected immediately. Notify your supervisor and make sure no other work is done near the hazard until it is corrected.

Employer Knowledge

- In order to issue a citation, Oregon OSHA must show that a supervisor, or other representative of the employer knew, or should have known, of the hazardous condition.
- What does this mean?
 - Employer knowledge can be established in a number of ways, including:
 - Company memos or safety work rules that specifically identify a hazard
 - Reports of prior incidents or near misses
 - Prior OSHA inspections documenting the same hazard
 - Employee complaints, safety committee minutes, or employee interviews
 - Prior corrective actions
 - Industry recognition
 - So make sure that when a potential workplace hazard is identified, it does not go ignored.

Affirmative Defenses

- Employers have the burden of proving any affirmative defense and any affirmative defense must be raised prior to the Hearing.
- **Unpreventable Employee or Supervisor Misconduct** (not really an affirmative defense)
 - Must show: (1) the violative conduct is unknown to the employer; (2) a work rule is in place to adequately prevent the violation; (3) the rule is effectively communicated to employees; (4) methods for discovering violations of work rules have been developed; and (5) the employer is effectively and uniformly enforcing the rules.
- **Impossibility/Infeasibility of Compliance**
- **Greater Hazard**

Penalties

- If Oregon OSHA believes they have sufficient proof to issue a citation, they will calculate the penalty that will go along with the citation.
- Penalties are calculated based on the following factors:
 - Probability
 - Severity
- Penalties can then be adjusted based on the following factors:
 - Repeat Violations (1st repeat (2x), 2nd repeat (5x), 3rd repeat (10x), 4th repeat (15x), 5th repeat (20x))
 - Willful Violations (25x)
 - Number of employees
 - Good faith effort (i.e., quality of safety program and employee involvement)
 - History of safety – specifically looks at injury history
 - Immediate correction

New Recordkeeping/Reporting Rules in Oregon

- **Electronic Recordkeeping**

- New rule requires certain employers to electronically submit information from the 300 Log, 300-A Summary, and 801 Forms, directly to federal OSHA.
- This information must be submitted once a year, but no later than July 1st for 2017 and 2018, and no later than March 2nd beginning in 2019. The rule applies to employers with 250 or more employees or establishments with 20-249 employees in certain industries.
- **The website portal was delayed but is now up and running and covered employers should be reporting.**

- **Anti-Retaliation Protections**

- Oregon OSHA also adopted the new federal rules prohibiting employers from discouraging workers from reporting an injury or illness.
- Now, employers must “establish a reasonable procedure for employees to report injuries and illnesses promptly and accurately.” The rule also specifically states that if a procedure would deter or discourage an employee from accurately reporting an injury or illness, it is not reasonable.
- Mandatory post-injury drug testing would be considered not reasonable because of the deterrent effect the policy may have on reporting injuries. Instead, employers must have an “objectively reasonable” basis for drug testing employees who report work-related injuries.

Safe: A Restaurant Musical



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attorney-client relationship. If you have a question about a specific situation, call us. We'd be happy to help. Thank you.