

# **DON'T CROSS THE LINE: HOT LEGAL TOPICS**

**Presented to**

**AHMA-NCNH  
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AND TRADE SHOW**

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by

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This Seminar is designed to provide a brief overview of various laws and issues which may arise in the course of the operation of multi-family rental housing in California. It is not designed as a substitute for management discretion or legal consultation. Because the evaluation of most legal situations requires a fact-specific inquiry, please consult with your supervisor and/or legal counsel when addressing a specific issue or concern.

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## I. E-SIGNATURES/DIGITAL SIGNATURES

- A. So long as you follow the formalities, electronic signatures are just as enforceable as “ink” signatures (California Civil Code Section 1633.7)
- B. Some of the Formalities
  - 1. Both parties must have agreed to conduct the transaction by electronic means (and cannot hide that agreement within a traditional written form agreement).
  - 2. Electronic signature must be attributable to the person, so you should have some protocol in place such as a system security procedure applied to determine the person to which the electronic signature was attributed.
  - 3. Need to make sure all adult household members “sign” the lease; otherwise it is not attributable to them.
- C. Red Flag Rules – you need to make sure you know who is moving into your apartment. If everything is done electronically, you should at least check some form of identification prior to the move-in of everyone who signed the lease.

## II. CARBON MONOXIDE DEVICES TO BE INSTALLED BY JANUARY 1, 2012 (Health & Safety Code Sections 17926, 17926.1 & 17926.2)

- A. Applies to all dwellings in the State that have a fossil fuel burning heater or appliance (for example, gas stoves in individual units or gas water heaters within the unit or in a closet on the balcony/patio).
- B. Takes effect for multi-family dwellings on **January 1, 2013** (effective for single family dwellings on July 1, 2011, and all other dwellings on January 1, 2013).
- C. The number and placement of the devices shall be “in a manner consistent with building standards applicable to new construction for the relevant type of occupancy, or with the manufacturer’s instructions if it is technically feasible.”
- D. Maximum fine of \$200 for non-compliance, but owner must be given 30 days’ Notice to fix before fine can be assessed
- E. Owner or agent must maintain devices and gives an Owner the authority to enter any dwelling unit to install, repair, test or maintain the device.

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- F. Tenant is responsible to notify owner if tenant becomes aware of any inoperable or deficient device. Owner must then repair any inoperable or deficient device.
- G. If sufficient devices are not available, the Department of Housing and Community Development, with consultation with Fire Marshall, may suspend enforcement for 6 months.

### III. A WORD ABOUT CREDIT SCORES

- A. A recent amendment to the Federal Fair Credit Reporting Act requires that if you reject someone in whole or in part because of his/her credit score, you must let them know and provide them with a copy of the score.
- B. Previously, we were just required to provide only a copy of the credit report, not the actual score.

### IV. HOT TOPICS IN REASONABLE ACCOMMODATIONS

- A. New Definition of "Service Animal" (*See Attached Article*)
  - 1. No impact on housing accommodations.
  - 2. Only applies to places of public accommodation.
- B. Medical Marijuana
  - 1. The only accommodation for which we can probably justify any company policy.
  - 2. Need to be clear on what specifically is being requested.
    - a) Must the resident smoke the marijuana?
    - b) Must the resident smoke on the property?
    - c) What to do when the use becomes unreasonable.
    - d) Now seeing request for cultivation as well as use.
  - 3. No matter what the Company policy is, however, you must engage in an interactive process with every resident/applicant making a request.

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C. Hoarding

1. Generally involves extreme accumulation of items with no apparent value which creates habitability issues and safety issues within the premises.
2. Often indicates a potential disability, which may need to be accommodated **if** a reasonable accommodation can be found.
3. Reasonable accommodation should be explored before taking adverse action such as eviction.
4. Accommodation Plans
  - a) Must be evaluated on a case-by-case basis.
  - b) Must address immediate health and safety concerns and damage to property.
  - c) Do not require the landlord to clean up the apartment as that would be a fundamental alteration to the nature of the program.
5. “Direct Threat” exception to the Fair Housing Act
  - a) Accommodation requirements do not protect a tenant whose tenancy would constitute a direct threat to the health or safety of other individuals, or whose tenancy would result in substantial physical damage to the property of others.
  - b) Very difficult exception to prove, especially if there is an accommodation that would eliminate or mitigate the direct threat.

D. Drive-By Lawsuits

1. Demand Letter
  - a) Required to maximize recovery in future lawsuit
  - b) Sometimes “disguised” as junk mail
  - c) Generally, if you don’t respond you will get sued.

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2. Response
  - a) Request identification of alleged violations
  - b) Address standing issues -- Plaintiff must establish that he has :
    - (1) Knowledge of architectural barriers at a place of public accommodation, **and**
    - (2) He intends to return to the public accommodation if it is made accessible. Molski v. Price, 224 F.R.D. 479, 483 (C.D. Cal. 2004).
3. The motivation behind a plaintiff's visit to a defendant's business establishment is **not** an element of a Title III claim, however, the plaintiff's motivation is relevant for purposes of determining redressability, which is also a requirement for standing.

## B. Evaluation

1. Are there any obvious violations?
  - a) Parking (*lack of accessible spaces/appropriate parking provided*)
  - b) Path of access to leasing office (*steps or stairs*)
  - c) Signage
  - d) Excessive slopes (*parking spaces, path to leasing office*)
  - e) Width of gates or doors (*non-compliant handles*)
  - f) Handrails on ramps
  - g) Amount of pressure required to open doors
  - h) Public restrooms
2. CASp Inspections

## C. Resolution

1. Settlement vs. Litigation – pros and cons
2. No matter what, remedy any violations – otherwise open to further claims

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V. TO SMOKE OR NOT TO SMOKE, THAT IS THE QUESTION

A. A Landlord May Ban Smoking

1. Should be governed by traditional property rights.
2. An increasing number of local ordinances restrict smoking.

B. Nuisance Issues

1. Nuisance: anything injurious to health, indecent or offensive to the senses, or which obstructs or interferes with the free use of property
2. Some City ordinances declare second-hand smoke to be a nuisance *per se*

C. Fair Housing/Accommodation Issues

1. Smokers are not a protected class.
2. Non-smokers may request ban on smoking as a reasonable accommodation.
  - a) Disability in California is exceptionally broad.
  - b) Alleged Disability is usually asthma, allergies, breathing difficulties (COPD / Emphysema).
  - c) While “breathing” is a major life activity, allergies/asthma may not be a disability in all circumstances.
  - d) Remember the standard – is the requested accommodation reasonable?
    - (1) Does it require a fundamental alteration to the property?
    - (2) Does it create an undue financial and administrative burden?
3. Medical Marijuana presents issues both at smoking and non-smoking properties.

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D. Legal Issues With Implementing Non-Smoking Policies

1. Do not guarantee “smoke free” housing.
2. Make sure you are clear with your residents as to what is allowed and where. A clear smoking policy addendum is the best way to accomplish this.
3. Do not “flip-flop” depending on the market.

VI. ABOUT THE PRESENTER

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Founded in 1989, Pahl & McCay serves its clients in California and throughout the United States as a full-service corporate, business and litigation law firm. The firm’s areas of practice are as broad as the interests of its clients, however, its emphasized areas of concentration are Real Estate and Development; Labor and Employment (exclusively representing Management); Commercial Lending; General Business and Commercial Litigation; Entity Formation and General Counsel for Closely Held Businesses.

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**NEW “SERVICE ANIMAL” DEFINITION DOES NOT CHANGE A HOUSING PROVIDER’S ACCOMMODATION OBLIGATIONS IN CALIFORNIA**

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Despite new federal regulations defining “service” animals, if a tenant requests an assistance animal in order to accommodate a disability, housing providers must continue to process those requests regardless of whether or not the animal qualifies as a “service” animal under the law. There has been much discussion in the housing industry recently about new federal regulations regarding “service” animals; however, the recent changes do **not** change the handling of accommodation requests for “assistance” animals in the context of rental housing.

On September 15, 2010, the Department of Justice issued Final Rules amending its regulations relating to the Americans with Disabilities Act (“ADA”). Effective March 15, 2011, these regulations define a service animal as:

[A]ny 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. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler’s disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal’s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

28 C.F.R. 35.104 (2011). Under certain circumstances, a miniature horse may also qualify as a service animal under these regulations. 28 C.F.R. 35.136(i) (2011). These new regulations, however, are not directly applicable to housing accommodation requests for assistance animals. While we often look to the ADA and its interpreting regulations and case law for guidance relating to accommodation issues, these regulations do not limit the scope of accommodations which may be reasonable for disabled individuals under FEHA or other fair housing laws.

Under California’s Fair Employment and Housing Act (“FEHA”), the federal Fair Housing Act and Section 504 of the Rehabilitation Act of 1974, a housing provider may be required to allow a companion or emotional support animal of almost any kind for a mentally disabled person as a reasonable accommodation even if that animal is not specifically trained to perform any specific task or work. This issue was addressed expressly by the California Court of Appeals in 2004 in the case of Auburn Woods I Homeowners Association v. Fair Employment and Housing Commission, 121 Cal. App. 4th 1578 (2004). In Auburn Woods I, while recognizing that companion pets are not always a reasonable accommodation for individuals with mental disabilities, the Third Appellate District unequivocally stated “**even if an animal does not qualify as a service animal, there is no basis for asserting there is no duty to reasonably accommodate non-service animals.**” 121 Cal. App. 4th at 1596 (citing Janush v. Charities Housing Development Corp., 169 F. Supp. 2d 1133, 1135-36 (N. Dist. Calif. 2000)). Similarly, on February 17, 2011, HUD’s Deputy Assistant Secretary for Enforcement and Programs issued a Memorandum for all FHEO Regional Directors and Regional Counsel confirming that the new definition of service animals issued by the Department of Justice’s recent amendments to its Americans with Disabilities Act regulations do not apply to reasonable accommodations for assistance animals under either the Fair Housing Act or Section 504 of the Rehabilitation Act of 1974. As a result, in California, regardless of the type of animal or how the animal assists a disabled individual, housing providers need to evaluate each request for an assistance animal the same as it would for any other accommodation request, regardless of whether the animal qualifies as a “service” animal under the new regulations.

These regulations also do not change the ability of a housing provider to implement reasonable rules with respect to such animals. There is nothing in the applicable fair housing laws that would prevent a landlord from having reasonable rules and regulations regarding breed restrictions and size/weight limitations or rules governing the conduct of the assistance animals so long as the landlord is willing to make exceptions to the generally applicable rules if required by a disabled individual as a reasonable accommodation. For example, if your animal rules generally prohibit animals over 25 pounds and a blind applicant wants to move in with a German Shepherd which is over 50 pounds, then the Landlord generally would be required to allow that particular animal because it would need to modify the policy (no animals over 25 pounds) to allow a disabled person to have the seeing-eye dog in order for the disabled individual to have equal access to housing.

New “Service Animal” Definition  
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If an applicant or tenant asks his or her landlord to change a no-pets policy in order to allow him or her to keep a cat, a bird or almost any other lawful animal within the State or wants to have an assistance animal that otherwise would not be allowed under applicable house rules governing animals, the landlord must do the reasonable accommodation request DANCE. Is the individual **D**isabled? Did they **A**sk for an accommodation? Is there a **N**exus between the disability and the accommodation requested? Would the accommodation, if granted, result in a fundamental **C**hange to the property/program? Is it **E**xcessive in that it would cause an undue financial and administrative burden? Only by doing this analysis can one determine if an animal should be allowed as a reasonable accommodation, regardless of its type or training.

Bottom line, a housing provider’s analysis has not changed. If a disabled individual requires a housing provider to modify a rule or policy in order to provide him or her with equal access to housing despite the disability, and granting the request does not result in a fundamental change to the property or present an undue financial and administrative burden, regardless of whether the animal is a “service” animal, the accommodation should be granted.<sup>1</sup>

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*Please understand that the information discussed in this Article is general in nature and is not intended to be legal advice. It is intended to assist owners and managers in understanding this issue area, but it may not apply to the specific fact circumstances or business situations of all owners and managers. You may need to consult applicable federal, state and local laws. For specific legal advice, consult your attorney.*

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<sup>1</sup> The intricacies of the reasonable accommodation request process are well beyond the scope of this article. Each accommodation request requires a case-by-case determination pursuant to applicable legal principles and the reader should consult with legal counsel before denying any requested accommodation.

City	% of units required to be designated nonsmoking	Effective date	Compliance deadline for multi-unit housing	Grandfather clause for smoking tenants?	Size of multi-unit housing required for nonsmoking units	Grouping of non-smoking units required?	Smoking prohibited in outdoor common areas?	Required designated outdoor smoking areas?	Required "No Smoking" signs?	Required lease language?	Secondhand smoke a nuisance?	Application to Medical Marijuana - Does the ordinance control medical marijuana as well as tobacco?
Albany	100%	6/19/2008	6/19/2008		2 or more units		Yes	No	Yes			Yes
Belmont	100%	11/9/2007	14 months: 11/9/2009	Yes	2 or more units	Yes	Yes - for housing of 2 or more units	No	Yes	Yes	Yes	No
Calabasas	80%	3/17/2006	80% by 1/1/2012	Yes	2 or more units	Yes	Only apartments of 2 or more units	Yes	Yes	Yes	Yes	Yes
Contra Costa County	100%	11/11/10 (Passed 10/12/10)	1/1/2011 - 100% of Buildings w/ permits after this date; all balconies, porches, decks, patios, carports of existing units; new leases/ renewals have specific language		4 or more units	No	Yes - other than a designated smoking area	No	Yes	Yes		Yes
Dublin	50%		25 months	No	16 or more units	Yes	Only apartments of 16 or more units	No	Yes	Yes	Yes	No
Glendale			passed October 7, 2008		2 or more units	No	Yes	No		Yes	Yes	Yes
Loma Linda	70%		Until January 1, 2012	Yes - requires written request to Landlord	2 or more units	Yes	Only apartments of 2 or more units	Yes	Yes	Yes	Yes	Yes
Novato	50% existing, 75% new		90 days	Yes	10 or more units	Yes	Yes - for housing of 2 or more units	No	Yes	Yes	Yes	Yes
Oakland			Dec. 4, 2007		2 or more units		Yes	No	Yes, though not inside units			Yes
Pleasant Hill	50% must be non smoking by 2015	5/5/2010	Landlords must begin by January 2011, and complete within 5 years (Jan 2016)		4 or more units		Yes	No	Yes			Yes
Richmond	100%		Until January 1, 2011 for existing units; new units must be nonsmoking when completed	No, existing units must conform by January 1, 2011.	2 or more units	N/A	Yes - for housing of 2 or more units	No	Yes	Yes	No	Yes
Rohnert Park	50% existing, 75% new	4/1/2009	25 months for existing units (5/1/2011); new units after 4/1/2009 must be nonsmoking when completed	Yes	2 or more units	Yes	Yes - for housing of 2 or more units	No	Yes	No	No	Likely. "Smoking" is "not limited to tobacco or tobacco products"
Santa Clara County	100%	12/9/2010	Immediate for new units, 14 months (2/9/12) for existing units	No	2 or more units	N/A	Yes	No	Yes	Yes	No	Yes
Sausalito	common areas only											
South Pasadena	80-100% Less than 100% requires LL action per statute		100% of "new" units, 100% of existing units by September 4, 2010-- unless vited otherwise per statute		2 or more units	Yes, where possible	Yes	No	Yes	Yes	Yes	Yes. Smoking is "engaging in an act that generates smoke"
Temecula	25%		5 years, up to 8 years with extensions	Yes	10 or more units	Yes	Only apartments of 2 or more units	No	Yes	No	No	Yes. Smoking is "engaging in an act that generates smoke"