

PUBLICATION

"Heigh Ho, Heigh Ho, It's Back to Work We Go – But Can My Dog Go Too?"

First Quarter 2022

Approximately two years ago, the World Health Organization (WHO) declared COVID-19 a pandemic. In response, the world essentially shut down, with schools closed, outdoor events cancelled, and employees told to work from home. People started wearing masks and "social distancing." We were forced to stay indoors and had limited interaction with friends and family. As a result, many found companionship from their animals. In fact, an American Society for the Prevention of Cruelty to Animals (ASPCA) survey revealed that from March 2020 to March 2021, approximately 23 million American households acquired a cat or dog. These animals provided emotional support for dealing with stress, depression, and anxiety that may have come about as a result of the pandemic. As we return to a state of normalcy, and employers request that their employees return to the office, what about the employee's emotional support companions - do the animals get to come to the office too? To answer this question, we must define what an emotional support animal is, understand employer obligations under federal law, and identify best practices should a companion not be allowed to return to the office.

What is an Emotional Support Animal?

An emotional support animal (ESA) provides companionship, relieves loneliness, and sometimes helps with depression, anxiety, and certain phobias. An ESA is not a service animal, which undergoes special training to perform tasks that assist people with disabilities. Consequently, although ESAs may be therapy animals that play a pivotal role in a medical treatment plan, they are not service animals as defined under Title III of the Americans with Disabilities Act (ADA) or even psychiatric service dogs that are trained to work with people with disabilities due to mental illness. If it is simply the animal's presence that allows the person to cope, which is generally the case with ESAs, then the animal likely does not qualify as a service dog. There is no official oversight regarding the qualifications of a pet as an ESA. Additionally, there is currently no requirement for a pet to be evaluated by a qualified animal evaluator to be called an ESA. All domesticated animals can be considered emotional support animals, including dogs, cats, birds, reptiles, and hedgehogs, among others. Ultimately, the owner can decide what type of pet they want to be designated as an ESA. However, to have the pet "qualified" as an ESA, the owner must obtain pertinent documentation from a medical provider.

Obligations Under Federal Law

Title I of the ADA prohibits disability discrimination in the employment context and affirmatively requires employers to provide reasonable accommodations to applicants and employees with disabilities absent undue hardship on the business operations. But it makes no reference to and does not define service dogs or ESAs. Moreover, the EEOC has failed to release any guidance on when it might be appropriate to permit an ESA in the workplace. Despite this lack of guidance, in 2017 the EEOC sued a trucking company alleging that it violated the ADA when it failed to accommodate, refused to hire, and retaliated against a job candidate because he used a service dog. The trucking company had a "no pet" policy and allegedly refused to provide a reasonable accommodation to the candidate. While this is just one example, employers should recognize that the typical process governing reasonable accommodations applies when someone requests to bring an ESA to work. To that end, the employer might have an obligation under the ADA to make modifications to any policies or procedures concerning ESAs so long as they do not pose an undue hardship or direct threat in the workplace.

Upon receipt of a request for an accommodation that entails allowing an employee to bring an ESA to work, a company is required to engage in an informal, interactive process with the employee to determine if the person is protected under the ADA as a qualified individual with a disability, the person's condition and needs, and how the ESA will help the employee perform the essential functions of his or her job. Additional questions to discuss during the interactive process may include where the ESA will stay, what the ESA will do, where the ESA will eat, how many breaks, if any, the employee will need for the ESA to relieve itself, what training the ESA has completed to assist the employee, and if the animal is current on its health care, among others. Ultimately, the employer must decide whether a reasonable accommodation can be provided or if there are any alternative options to assist the employee with the disability. Therefore, if the disability is not obvious and/or the reason the animal is needed is not clear, an employer may request documentation to establish the existence of a disability and how the animal helps the individual perform his or her job.

Employers should be mindful that state employment laws may broaden their obligation with respect to a request for an ESA or service animal in the workplace. As such, employers should review the laws of the states in which their operations are conducted to determine any additional obligations.

Best Practices

Regardless of the request, it is important for the employer to follow its usual procedures when someone requests an accommodation in the form of allowing them to bring an ESA to work. Employers are encouraged to document the interactive process and exchanges with the employee, avoid rushed or knee-jerk "no" responses, and communicate throughout the process. Some employers may even consider allowing the ESA in the workplace, perhaps even on a trial basis, or offering a "bring your pet to work" day if it suits the workplace. But what happens if the request to bring the ESA is not practicable due to legal or regulatory limitations that prohibit animals in the workplace (e.g., health care and restaurants) or other instances where the presence of an animal might pose a direct threat to the health and safety of the employee or others? What should an employer in this scenario do?

1. **Hybrid Remote Work Option.** One lesson learned from the Covid-19 pandemic has been that some employees are just as, or perhaps more, productive while working from home. Instead of requiring the employee to return fully back to the office, an alternative would be to allow the employee to continue to work under a hybrid remote schedule. This will allow the employee to continue to have his/her ESA at home and the employee might feel comfortable returning to work for only two or three days in the office without it.
2. **Flexible Work Arrangement.** Perhaps during the interactive process, an employee reveals that he or she is struggling in the afternoons and experiencing higher levels of stress during this time. An option to help alleviate this stress may be to shift the employee's schedule so that they report to work earlier during the day.
3. **Provide Additional Support Tools and Resources.** Provide employees with other resources and opportunities to address mental health care. For example, [Ginger](#) is a great resource that can allow employees to access mental health care with the click of a button on their phones and the services are available 24/7.
4. **Conduct Regular Check-Ins.** An ESA is typically used by a handler to alleviate anxiety and depression and provide companionship. Conducting regular weekly, or even daily, check-ins with your employee to discuss any issues the employee is currently dealing with on a personal or professional basis may help reduce any anxiety or depression.

5. **Create a Meditation Room.** Meditation can help decrease an individual's stress levels. A designated place for employees to take a five-minute break to decompress might improve an employee's mental health.

As employees return to the workplace, employers should recognize that their employees have dealt with a lot of change over the past two years, which may have impacted their mental health. An employee may request to bring an ESA back with them into the office and an employer should be prepared to properly address such requests. For assistance in addressing employee requests to bring an animal into the workplace, please reach out to the author or any member of Baker Donelson's [Labor & Employment Team](#).