Kriger LAW FIRM

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News

Shakeup On Emotional Support Animals

By Niki Tran, Esq.

Effective since the beginning of this year, Assembly Bill 468, signed into law by California Governor Newsom, imposes several new requirements intended to crack down on emotional support animal ("ESA") fraud. Fraudulent practices surrounding ESAs are problematic for not only businesses but homeowner associations as well. HOAs have seen an influx of ESA requests for reasonable accommodation and an increase in the fraudulent selling of misleading ESA-related certificates and merchandise that frequently misrepresent emotional support dogs as service dogs.

The new law seeks to crack down on the increased misrepresentation of emotional support animals as service animals. It also aims to prevent businesses that sell ESA certificates, vests, tags, patches, holographic identification cards, and harnesses that attempt to mislead others into thinking the emotional support animal is a service animal. Until now, there was no law to punish those who knowingly and fraudulently represent ESAs as service animals.

To fully appreciate what this new law is attempting to accomplish, we must understand the difference between an ESA and a service animal. A service animal is specially trained to assist a specific individual with a disability with services such as guiding people who are blind, alerting a hearing-impaired person to a sound, alerting a person to the onset of a seizure and helping the person remain safe during the seizure, or pulling a wheelchair, among other assigned tasks. Furthermore, only a dog can qualify as a service animal. No other animal can be recognized as a service animal, even if that animal is trained to assist a person with a disability.

On the other hand, an ESA can be any animal and does not have training specific to the owner's disability. According to the United States Department of Housing and Urban Development (HUD), an ESA is any animal that provides emotional support that alleviates one or more identified symptoms or effects of a person's disability. However, ESAs are not trained to perform specific tasks to assist people with disabilities. ESAs "do not need training to ameliorate the effects of a person's mental and emotional disabilities."

Before AB 468, the bar was low for homeowners and residents to assert a disability and demand rights and recognition for their ESAs. One of the major changes under the new law concerns requirements for licensed healthcare practitioners who provide documentation relating to an individual's need for an ESA. Health care practitioners are no longer allowed to issue letters or documentation related to an individual's need for an ESA unless the following requirements are met:

(1) They possess a valid and active license, and their letter/documentation must include their license number, the effective date, jurisdiction, and type of professional license;
(2) They are licensed to provide professional services within the scope of the license in the jurisdiction in which the documentation is provided;
(3) They must establish a client-provider relationship with the individual for at least 30 days prior to providing the documentation;
(4) They must complete a clinical evaluation of the individual regarding the need for an ESA; and
(5) They must provide a verbal or written notice to the individual that knowingly and fraudulently representing oneself to be the owner or trainer of any canine licensed as, to be qualified as, or identified as, a guide, signal, or service dog is a misdemeanor in violation of Penal Code Section 365.7

Under the new law, a person who knowingly and fraudulently represents ESAs as service animals "shall be subject to a civil penalty of five hundred dollars ($500) for the first violation, one thousand dollars ($1,000) for the second violation, and two thousand five hundred dollars ($2,500) for the third and any subsequent violation." (Civil Code 122319.) As for the health care practitioner, failure to comply with the law may subject the health care practitioner to discipline from the health care practitioner's licensing board.

Unfortunately, the new law will not impact homeowners/residents who currently have an animal that gained their status as an ESA, even if their status was obtained through fraudulent means. Furthermore, the new law does not restrict or change existing federal and state laws related to a person's right to a reasonable accommodation. There is still no limit to the number of ESAs a person can have. However, each ESA must be covered by the ESA documentation from the licensed health care practitioner and must assist the person with the disability in a specific way. Associations should continue to consult with legal counsel about what documentation may be requested from a resident requesting to keep an ESA or a service animal. ▪

In This Issue:

Protecting 55+ Communities – What's Legal? What's Practical

By Garrett Wait, Esq.

To create senior-specific communities, California carved out certain allowable restrictions in Civil Code Section 51.3 and its Riverside County-specific counterpart 51.11. Those statutes provide three distinct categorical definitions of people who can legally reside in communities designated for senior living:

1. "Qualifying resident" or "senior citizen" means a person 62 years of age or older, or 55 years of age or older in a senior citizen housing development.
2. "Qualified permanent resident" means a person who either meets the requirements of both (A) and (B) below or who meets the requirement set forth in (C) below:

(A) Was residing with the qualifying resident or senior citizen prior to the death, hospitalization, or other prolonged absence of, or the dissolution of marriage with, the qualifying resident or senior citizen.

(B) Was 45 years of age or older, or was a spouse, cohabitant, or person providing primary physical or economic support to the qualifying resident or senior citizen.

Or

(C) A disabled person or person with a disabling illness or injury who is a child or grandchild of the senior citizen or a qualified permanent resident as defined in paragraph (2) who needs to live with the senior citizen or qualified permanent resident because of the disabling condition, illness, or injury.

3. "Permitted health care resident" means a person hired to provide live-in, long-term, or terminal health care to a qualifying resident, or a family member of the qualifying resident providing that care. For the purposes of this section, the care provided by a permitted health care resident must be substantial in nature and must provide either assistance with necessary daily activities or medical treatment, or both.

Those three definitions – qualifying resident, qualified permanent resident, and permitted health care resident – are the only people allowed to reside in a designated senior community unless less restrictive qualifications are found in the CC&Rs. But what happens if the Association suspects that a community resident does not meet those definitions?

Only one published opinion exists in California that discusses the Association's rights to terminate an unqualified resident's tenancy, *Huntington Landmark Adult Community Assn. v. Ross* (1989) 213 Cal.App.3d 1012. In that case, the Court found that the grandson of a qualified resident did not meet the requirements of a qualified permanent resident as defined under the Civil Code. The grandson argued that he provided "primary physical support" for his grandmother, but the trial court made a factual finding to the contrary, which was supported by "substantial evidence."

Unfortunately, the appellate decision in *Huntington* did not address what those facts were. Thus, senior communities are left with little guidance regarding what evidence would support a finding that a resident does not qualify under the statute. However, it is also clear that senior communities should aggressively safeguard their statutory age protections. Federal protections require that to maintain its protected status, a senior community must demonstrate its properties are at least 80% senior-occupied and that it maintains adequate age verification rules and procedures.

If a senior community suspects that a resident does not meet the statutory definition of a qualifying resident, a qualified permanent resident, or a permitted health care resident, it should call the owner to a hearing to gather information about the questionable residency. The Board should then determine whether the resident qualifies under the Civil Code. If not, the Board should take steps to terminate the resident's tenancy. That will likely include efforts to enforce the violation in the same way as any other governing document violation, which, of course, could ultimately lead to a lawsuit seeking to enjoin the violation.

In practice, this will almost always require input from the Association's legal counsel. If your community needs assistance with this issue, do not hesitate to contact our office. ■

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Safe at Home

By Bradley Schuber, Esq.

Originally established in 1998, the Safe at Home program is a confidential address program administered by the California Secretary of State. The program, which is provided for in California Government Code Section 6205 et seq., was originally designed to help victims of domestic violence by providing free post office boxes and mail forwarding services. Over time, the program has expanded and it now allows others to participate, including as follows: (1) a victim of domestic violence, sexual assault, stalking, or human trafficking, (2) an employee, provider, patient, or volunteer of a reproductive health care service facility, or (3) a household member of an eligible victim in fear for his or her own safety or for the safety of a minor child or an incapacitated adult. In order to participate in the program, applicants must submit evidence in support of their application such as police reports, court records, medical files, or documentation from other professionals from whom the applicant sought assistance in dealing with the alleged violence or abuse.

If approved, the Safe at Home program offers participants a substitute mailing address to receive first class, certified, and registered mail. The substitute mailing address is accepted by California state, county, and city government agencies in lieu of a residential address. This helps keep participants safe from those who might want to harm them. In addition to confidential mail-forwarding services, program participants may be eligible for confidential voter registration, confidential name change, department of motor vehicles records suppression, and internet disclosure prohibition. Once accepted into the program, participants are certified for four years. Services under the program are provided free of charge to California residents who qualify as participants.

However, the Safe at Home program was not established with homeowner associations in mind. Moreover, when a person purchases a home in a common interest development in California, he or she is required to become a member of its homeowners association. It's fairly common for an association to maintain a list of its members, including names, addresses, phone numbers, and email addresses. It's also common for an association to share member information in various circumstances with others such as its management company, third party vendors, and with its members. Unfortunately, when an association shares member information with others, it can place participants in the Safe at Home program at risk.

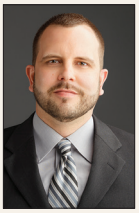
In an effort to protect Safe at Home program participants, Assembly Bill 611 was approved last year, which added new Civil Code Section 5216 to California law. Under the new law, a member of an association, who is an active participant in the program, may make two specific requests to his or her association. First,

a member may request that the association accept and use the address designated by the Secretary of State as the Safe at Home participant's substitute address for all association communications. Thus, if an association receives such a request, it is required to send items such as monthly statements, annual disclosures, newsletters, and violation notices to the substitute mailing address.

Second, a member may request that his or her association withhold or redact information that would reveal the name, community property address, or email address of the Safe at Home program participant. Section 5216 specifies that an association would need to withhold or redact this information from all resident community membership lists such as mailbox bank listings, resident directories, electronic keypads, unit property numbers, and internet web portal accounts. The association would also need to withhold or redact the same information from any membership list that would be shared with other members of the association, including a request made pursuant to Civil Code Section 5200(a)(9) or a similar request made in accordance with the association's governing documents.

In the event an association receives a request from one of its members, who is a participant in the Safe at Home program, to use a substitute address as designated by the California Secretary of State, or to withhold or redact information member information, then the board of directors for the association should promptly review and, if legitimate, honor the request. Also, board members should keep member participation in the Safe at Home program confidential. ■

Statutory Changes Regarding Delivery of Association Notices



By Tyler Kerns, Esq.

The California Civil Code specifies the manner in which associations must provide certain notices to owners. In some instances, "general notice" or "general delivery" is sufficient but, in others, "individual notice" or "individual delivery" is necessary. As just a few examples, notices of board meetings, notices regarding rule changes, and notices of election results can be provided by general notice or delivery, while notices of assessment increases, notices of significant changes to the association's insurance policies, and annual budget reports and annual policy statements must be provided by individual notice or delivery.

The methods by which general notice may be provided are set forth at Civil Code §4045, and the methods by which individual notice may be provided are set forth at Civil Code §4040. Senate Bill 392 amended Civil Code §4045 regarding general notice as of January 1, 2022, and will amend Civil Code §4040 regarding individual notice effective next year on January 1, 2023.

Prior to this year, Civil Code §4045 provided that general notice or delivery could be accomplished by any of the following methods: (1) by any method provided for delivery of an individual notice; (2) by inclusion in a billing statement, newsletter, or other document that is delivered by one of the other methods of general or individual delivery; (3) by posting the printed document in a prominent location that is accessible to all members if the location has been designated for the posting of general notices in the association's annual policy statement; or (4) if the association broadcasts

television programming for the purpose of distributing information on association business to its members, by inclusion in such

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STATUTORY CHANGES REGARDING DELIVERY OF ASSOCIATION NOTICES

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television programming. Effective as of January 1, 2022, Civil Code §4045 was amended to add another method by which general notice or delivery can be accomplished if an association maintains a website. If an association maintains a website for the purpose of distributing information on association business to its members, the association may now provide general notice by posting the notice on the association's website in a prominent location that is accessible to all members and designated as a location for the posting of general notices in the association's annual policy statement. Accordingly, if your association maintains a website and you wish to use the website for the purpose of distributing those notices that can be provided to members by general delivery, it will be necessary to specifically identify the website in your association's annual policy statement as a designated location for the posting of general notices.

With respect to individual notice or delivery pursuant to Civil Code §4040, the default method is to provide such notices, addressed to the recipient at the address last shown on the books of the association, by first-class mail, registered or certified mail, express mail, or overnight delivery by an express service carrier. Individual notice or delivery could also be accomplished by email if the owner had consented in writing or by email to receiving individual notices by email. Effective January 1, 2023, Civil Code §4040 will be amended so that documents required to be provided by individual notice or delivery must be sent "in accordance with the preferred delivery method specified by the member pursuant to Section 4041." Civil Code §4041, which requires associations to solicit certain information from owners each year, has also been amended to require owners to designate a preferred method of receiving notices from the association, which shall include the option of receiving notices at either or both a mailing address or an email address. Associations should ensure that their annual solicitations of member information are updated to be consistent with Civil Code §4041 as amended. If an owner fails to designate a valid delivery method, the default method of providing individual notice or delivery remains first-class mail, registered or certified mail, express mail, or overnight delivery by an express service carrier to the mailing address last shown on the books of the association.

Lastly, it's important to note that Civil Code §4045(b) still allows members to request to receive all general notices by individual delivery. This means that, even if a statute says that a particular notice can be provided by general delivery, the association would still need to provide that notice by individual delivery to any owners who have requested to receive general notices by individual delivery.

Please contact our firm with any questions you may have regarding providing notices to your association's membership. ■