



THE RIGHT TO REFUSE SERVICE?

By Jason Sifers, Attorney, McDonald Carano

THERE HAVE RECENTLY BEEN SEVERAL HIGH-PROFILE

incidents involving patrons removed from businesses, often by law enforcement, for what the patrons alleged were discriminatory reasons.

Despite the familiar refrain that businesses “reserve the right to refuse service for anyone,” they do not reserve the right to refuse service for any reason.

A business that refuses service to a patron risks violating federal, state, and local non-discrimination laws if it does not handle this delicate process carefully.

Defending against these types of claims can be costly even for a business that eventually prevails. Perhaps worse still, the reputational risks of a misstep in this area are substantial—one only needs to look at the widespread social and conventional media coverage of recent incidents to see the problems a business’s refusal of service can cause when not handled properly.

Businesses need to be aware of federal nondiscrimination laws as well as any relevant state and local laws in their jurisdiction. There are two key federal laws businesses need to be aware of when refusing service to a patron: Title II of the Civil Rights Act of 1964 (“Title II”) and the Americans With Disabilities Act

(“ADA”).

Title II prohibits discrimination or segregation on the basis of race, color, religion, or national origin in a “place of public accommodation.” Under Title II, places of public accommodation include hotels, restaurants, gas stations, theaters, and related facilities.

The ADA prohibits discrimination on the basis of disability in a public accommodation. The ADA has a broader definition of public accommodation, encompassing essentially all private businesses open to the public. The ADA imposes requirements on businesses that differ from Title II in one other significant regard.

Complying with Title II generally requires a business to treat patrons without regard to their race, color, religion, or national origin. The ADA can require businesses to make “reasonable modifications” to their policies, practices, and procedures to accommodate individuals with disabilities.

ADA regulations surrounding service animals provide an example of how the ADA imposes additional obligations on businesses. A business is generally free to prohibit animals from their premises. Indeed, some businesses are required to prohibit animals by local health and safety regulations. The ADA generally requires

businesses to accommodate bona fide service animals to accompany patrons anywhere open to the public. While there are exceptions, businesses generally cannot force patrons to remove bona fide service animals from areas open to the public without incurring liability under the ADA.

Nevada has state nondiscrimination laws that exceed Title II and even the ADA. Nevada prohibits discrimination or segregation in places of public accommodations based upon race, color, religion, national origin, disability, sexual orientation (actual or perceived), sex, gender identity or expression.

Nevada’s definition of “public accommodation” largely tracks (but is even broader than) the ADA’s broad definition and includes to “any establishment or place to which the public is invited or which is intended for public use.”

Finally, local jurisdictions may enact their own nondiscrimination regulations, which may include categories not protected under state or federal law.

It is important to remember that the above laws limit the reasons a business may refuse service; a business is free to refuse service for reasons not prohibited by law, so long as those reasons are applied in a nondiscriminatory fashion. For example, customer-



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only policies for restrooms are generally permissible in Nevada unless applied in a discriminatory fashion.

To limit exposure under federal, state, and local nondiscrimination laws, businesses should adopt policies regarding refusing service to avoid real or perceived violations of nondiscrimination law.

The specifics of the policy will vary based upon industry, location, and other factors—a nightclub, for example, will likely have a more detailed and formal policy than a hardware store—but there are some general best practices that will work for most businesses.

First, while it is legal to refuse service for any reason not prohibited by law, businesses should not refuse service arbitrarily. Rather, businesses should adopt a policy of only refusing service when justified by business necessity, such as, for example, when a patron is unruly, violates the businesses

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LEGISLATIVE COMMISSION REGULATIONS UPDATE

By Liz MacMenamin

THE LEGISLATIVE COMMISSION, A STATUTORY

committee, that meets during the legislative interim period, convenes regularly to determine the priority of all studies and investigations assigned to it by the full legislative body.

During the meeting held on May 16, 2018, the Commission reviewed several regulations affecting pharmacies and the Nevada Department of Health and Human Services. Of note were regulations regarding controlled substances, the result of which showed the continued commitment to effectively regulate controlled substances, while at the same time ensuring adequate access to patients, and best practice methodologies for healthcare providers.

The Nevada State Board of Pharmacy proposed the following specific regulations:

LCB File No. R132-17

A REGULATION relating to pharmacy; revising provisions concerning the authority of certain advanced practice registered nurses to dispense controlled substances, poisons, dangerous drugs and devices; and providing other matters properly relating thereto.

This regulation revises the amounts that advanced practice registered nurses are authorized to dispense.

LCB File No. R014-18

A REGULATION relating to pharmacy; authorizing the State Board of Pharmacy (BoP) to issue an order for a hearing to show cause under certain circumstances; and providing other matters properly relating thereto.

This regulation authorizes the BoP to issue an order to appear at a hearing to show cause to a respondent who fails to comply with an order

imposing discipline. This order to show cause requires proposed action by the BoP for this failure, requires the respondent to respond as to why this action should not be taken and further requires the BoP provide prompt notice to respondent's attorney of record, Regulation R014-18 also includes action for failure to comply.

This agenda also included a couple of regulations that had been worked on in co-operation by the Board of Pharmacy and veterinarians for the continued efforts regarding controlled substances. It is often times forgotten that our four-legged family also are in need of pain killers and the control and care of these products while ensuring adequate care in a very important part of the medical community.

LCB File No. R146-17

A REGULATION relating to pharmacy; defining the term

"consignment" and certain related terms for purposes governing the purchase, transfer and dispensing of certain drugs; authorizing licensed veterinarians to engage in a consignment; establishing the procedures and requirements for a consignment; authorizing certain wholesalers to enter a consignment; authorizing certain pharmacies to enter a consignment; and providing other matters properly relating thereto.

LCB File No. R015-18

A REGULATION relating to pharmacy; establishing the requirements for a licensed veterinarian to obtain a certificate of registration from the State Board of Pharmacy to dispense controlled substances or dangerous drugs; revising the fees for a licensed veterinarian to dispense controlled substances or dangerous drugs; and

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policies, or would cause the business to exceed a safe or lawful capacity.

Second, policies should serve legitimate, nondiscriminatory purposes. For example, reasonable dress codes are fine, while a dress code that is arbitrary

or discriminatory, in policy or application, may subject a business to liability.

Third, policies should be applied consistently to avoid the appearance of discriminatory application. To that end, businesses should identify which employees

have the authority to refuse service, and make sure those employees are properly trained in nondiscrimination law and the businesses' policies.

As with many other risks, businesses may avoid or mitigate discrimination claims by taking a proactive approach

to establishing well-designed policies and properly training the employees who will implement them. ■

(Editor's Note: Jason Sifers is an attorney at McDonald Carano, where he focuses on commercial and complex litigation cases. He works with Josh Hicks, a McDonald Carano partner and RAN's General Counsel.)