

General Fair Housing Law

by Zoe Ann Olson, Director of Intermountain
Fair Housing Council

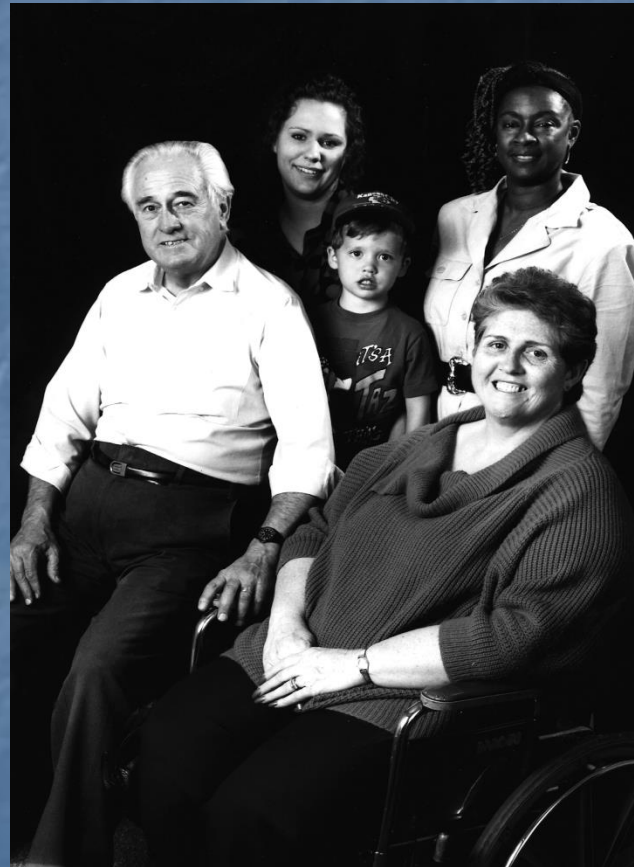


The work that provided the basis for this presentation was supported by funding under a grant with the U.S. Department of Housing and Urban Development. The creator is solely responsible for the accuracy of the statements and interpretations contained in this presentation. Such interpretations do not necessarily reflect the views of the federal government.

- I. Fair Housing Basics
- II. Fair Housing: Race, Color, Religion
- III. Fair Housing: National Origin and LEP Compliance
- IV. Fair Housing and Sexual Orientation/Gender Identity
- V. Familial Status
- VI. Disability
- VII. Best Practices

What is the Fair Housing Act?

The Fair Housing Act, Title VIII of the Civil Rights Acts, prohibits discrimination in housing.



Why Fair Housing?

Where you live determines:

- Where your children go to school
- Ease of getting to work, healthcare, recreation
- What kind of physical danger you may be exposed to

It is good for the community:

- Ensures it is a good place for future businesses to locate
- Promotes economic growth and welfare for all

Elements of a Fair Housing Case

When a complaint is filed, one must show:

- (1) that a member of a protected class was discriminated against
- (2) (a) the dwelling is covered (4 or more units/property/in business of housing) by (b) a person/entity in the business of housing
- (3) within the time limitations (Statute of Limitations)
- (4) a discriminatory act occurred such as:
 - During application or screening
 - Denial of reasonable accommodation/modification
 - Inner-tenancy harassment
 - Different policies, charges, treatment

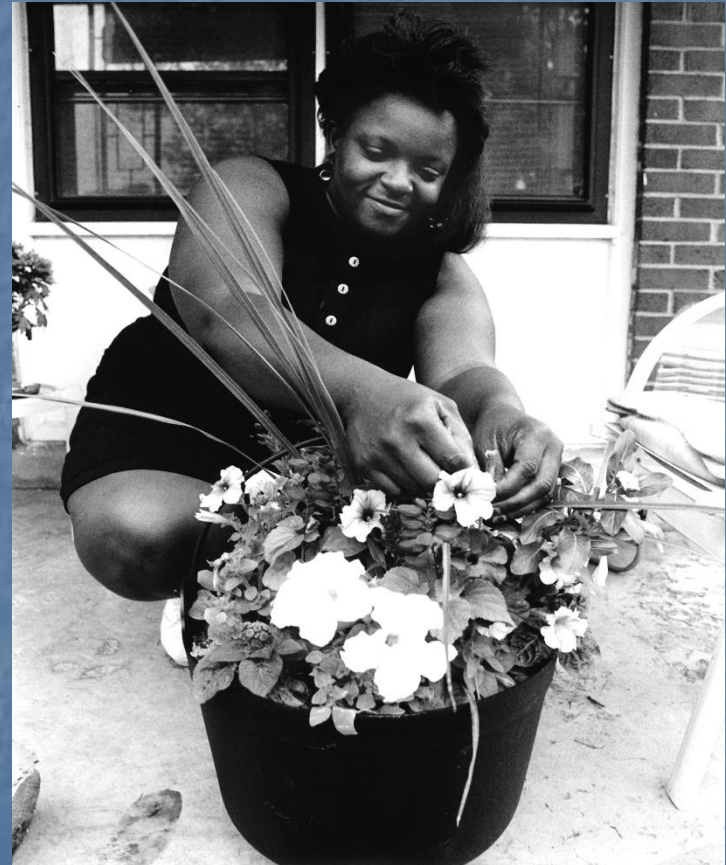
Two Theories of Discrimination

- Intentional Discrimination or Disparate Treatment
 - Discrimination because of a protected class
- Disparate impact or effect
 - Neutral Policy that impacts a protected class based on status
 - Does the housing provider demonstrate that the rule is necessary to achieve one or more substantial, legitimate, nondiscriminatory government interests?
 - *If not*, could that interest be served by a less discriminatory alternative?
 - *If yes*, then may be FHA violation.
 - *If not*, then probably not a FHA violation

First, the Fair Housing Act Prohibits Discrimination in the Sale and Rental of Housing Based on a Person's Protected Class:

- Race
- Color
- Sex
- Religion
- National Origin
- Disability
- Familial Status (presence of children under 18 yrs. old)
- Sexual Orientation/Gender Identity in HUD-Funded Housing

<http://portal.hud.gov/hudportal/documents/huddoc?id=LGBTPR.PDF>



Second, Part A: What is Housing?

A “dwelling” ...

- Any building, structure, or portion of a building that is occupied or intended to be occupied
- Any of the above where a person intends to return

Housing Covered under the Fair Housing Act

includes but is not limited to:

- Condominiums
- Duplexes
- Multi-unit dwellings (apartments) with 4 or more units
- Manufactured homes
- Group homes for the recovery of drug addicts and alcoholics
- Seasonal bungalows
- Private homes
- Vacant land
- Homeless shelters
- Shelters for victims of domestic violence
- Hospice
- Nursing Home
- Assisted Living

Second, Part B, Fair Housing Act Applies to Many Different Housing Transactors:

- Advertising media
- Residential landlords
- Rental agents
- Housing Agents/Managers
- Real Estate Brokers and Salespersons
- Homeowners
- Homebuilders
- Refugee Agencies
- Banks, Savings and Loan Associations, Mortgage Lenders or other financial institutions
- Developers and contractors
- Landowners
- Condominium developers or owners
- Home Owner and Condo Owner Associations

Third, Statute of Limitations

- In general, the statute of limitations to file a FHA complaint with HUD is one year from the date of the discriminatory event.
- The statute of limitation to file a FHA complaint in court is two years from the date of the discriminatory event.

Four, Discriminatory Act--

A housing provider may not:

- Refuse to rent, sell, or deal with a person of a protected class
- Discriminate in terms or conditions of sale
- Force tenant to provide information about extent of disability
 - Unless determining eligibility for a program with priority status
- Refuse to design and construct covered multifamily dwellings that are accessible to and usable by persons with disabilities

A housing provider may not:

- State that housing is not available when it actually is available
- Threaten, intimidate or interfere with a protected class member or someone that has filed a complaint
- Assign different policies, conditions, or terms
- Steer or encourage a person's choice based on race, familial status, color, disability status, etc.



Fair Housing Laws Prohibit:

- Channeling or sending a person into a neighborhood, or not showing some neighborhood, based on ethnic identity
- Segregating and/or separating people in housing
- Aiding and abetting in unfair housing practices
- Preventing any person from complying with fair housing practices



The Fair Housing Act Prohibits Discriminatory Statements

- It is illegal to make, print, or publish advertisements relating to the sale, rental, or financing of a dwelling that indicates a preference, limitation, or discrimination



Advertising Examples

- “Christian only” or “female only”
- “empty nesters” or “# children only”
- “adults only” or “mature couple”
- “near ... Church”
- “no disabled” or “able-bodied only”
- “religious reference”
- “must be employed”
- “no Español”

Advertising Exception?

Per HUD/case law say roommates may advertise for gender only. (This may be challenged so be careful!)

For example: “female roommate wanted”

However, you can still not show a preference based on any of the other protected classes: race, religion, color, national origin, familial status, or disability

HUD's Advertising Guidance

<http://www.hud.gov/offices/fheo/disabilities/sect804achtenberg.pdf>

Housing Providers May:

- Check references
- Check ability to pay rent
- Inquire on how best to make reasonable accommodations for prospective tenant
- Create rules for benefit of entire community
 - Given rules are not discriminatory

A person or entity may have a fair housing complaint when:

The person or party:

- Believes he or she is about to be injured by a discriminatory housing practice
- Is a member of a protected class
 - Acts on behalf of a disabled person residing or intending to reside in the dwelling after it is sold, rented, or made available
- Is a member in a group that is statistically affected by a policy

Parties Who May Take Action Against A Discriminating Party



- Individuals
- Testers
- Fair Housing Organizations
- Neighbors
- Community groups
- Municipalities
- Housing Providers/HP Employees

Reporting Discrimination

- Document the incident:
 - Write down the date of the incident
 - Time it occurred
 - Any witnesses
 - Summary of the incident
 - Any response or action taken
- Discuss and report it

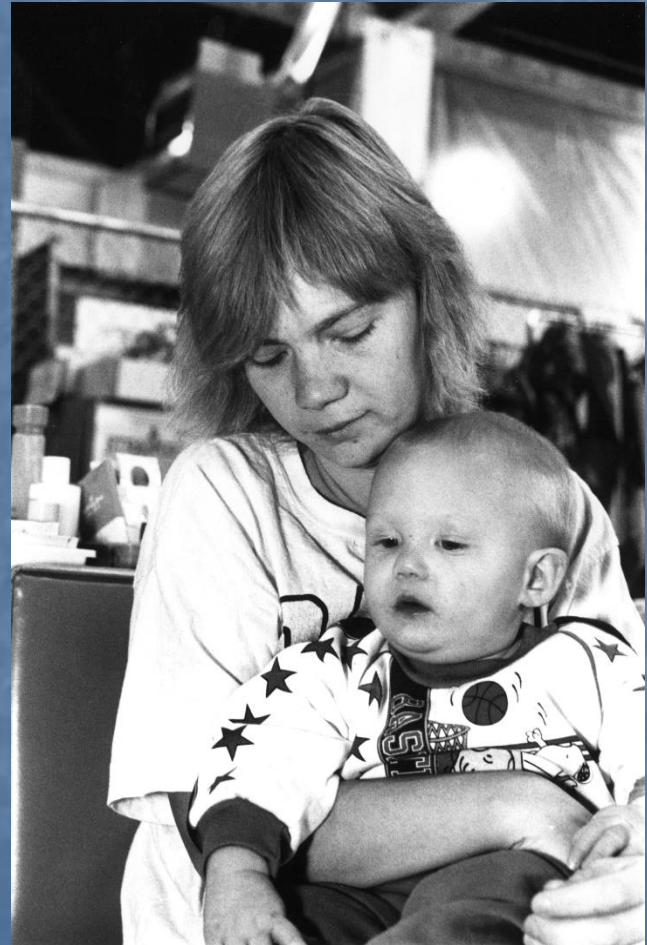
Discuss and Report Where?

- HUD(the US Department of Housing and Urban Development)
 - Online, www.hud.gov
 - Toll Free: 1-800-669-9777
 - TDD/TTY: 1-800-927-9275 (TDD)
- Intermountain Fair Housing Council
 - (208) 383-0695 in Boise
 - Toll Free: 1-800-717-0695

Filing a Complaint with HUD

1. Complaints must be filed through the HUD administration process within one (1) year of discrimination
2. HUD will either complete an investigation of the complaint within one hundred (100) days or provide a reason it failed to do so.

http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/online-complaint



Further Action

- If HUD finds that there is reasonable cause, then a charge will be issued and may:
 - Go to trial before an administrative law judge
 - Go to court where the complaint will be represented by the Justice Department

Filing in Court

- Private attorneys/individuals may file a suit within two (2) years of the alleged violation
- Can be filed at the same time as a complaint filed with HUD
- Can file a suit even if HUD did not take action on the complaint
- May include more monetary damages

Ignorance of the Law



- Ignorance of the law is no defense
 - A defendant may not claim that s/he was not properly informed regarding the law
 - It is the housing provider's responsibility to be educated on housing laws

II. Race, Color, Religion

- Race, Color, Religion
- Best practice for addressing harassment and hate
- Criminal Background

Race, Color, Religion

- Race is group of people identified as distinct from other groups because of supposed physical or genetic traits shared by the group.
- Color refers to the color of your skin.
- Religion refers to the belief in a faith or system of worship or no practice of a faith.

Guidance on Harassment and Hate

- HUD's Guidance
- <https://www.gpo.gov/fdsys/pkg/FR-2016-09-14/pdf/2016-21868.pdf>

HUD's Final Rule

- **On September 14, 2016 HUD's final Harassment Rule was published in the federal register.**
- **The rule amends HUD's fair housing regulations to formalize standards for use in investigations and adjudications involving allegations of harassment on the basis of all 7 protected classes: race, color, religion, national origin, sex, familial status, or disability.**

Harassment Rule

- **The rule defines “quid pro quo” and “hostile environment harassment,” as prohibited under the Fair Housing Act and specifies how HUD will evaluate such complaints**
- **In addition, this rule clarifies direct and vicarious liability in the Fair Housing Act context**

Harassment Rule: Quid Pro Quo

Quid Pro Quo Harassment occurs when:

A person is subjected to an unwelcome request or demand because of his or her protected characteristic, i.e., of sex, race, color, religion, national origin, familial status, or disability, AND Submission to the request or demand is, either explicitly or implicitly, made a condition related to housing or a residential real estate-related transaction.

A person's conduct may constitute quid pro quo harassment whether or not the victim submits to the unwelcome request or demand.

Harassment Rule: Hostile Environment

- **Hostile environment harassment occurs when a person is subjected to unwelcome conduct that is sufficiently severe or pervasive as to interfere with the availability, terms, conditions or services of his or her housing or a residential real estate-related transaction because of a protected characteristic.**

Direct Liability

- **A person can be found directly liable for his/her own conduct as well as:**
 - **Failing to take prompt action to correct and end discriminatory conduct by an agent/employee of which the person knew or should have known.**
 - **Failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it.**

Vicarious Liability

- **The rule makes clear that a person is vicariously liable for the actions of their agents or employees, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice.**

Best Practice for Addressing Hate and Harassment

- Southern Poverty Law Center's Ten Ways to Fight Hate
- Linda Lewis Griffith's Article in the San Luis Obispo's The Tribune
- IFHC's Tenant-On-Tenant Harassment Policy
- U of I's How to Report Bias & Hate Crimes in Idaho

HUD Criminal Background Guidance

- http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf

Stats

- 1 in 4 U.S. adults has a criminal record
- United States has the highest incarceration rate in the world.
- U.S. has 4% of the world's population and 25% of the world's incarcerated people
- At any given time in 2014, there are over 2,200,000 individuals in custody in the United States
- 14,000,000 people move through the prison system every year
- States with highest recidivism rates –Southern belt states & Alaska
- U. S. Prison business - \$1 trillion per year

Removing Barriers

- HUD: “the difficulties in reintegrating into the community increase the risk of homelessness for released prisoners, and homelessness in turn increases the risk of for subsequent re-incarceration.”
- Research supports this:
- One study followed people for a year after release and found that those without adequate housing were more than 2X as likely to commit another crime
- Another study found that homeless individuals with prior convictions were significantly less likely to recidivate if they secured rental housing
- Removing unnecessary housing barriers for people with criminal records is a critical component of homelessness prevention

Fair Housing & Disparate Impact

- Discrimination can include a housing provider's neutral policy that, when put into practice, has a greater negative effect on one group of people of a certain protected class relative to another group of people
- *For example, an overly restrictive screening process may have an adverse impact based on a protected class such as occupancy or no arrests*

HUD April 2016 Fair Housing Guidance

- Legal opinion from HUD Office of the General Counsel
- Applies to all housing covered by the Fair Housing Act
- Criminal record status is not a protected class
- But, adverse housing decisions based on criminal record screening may violate the FHA's ban on race discrimination
 - 1. *Discriminatory treatment*—criminal record as a pretext for race (e.g., policy applied inconsistently—only screen African American males)
 - 2. *Disparate impact*—facially neutral policies that have an unjustified disparate impact on racial minorities (e.g., blanket bans on anyone with a record)

HUD April 2016 Fair Housing Guidance

Rationale: Racial disparities in the criminal justice system mean criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics

- Source: E. Ann Carson, Bureau of Justice Statistics, US Department of Justice, Prisoners in 2014 (Sept. 2015) www.bjs.gov/index.cfm?ty-pbdetail&iid=5387

HUD April 2016 Guidance - General Principles

- No arrests without conviction because no proof of criminal activity
- No blanket bans on convictions because not all indicate risk to resident safety and/or property
- Even if only blocking based on certain convictions, must show demonstrable risk to resident safety and/or property, usually by showing that the policy considers (1) nature (2) severity and (3) recency of criminal activity

HUD Policies on the Use of Criminal Records in Federally Subsidized Housing

Mandatory Bans

PHA and Project owners MUST deny admission to:

- 1.Anyone convicted of manufacturing meth on a federally assisted property
- 2.Anyone subject to lifetime registration for a sex offense
- 3.Current users of illegal drugs, abusers of alcohol, or a pattern of abuse that threatens the health, safety, or right to peaceful enjoyment of others
- 4.Anyone who, within the last 3 years, has been evicted from federal housing for drug-related criminal activity, unless(1) completed rehab or (2) circumstances leading to eviction no longer exist

HUD Policies on the Use of Criminal Records in Federally Subsidized Housing

PHAs and project owners may consider denying admission, terminating, or evicting for:

- 1. Drug-related criminal activity
- 2. Violent criminal activity
- 3. Other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing employees

The discretion of PHAs and project is subject to 2 limits:

- 1. Civil Rights Laws (incl. Fair Housing Act, VAWA)
- 2. Time – criminal activity must have occurred during a “reasonable time” before the screening takes place. 42 USC 13661(c).

Due Process in Adverse Decisions

- Mitigating circumstances –consideration required for PHA admissions, *may* be considered in other decisions; and
- Before adverse decision, applicant/resident must have the right to dispute the relevancy/accuracy of a criminal record

HUD PIH/Housing Arrest Record Guidance

HUD Notices PIH 2015-19/H 2015-10 (Nov. 2015)

- Applies to public housing, Section 8 Housing Choice Voucher landlords, and federally assisted multi-family housing
- Arrests alone cannot be the basis of a denial, eviction, or termination

So, short of conviction, what is proof of criminal activity?

- Arrests can be a starting point
- Other evidence of the conduct, e.g., police reports
- Must be based on a preponderance of evidence (more likely than not)

III. Fair Housing: National Origin, Affirmative Marketing, LEP Compliance

National Origin

- National Origin refers to one's ancestor's, place of **origin**; or because an individual has the physical, cultural or linguistic characteristics of a **national origin** group.
- Difference in treatment or in impact
 - Harassment
 - Bans on smells, foods, language
 - Policies involving criminal background, arrests, etc.
 - Marketing to diverse groups

Affirmative Marketing

- For federally subsidized but all housing--
- The Affirmative Fair Housing Marketing Plan (AFHMP) is a marketing strategy designed to attract renters and or buyers of all majority and minority groups, regardless of protected class to assisted rental units and sales of dwellings that are being marketed.
- Affirmative marketing differs from general marketing activities because it specifically targets potential tenants and homebuyers who are least likely to apply for the housing, in order to make them aware of available affordable housing opportunities.

Title VI: Language Access

- Title VI of the 1964 Civil Rights Act
- U.S. Supreme Court—Lau v. Nichols (1974)
- Executive Order 13166 (2000)
- Federal Agency Guidelines

HUD – 2007

- **HUD Guidance:**

<http://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf>

Fair Housing and LEP

- **LEP refers to a person's limited ability to read, write, speak, or understand English.**
- **People with limited English proficiency are not a protected class under the Fair Housing Act.**
- **However, the Fair Housing Act prohibits discrimination based on national origin, which is closely linked to the ability to communicate proficiently in English (LEP).**

National Origin Discrimination

- Failure to provide interpretation when persons are LEP
- If federally funded, have a Language Access Plan
- Whether federally funded or not, do not treat differently or worse when someone is LEP

Language Access Plan

- If federally assisted:
- Have a Language Access Policy
- Have Procedures
- Provide interpretation
 - I Speak Card
- Translation—vital docs
- Staff training
- Monitor and Evaluate

Resources

- U.S. Department of Justice: www.lep.gov
- Court House or Boise Interpreters
- Universities, Agencies, Community Groups
- IFHC
- Apps
- www.gehanes.com
 - Offers to Interpret
 - Langwij Finder

IV. Fair Housing: Sex, Sexual Orientation, & Gender Identity

Sex

- Sex
 - Harassment—HUD guidance
 - Domestic Violence
- Sexual Orientation
- Gender Identity

Sex

- Difference in treatment
- Sexual harassment
 - Quid Pro Quo
 - Hostile Environment
- Rules that have a disparate impact
 - Domestic Violence
 - Women and women of color disproportionately affected
 - Review VAWA
 - Nuisance Ordinance
 - Crime Free Lease Rules

Domestic Violence

- HUD Guidance:
<http://www.hud.gov/offices/ftheo/library/11-domestic-violence-memo-with-attachment.pdf>
- Rules that outright discriminate based on sex or that have disparate impact
 - Zero Tolerance or evictions based on DV
 - Adopt Policy of not evicting Victims of DV

HUD's Nuisance Guidance

On September 13, 2016, HUD published new legal guidance, entitled, *"Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services"*, also referred to as the "Nuisance Guidance"

The Guidance:

- **Addresses how the Fair Housing Act applies to the growing number of local nuisance ordinances and crime free housing ordinances**
- **Primarily focuses on the impact these ordinances may have on domestic violence victims**

Nuisance and Crime-Free Housing Ordinances

- These ordinances often label various types of conduct associated with a property—whether the conduct is by a resident, guest or other person—a “nuisance” and require the landlord or homeowner to abate the nuisance under the threat of a variety of penalties

Nuisance Ordinances

- **Types of conduct considered a nuisance vary & often times include so-called “excessive” number of calls for emergency police or ambulance services.**
- **In many jurisdictions, domestic-violence related calls are the largest category of calls received by police.**

Crime-Free Housing Ordinances

- **Often require or encourage housing providers to evict tenants because of alleged criminal activity on or near the property, regardless of whether the tenant was a victim of the criminal activity, including domestic violence.**
- **Also may mandate or strongly encourage housing providers to use lease provisions that require eviction based on an arrest or even on assertions of criminal activity.**

Caution Against Nuisance and Crime-Free Policies

- May have a disparate impact on domestic violence victims who are predominantly female and persons of color with children
- Don't have these blanket ordinances, policies or rules

Sex Orientation/Gender Identity

If the housing denial is because of the prospective tenant's non-conformity with gender stereotypes, it may constitute illegal discrimination on the basis of sex under the Fair Housing Act.

Sexual Orientation/Gender Identity

- Sexual Orientation refers to who you love/like/attracted to
- Gender Identity refers to what gender or no gender you identify with
 - Pronoun offer—I use the pronoun she or her

HUD RULE: Equal Access

- HUD Rule Adopted March 2012
 - Equal Access
 - Definitions
 - Sexual Orientation: Homosexuality, Heterosexuality, Bisexuality
 - Gender Identity: Actual or perceived gender related characteristics
 - Inquiries—can't inquire into one's sexual orientation/gender identity
 - Applies to HUD programs: FHA insured loans, Section 8, public housing, CDBG

Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity-Effective March 5, 2012

- **Equal Access to Housing in HUD Programs
Regardless of Sexual Orientation or Gender
Identity-Effective March 5, 2012**
- **Defines sexual orientation and gender identity**
- **Adds general equal access provision**
- **Clarifies HUD “family” definition**
- **Prohibits inquiries in certain contexts**
- **Adds sexual orientation and gender identity to
existing FHA equal access provision**

City Ordinances

- The following Idaho cities have [ordinances](#) prohibiting discrimination on the basis of sexual orientation and gender identity: [Boise](#), [Coeur d'Alene](#), [Driggs](#), [Idaho Falls](#), [Ketchum](#), [Lewiston](#), [Moscow](#), [Meridian](#), [Pocatello](#), [Sandpoint](#), and [Victor](#).
- The city of [Twin Falls](#) has an ordinance prohibiting discrimination on the basis of sexual orientation only.

V. Familial Status

Familial Status

- Refers to the presence of children under the age of 18
- Rules regarding children
 - Safety yes, but don't segregate, be overly restrictive or tell people where to sleep
- HOPA-Housing for Older Persons Act
 - Exception—55+ and 62+ housing

Familial Status

- Occupancy
 - 2 per bedroom plus one, don't count children under 5
 - Keating with caution
- Affordable housing NIMBYism, regulatory barriers (may include other protected classes)

VI. Disability

- Other PowerPoint

VII. Best Practices

- From a housing attorney perspective

Please contact the following with any questions and/or concerns:

U.S. Department of Housing and
Urban Development (HUD)

1-800-669-9777

-or-

1-800-927-9275 (TDD)

www.hud.gov

Intermountain Fair Housing Council
(208) 383-0695 in Boise

-or-

1-800-717-0695 (toll-free)

Web Resources:

- www.fairhousinglaw.org
- www.nationalfairhousing.org
- <http://fairhousing.jmls.edu/>
- <http://www.usdoj.gov/crt/housing/>
- www2.state.id.us/ihrc/about.htm
- www.hud.gov
- www.bazelon.org
- www.idaholegalaid.org
- www.ifhcidaho.org

Questions?