

GENERAL FAIR HOUSING LAW

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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

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)



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

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

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

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

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.

HOT TOPICS

- Addressing harassment (tenant-on-tenant harassment, housing provider-tenant) and hate;
- Criminal background (HUD guidance)

GUIDANCE ON HARASSMENT AND HATE

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

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.**

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 (more likely to reoffend and be homeless)
- U. S. Prison business - \$1 trillion per year

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)

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

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/fheo/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**
 - **Remedy adopt a policy of not evicting victims of DV**

THE HUD NUISANCE 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 OR CRIME FREE 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.

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

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

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.

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

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.

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
 - Must start out as HOPA housing cannot evict families to become HOPA housing

FAMILIAL STATUS

- Occupancy
 - 2 per bedroom plus one, don't count children under 5
 - Keating with caution
 - Connecticut Fair Housing Center et. al v. TGM Associates
- Affordable housing NIMBYism, regulatory barriers (may include other protected classes)

WHO IS DISABLED AS DEFINED BY THE FAIR HOUSING ACT?

A person who (42 U.S.C. 3602 (h)(1)-(3)):

- has a physical or mental impairment that substantially limits one or more major life activities
- has a record of such impairment
- is regarded as having such an impairment

HOT TOPICS

- Service Animals
- Reasonable Accommodations/Modifications
- Design and Construction

RESOURCES:

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?