

## WHAT KIND OF DISCRIMINATION IS PROHIBITED UNDER THE LAW?

No provision in the United States Constitution, in any federal statute, or in any federal subsidized housing program ensures that all persons will have access to decent, safe and sanitary housing as a matter of right. The fair housing laws do not directly address the problems of the homeless or those who cannot afford decent housing. They prohibit certain types of discrimination that limit the choice of persons in the housing market.

The 1866 Civil Rights Act prohibits discrimination based on race or color. The 1968 Fair Housing Act prohibits discrimination on the basis of race and color and also because of religion, sex and national origin. This law was further expanded in 1988 to prohibit discrimination against families with children and against persons with disabilities, both physical and mental.

Federal law does not generally prohibit discrimination based solely on marital status, sexual preference, age, wealth, source of income, or similar classifications. However, state or local laws may prohibit these broader classes of discrimination, and they should be consulted to see if they provide relief not offered by federal law.

In some jurisdictions, “source of income” provisions may make it illegal for landlords to discriminate against recipients of Section 8 vouchers. However, this type of discrimination is not illegal under federal law, and therefore, whether Section 8 recipients are protected against discrimination will depend upon the laws in the locality where the discrimination was alleged to have occurred.

Similarly, when state and local laws prohibit discrimination on the basis of “marital status,” that definition may vary from jurisdiction to jurisdiction. For instance, in some jurisdictions the term “marital status” applies only when the housing provider distinguishes between persons who are single and those who are married. In other jurisdictions, “marital status” may apply to unmarried cohabiting couples.

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## ***RACE, COLOR, OR NATIONAL ORIGIN:***

The Fair Housing Act broadly prohibits discrimination based on race, color or national origin. Color generally refers to skin tone. Therefore, discrimination against dark skinned but not light skinned Hispanics is illegal. National origin refers to the county of a person's ancestry.

Normally, the complaining party need show only that race, color or national origin was a motivating factor in the denial of the housing. The courts have devised a number of standards that can be used to show that such discrimination was present. A person can be a victim of discrimination based on race, color or national origin even if the person does not belong to a minority group that has traditionally suffered discrimination as a class. For instance, the Supreme Court has held that white persons may be the victims of racial discrimination and can sue when their civil rights are violated if they are injured.

## ***GENDER:***

Any type of discrimination based on a person's gender is prohibited. However, as defined by the courts, gender discrimination does not include discrimination based on sexual orientation. Gays and lesbians are not generally protected from housing discrimination under federal law unless discrimination on some other protected basis is also present. Some state laws and local ordinances do prohibit discrimination based on sexual orientation, however. Sexual harassment is a prohibited form of gender discrimination. If a landlord demands sexual favors from a tenant or makes deliberate or repeated unsolicited verbal comments, gestures or physical contact that makes for a hostile environment, the fair housing laws can be invoked. Courts have provided substantial remedies to victims of sexual harassment in housing cases.

## ***RELIGION:***

Discrimination on the basis of religion is generally prohibited under the Fair Housing Act. On occasion, religious discrimination may also violate one of the other categories of the Fair Housing Act. For instance, discrimination against Jews or Arabs may also constitute racial discrimination under the 1866 Civil Rights Act

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according to the Supreme Court The Fair Housing Act allows a religious organization to limit the sale, rental or occupancy of a dwelling to persons of the same religion or to give preference to persons of the same religion so long as membership in the organization is not limited because of race, color or national origin. This exemption is narrowly construed. Furthermore, if the religious group is acting for a commercial purpose, it will not be exempt from the Fair Housing Act and can be found liable of discrimination.

The Fair Housing Act's prohibition against discrimination based upon religion covers instances of overt discrimination against members of a particular religion as well less direct actions, such as zoning ordinances designed to limit the use of private homes as a places of worship.

### ***FAMILIAL STATUS:***

Amendments to the Fair Housing Act in 1988 prohibit familial status discrimination. Families are defined as one or more individuals (under the age of 18 years) who live with a parent or other adult who has custody of them or has been designated by the parent to have custody of them. They also include pregnant women and foster families. Housing specially designated for "older persons" may exclude families with children. However, to qualify as housing for "older persons," the housing must be solely occupied by persons who are at least 62 years of age or 80 percent of the occupied units must contain at least one person who is 55 years old or older and the facility otherwise meets all HUD requirements.

A landlord may not restrict children to designated buildings or to first floor units because of concerns that the children may make noise or fall from second story units. Nor may landlords generally prohibit children from using recreational areas or other services. Just as it is illegal to segregate persons because of their race, it is illegal to segregate them because they have children.

A landlord may not impose occupancy standards solely to exclude children. However, the Fair Housing Act does state that local, state or federal regulations can set a reasonable limitation on the maximum number of persons permitted to occupy a unit, so long as the restrictions do not specifically discriminate against

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families with children or other groups protected by the law. The Act does not state anything about restrictions imposed by private landlords, but HUD regulations provide that such restrictions are legal so long as they are reasonable.

The key word is "reasonable." What is reasonable depends upon the circumstances. Regulations that restrict housing to one person to a bedroom are clearly suspect. A regulation that restricts occupancy to two persons to a bedroom will probably be reasonable under HUD guidelines, but special circumstances may make it unreasonable. The size or layout of the unit must be taken into consideration in each case. Nothing in the Act requires a landlord to provide special facilities for children.

A landlord cannot stereotype families and assume that all children make noise or cause damage to property. However, if a family has a history of disturbances or damage caused by children, this may constitute a neutral ground to exclude the family from a dwelling. Such exclusions should be carefully examined to be certain that the explanation is not a mere pretext to discriminate against children. Unless well-founded, any attempt to segregate families with children to a particular section of an apartment community or to a particular floor of a building will be a violation of the fair housing laws.

Incidentally, the presence/existence of a hazardous condition will not excuse a landlord's refusal to rent to a family with children. Although landlords have a duty to protect residents from dangerous conditions on the premises, landlords may not specifically reject families with children because of possible dangers. Fair housing laws do not permit a landlord to determine that risks and circumstances of a dwelling or apartment building make it inappropriate for children. For example, the presence of lead paint or steep stairs in a dwelling is not a proper basis for rejecting families with children.

It may be a violation of the Fair Housing Act to restrict children from using a community's facilities such as the pool, hot tub, clubhouse, etc. The Fair Housing Act states that landlords may not discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or "*in the provision of services or facilities in connection therewith.*" When a landlord enacts a rule that

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denies or limits children's access to facilities and attempts to justify the rule by stating that the children are a nuisance or by offering no explanation whatsoever, the provider violates the Fair Housing Act.

HUD has suggested that "reasonable rules and regulations relating to the use of facilities associated with dwellings for the health and safety of persons" are permissible. Because the HUD regulations do not define what types of health and safety factors justify discrimination against children, landlords should proceed with caution.

### ***PERSONS WITH DISABILITIES:***

The Fair Housing Act prohibits discrimination on the basis of disability in all types of housing transactions. The Act defines persons with a disability to mean those individuals with mental or physical impairments that substantially limit one or more major life activities. The term mental or physical impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness. The term major life activity may include seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, or working.

The Fair Housing Act also protects persons who have a record of such an impairment, or are regarded as having such an impairment. Current users of illegal controlled substances, persons convicted for illegal manufacture or distribution of a controlled substance, sex offenders, and juvenile offenders are not considered disabled under the Fair Housing Act, by virtue of that status. However, landlords and communities cannot exclude past drug users or those who are in rehabilitation programs, if these persons are not currently using drugs. Alcoholics are considered to be "handicapped" under the Act. However, a landlord can properly exclude an alcoholic if that person violates neutral behavioral standards applicable to everyone, such as a prohibition against noise or disruptive behavior.

The Fair Housing Act affords no protections to individuals with or without disabilities who present a direct threat to the persons or property of others.

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Determining whether someone poses such a direct threat must be made on an individualized basis, however, and cannot be based on general assumptions or speculation about the nature of a disability.

In addition to the foregoing, a landlord or seller must make reasonable accommodations so that a person with disabilities has equal opportunity to use and enjoy a dwelling. A reasonable accommodation is one that does not impose undue financial or administrative burdens on the owner or seller. Obvious examples would be where a blind person needs a support animal or where a person in a wheel chair needs a first floor apartment and where one is available. Apartment complexes may also be required to move a person with disabilities to the top of a waiting list for a convenient parking space. It is important to recognize that “senior housing” is not exempt under the disability provisions of the Fair Housing Act. Therefore, a complex that will lease only to “active” or “mobile” seniors would violate the Act. Complexes that require seniors to move once they become disabled have also been found to violate the Act.

Even if an accommodation would be costly or burdensome, a landlord or seller cannot refuse to let the disabled person make a reasonable modification of the premises at that person's own expense. The person with disabilities should first seek the permission of the landlord and may be required to give the landlord assurances that the work will be done suitably. The landlord may also require the tenant to restore the premises to their original condition once the lease ends if it is reasonable to do so.

The Fair Housing Act also requires that certain multi-family dwellings of four or more units designed or constructed for first occupancy after March 31, 1991 meet defined design and construction Requirements. These requirements provide for minimal accessibility, but if the requirements are not met, it may be costly for the designer or contractor to retrofit the units. Dwellings that are built with public funds may have even greater accessibility requirements.

The Fair Housing Act explicitly allows a landlord to exclude a person whose tenancy would constitute a direct threat to the health or safety of others or would result in physical damages to the property of others. Landlords, however, may not

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stereotype individuals. Thus, a person who poses a significant risk of communicating an infectious disease that a reasonable accommodation would not eliminate can be excluded from a dwelling. However, if the disease is not truly communicable, such as non-infectious tuberculosis, or if a reasonable accommodation would reduce the risk, the landlord cannot exclude the disabled person. The Act clearly protects persons with the AIDS (HIV) virus as well as those who actually have AIDS. Similarly, although sexual preference is not protected by the Act, a landlord could be found guilty of violating the Act for refusing to rent to a gay man because of the fear that he might have AIDS.

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