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WHAT DOES THE LAW SAY?

The Fair Housing Act (FHA) prohibits discrimination in housing because of race, color, religion, sex, national origin, familial status, or disability. In addition, many state and local fair housing laws ban discrimination based on source of income, sexual orientation and gender identity, and other characteristics.

Enforcement officials and private advocacy groups remain deeply concerned about unlawful discrimination in rental housing. The latest figures indicate that in 2011, governmental and private fair housing agencies fielded more than 27,000 housing discrimination complaints—more than half involving rental housing, according to an April 2012 report from the National Fair Housing Alliance (NFHA). The numbers vary, based on where the complaint is filed, but most involve disability, race, familial status, and national origin.

But many believe that those numbers represent only the tip of the iceberg. At the far end are estimates that formal fair housing complaints account for less than 1 percent of actual incidents of housing discrimination—which would exceed 4 million—per year. Without hard numbers, no one knows for sure, but many acknowledge that housing discrimination often goes unreported.

HUD and the Justice Department are the federal agencies charged with enforcing the law; in states and local governments with fair housing laws substantially equivalent to the FHA, officials in those jurisdictions handle federal as well as state and local discrimination complaints. The law also allows for private enforcement by individuals and advocacy organizations who may file a lawsuit for unlawful housing discrimination directly in federal court.

Through various programs, HUD provides funding to public and private entities to support fair housing enforcement, education, and outreach initiatives. Plans to conduct fair housing testing are among the projects funded by \$7.5 million awarded by HUD to state and local agencies earlier this year. For example, a \$150,000 grant to the Boston Fair Housing Commission will fund a partnership with Suffolk University Law School; its new clinical program will conduct systemic fair housing testing focused on LGBT, disability, and familial status issues, and support complaint-based testing by fair housing agencies. The Pennsylvania Human Relations Commission plans to use its \$59,000 grant in a partnership that includes 600 paired tests to expose and reduce disability discrimination in the state.

A few months later, HUD followed up with more than \$40 million in grants to 99 private fair housing organizations in 35 states and the District of Columbia through the Fair Housing Initiatives Program (FHIP). The bulk of the funding—\$30 million—was earmarked to support enforcement activities by grant recipients, many of which plan to use the funds to recruit and train testers and to conduct fair housing testing. According to a 2011 study, FHIP organizations are the primary source for testing evidence associated with complaints and play a particularly important role in cases involving design and

construction, familial status, and a pattern and practice of discrimination.

In announcing the grants, HUD Secretary Shaun Donovan stressed the value of testing to support fair housing enforcement. “It is our continued commitment to ensure that every person has equal access to housing,” Donovan said in a statement. “These grants are a cost-effective investment. Cases bolstered by FHIP-funded investigations are more likely to uncover discrimination when it has occurred than cases without such support.”

Meanwhile, the Justice Department has its own fair housing testing program to identify and challenge cases involving a pattern or practice of housing discrimination. According to the department, the vast majority of lawsuits filed based on testing evidence involve allegations that individuals misrepresented the availability of rental units or offered different terms and conditions based on race, national origin, disability, or family status.

EXAMPLE: In April 2012, the owner of a New York community agreed to pay \$175,000 to settle a race discrimination case based on testing conducted by a private fair housing organization at the request of the Justice Department. As part of the settlement, the community admitted that its former on-site manager told African-American prospects that certain apartments were not available while telling non-African Americans that such apartments were in fact available, and quoting higher rent prices to African-American prospects. The settlement requires the community to pay a \$25,000 civil penalty and \$150,000 into a victim fund to compensate persons who were harmed by its discriminatory practices [U.S. v. Burgundy Gardens, LLC, April 2012].

Fair housing testing may be triggered by a variety of circumstances. In complaint-based testing, it’s used to verify whether an individual who claims a particular community discriminated against him based on his race, national origin, or other characteristic, has a legitimate complaint. If the fair housing organization conducts site visits, it will send individuals whose backgrounds—credit, rental, or employment history—are similar, but differ based on the protected characteristic at issue. If the results of testing support the individual’s claim, then the evidence gathered may be used in court or enforcement proceedings.

Sometimes, the trigger isn’t a complaint, but suspicions about discriminatory policies or practices at a particular community. Testing could be initiated by a fair housing organization on its own—or on behalf of federal enforcement officials. A prime example involves compliance testing of new or existing housing to check for accessibility under the FHA’s design and construction standards.

In its broadest form, “systemic” testing is used to gauge whether discrimination based on a particular characteristic is a problem in communities within a geographical area. It could involve site visits to check for various forms of discrimination or telephone tests aimed at linguistic profiling—treating prospects differently because of assumptions about their race or national origin based on the way they speak.

EXAMPLE: In March 2012, Vermont Legal Aid Inc. reported the results of its audit showing discriminatory treatment of African-American renters, renters of foreign origin, renters with children, and renters with disabilities. The audit, conducted between 2009 and 2011, consisted of 95 paired rental visit tests, 300 paired linguistic telephone tests, and 18 accessibility audits of newly constructed multifamily housing units to measure compliance with the FHA’s design and construction standards.

In a small majority of both the rental visit and linguistic telephone audits, housing providers’ treatment of the paired testers indicated no apparent discrimination; however, significant percentages demonstrated some preferential treatment toward the white testers of U.S. origin, according to the organization. Combining the testing outcomes for the site visits and telephone audits, testing results reflected preferential treatment toward the control testers in 38 percent of the race-based tests, 40 percent of the national origin tests, and 36 percent of the familial status tests. In 27 percent of rental visit audits conducted on the basis of disability, housing providers indicated preferential treatment toward the tester without an apparent disability, and in 83 percent of the 18 accessibility tests conducted, testers found significant or minor non-compliance with FHA’s accessibility requirements.

According to the report, very few housing providers made overtly discriminatory remarks to testers. The majority of paired tests indicating discrimination or preferential treatment toward the control tester involved subtle behaviors such as delayed response times to the protected tester or asking more probing

questions of the protected tester as in comparison to the control tester.

The organization noted that these differences in treatment would have been difficult to recognize absent this comparative analysis of testing results. In many situations, protected testers experiencing unfavorable treatment weren't aware that they had been discriminated against. It was only by comparing treatment with the control that different treatment was evident, the organization said.

5 RULES FOR AVOIDING PROBLEMS DURING FAIR HOUSING TESTING

Rule #1: Treat All Prospects as if They're Fair Housing Testers

On any given day, you're likely to have many interactions with prospective residents, including phone calls, email inquiries, Internet communications, or visits to your community. They may be inquiries about advertised vacancies or the availability of certain types of units at the community.

Our fair housing experts warn that you may never know when one of these encounters is part of a fair housing test. That's because enforcement agencies and fair housing organizations generally exercise caution in selecting and training fair housing testers.

In any given geographical area, local fair housing organizations may maintain a pool of trained fair housing testers who are called upon infrequently to preserve their anonymity. In general, they are volunteers, who may receive a stipend for their time and travel. Because of the potential that they may be a party or witness in any resulting litigation, they're likely to be screened for criminal history and any conflicts of interest. In fact, HUD enforcement officials go to great pains to safeguard the confidentiality of a tester's identity.

So even if you have an inkling that a particular prospect is a tester—because of the type of questions being asked, the way he carries himself, or the timing of similar contacts—you really can't be sure if a given encounter is part of a fair housing test. Testers posing as prospects may call your office or visit the property to check for differences in treatment based on race, national origin, disability, familial status—or other characteristics protected under state or local laws.

Don't forget about fair housing concerns when responding to emails or online inquiries on your Web site. Our experts pointed to a recent fair housing test of online communications using racially identifiable names in email addresses to check for differences in how they were treated.

EXAMPLE: A 2011 study by Georgia State University researchers detected race discrimination based on differences in responses to emails depending on the tester's name. Those whose names sounded African American received delayed, shorter, and curt responses to prospects as compared to quicker, longer, and more welcoming responses to those perceived to be white. The study concluded: "We find that landlords practice subtle discrimination in the rental housing market through the use of language associated with describing and viewing a unit, inviting further correspondence, making a formal greeting, and using polite language when replying to e-mail inquiries from a white name more often than to an African American name, they also send longer e-mails and respond quicker to white names."

So why take chances? Your best bet is to treat everyone contacting or visiting your community as if he were part of a fair housing test. Keep personal biases out of the leasing office and treat all prospects with professionalism and courtesy, starting with the initial contact—whether online, on the phone, or visits to your property.

Rule #2: Incorporate Fair Housing into Your Community's SOP

Make compliance with fair housing an integral part of your community's standard operating procedures. No doubt, you have numerous policies, practices, and procedures governing the marketing, leasing, maintenance, and other critical operations within your community. Many are based on business decisions, while others reflect legal requirements, such as landlord-tenant laws, health and safety codes, and other regulatory obligations.

Incorporating fair housing requirements serves both—it's not only a legal requirement, but it's a good business decision. Making your community available to any prospect who meets objective criteria to rent meets your legal obligations under fair housing laws. And, by distinguishing your reputation as an equal housing provider, you'll decrease the risk of being

targeted for fair housing testing based on suspicions about discriminatory policies or practices.

Maintain a formal written fair housing policy, affirmatively stating that your community does not discriminate on the basis of race, color, religion, national origin, sex, disability, or familial status. Add any characteristics protected under state and local laws, such as sexual orientation, marital status, or source of income. Include it in your rental applications and leasing agreements, and post it in your office, alongside the fair housing poster required under HUD regulations.

Pay particular attention to your advertising and marketing policies. Make sure your Web site, ads, brochures, and other media—whether in print or online—reflect your fair housing policy. Use of questionable phrases or buzzwords that suggest a preference against people with children or disabilities, for example, is likely to draw the attention of fair housing enforcement or advocacy agencies, which could lead them to target your community for fair housing testing.

EXAMPLE: In August 2012, the owner of a 16-unit rental community in South Carolina agreed to pay \$25,000 to resolve a lawsuit accusing him of discriminating against families with children. The case was filed by the Justice Department based on evidence gathered through its fair housing testing program. According to the complaint, the landlord published online ads stating “No Children,” and left a voicemail message at his office stating that “tenants must be at least 21.” Allegedly, he made several oral statements, which were recorded, to testers working for the Justice Department, that he did not rent units at the community to applicants with children. After a court ruled that the owner violated the FHA, he agreed to the settlement, requiring him to pay \$15,000 in damages along with a \$10,000 civil penalty [U.S. v. Altman, August 2012].

Rule #3: Ensure Consistency in the Leasing Office

Put in place standard, nondiscriminatory rental policies to ensure that prospects are treated fairly and consistently from the moment they contact your leasing office.

Testing is often focused on differences in the information provided to prospects about the availability of units, so it’s important to ensure that leasing agents have accurate, up-to-date information about vacancies. If, for example, you tell a couple without children about a vacant unit a short time after telling a single mother of a young child that nothing is available, it may appear that your community is discriminating against families with children. If these prospects are testers, they may get the wrong impression about why you told the first prospect that an advertised unit wasn’t available, since it’s impossible for them to know whether it’s because of blatant discrimination, sloppy record keeping, or simply that a vacancy just opened up.

Similarly, make sure prospects receive the same information about the terms and conditions of tenancy, such as screening criteria, rental terms, security deposits and fees, and any other relevant information. Quoting more stringent lease terms or higher rental payments to prospects based on a violation is a violation of fair housing law.

EXAMPLE: In March 2012, HUD announced that the owner of an apartment complex outside of Philadelphia agreed to pay \$15,000 to settle claims that the development’s on-site manager discriminated against families with children. Last summer, HUD charged the owner and manager with charging families higher rent when they have children and indicating a preference against families with children. The HUD complaint was filed by a fair housing organization that conducted compliance testing after it noticed several online ads seemingly expressing a preference against families with children. The testing allegedly showed that the on-site manager charged households with children more than same-size households without children. In one test, for example, the manager reportedly told a tester posing as a mother with a son that she would have to pay \$775 for a two-bedroom apartment that had been advertised as renting for \$740; later that same day, he allegedly told a different tester posing as a married woman with no children that a two-bedroom apartment rented for \$745 a month [U.S. v. Breckenridge Plaza, September 2011].

Testers also may be looking for signs of unlawful steering—that is, guiding, directing, or encouraging prospects from living in your community or certain parts of the community based on a protected characteristic. For example, it’s a violation of fair housing

law to tell Hispanic prospects that they wouldn't be happy living in your community—or showing them only units in undesirable locations. Even if based on well-intentioned concerns about convenience or safety, failure to disclose vacancies in upper-level floors to a prospect who has a disability or families with young children could be considered unlawful steering. Whatever your personal opinions about which units are best suited to a particular prospect, tell him about all available units that meet his needs and offer to show him as many as he wishes to see.

Rule #4: Provide Fair Housing Training to All Employees

All your employees, from your leasing staff to service workers in your maintenance, housekeeping, and landscaping operations, should receive periodic fair housing training. Although most testing efforts are addressed to your leasing office, interactions with any employee who interacts with the public could lead to a discrimination complaint, which in turn could trigger a fair housing test.

The training should cover the fundamentals of fair housing, including who is protected under federal law as well as any applicable state and local laws. It should also explain your community's policies and what employees can and can't do under fair housing law. Reinforce the importance of keeping personal biases out of the workplace and to treat everyone at the community with courtesy and professionalism. Make sure employees understand the chain of command so they know where to go for help or to report any fair housing concerns or observations.

Of course, you should focus particular attention on the leasing office. Our experts noted that the upswing in the rental market means high turnover in leasing staff, so a sizable proportion of your leasing employees may be unfamiliar with fair housing law or your community's policies.

Don't allow new employees to interact with the public without at least a basic understanding of fair housing law. Otherwise, they may inadvertently make well-intentioned, but inappropriate comments when answering the phone or meeting prospects. For example, an inexperienced employee could be overly curious about the nature of a prospect's disability or cultural differences reflected in the prospect's accent

or appearance—just the type of conduct that could draw the attention of fair housing testers.

Managers should monitor how the leasing staff, particularly new employees, interact with prospects on the phone, in site visits, and in Internet communications. Consider an open-door policy for management staff, so managers can hear what's going on in the office—and encourage them to periodically sit in on phone calls or meetings with prospects and to tag along on tours.

Managers must be trainers to reinforce good habits in employees, so good management means checking up from time to time on sales presentations, tours, applications, and so on, to see what staff members are doing. And it's a good idea to have all employees sign an acknowledgement saying that they agree to abide by fair housing laws and that they understand that they may be monitored and recorded for training and compliance purposes.

COACH'S TIP: Our legal experts stress the importance of maintaining documentation that your community has a fair housing policy and actively trains employees on fair housing compliance. In the event that a fair housing problem ever arises, the stack of documentation showing just how much time goes into training makes for an impressive exhibit in court.

Rule #5: Shop Your Property

Shopping yourself—either by internal means or by hiring an outside shopping service—is one of the best ways to ensure that you won't be caught off-guard from the results of a fair housing test. It's an effective tool to monitor whether your employees are complying with fair housing laws and to identify any weaknesses—either in an employee's performance or in the effectiveness of your training program.

You can do it informally, by asking people you know to pose as rental prospects, but many communities hire outside shopping services to call or visit the leasing office to monitor sales and marketing as well as fair housing issues.

You can contact your local apartment association for shopping resources. And, although our fair housing experts disagreed about whether it's a good idea to use them, many fair housing advocates offer shop-

ping services to private communities with assurances that any results will be kept confidential and won't be used against you.

Whatever means you use, it's important to follow up to determine the root cause of any deficiencies detected during the "shop." There could be a number of reasons why a shopping service might report that a leasing consultant responded inappropriately to a shopper's question. If it's because the employee truly acted improperly, you should respond with disciplinary action. If the employee simply misunderstood fair housing requirements, you'll know that the employee needs additional training.

Alternatively, the results of a shopping test may reveal a larger problem—for example, that your policy or training on a particular issue is unclear or incorrect. If that's the case, you'll have an opportunity to rectify the problem on your own, rather than having to address it after the fact if it surfaces for the first time during a fair housing test.

■ Fair Housing Act: 42 USC §3601 *et seq.*

COACH Sources

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COACH'S QUIZ

We've given you five rules to follow to avoid problems during fair housing testing. Now let's look at how the rules might apply in the real world. Take the **COACH's Quiz** to see what you've learned.

INSTRUCTIONS: Each of the following questions has only one correct answer. On a separate piece of paper, write down the number of each question, followed by the answer you think is correct—for example, (1) b, (2) a, and so on. The correct answers (with explanations) follow the quiz. Good luck!

QUESTION #1

From the way a prospect is asking questions, you believe she's really a fair housing tester. You should:

- Try to get her out the door as soon as possible to avoid any inadvertent slip-ups.
- Treat her the same as everyone else by taking as much time as necessary to respond to her questions.
- Give her extra attention by going out of your way to make sure you can't be accused of any fair housing violation.

QUESTION #2

You have a vacancy in a studio apartment, but it's very small so you think that it would be best for only one person. Nevertheless, posting an online ad with language that it's "Per-

fect for Singles" could trigger a fair housing investigation. True or false?

- True.
- False.

QUESTION #3

A prospect visits your office, asking about available one-bedroom units in your community. Since he's in a wheelchair, you tell him about a unit on the first floor near the building entrance, but not available units in more distant locations or on upper floors. Though you have his welfare and convenience at heart, you could face a fair housing problem because of your conduct. True or false?

- True.
- False.

COACH'S ANSWERS & EXPLANATIONS

QUESTION #1

Correct answer: b

Reason: Rule #1 applies here:

Rule #1: Treat All Prospects as if They're Fair Housing Testers

Your best bet is to treat all individuals contacting or visiting your community as if they were part of a fair housing test. Treat all prospects with professionalism and courtesy, starting with the initial contact—whether online, on the phone, or visits to your property.

Wrong answers explained:

- a. Even if you believe that a particular prospect is a tester because of the type of questions she's asking, it's a mistake to rush her out the door quickly. Fair housing testers are trained to look for differences in treatment—and giving her short shrift because you're nervous may give the false impression that you're treating her brusquely because of a protected characteristic.
- b. By the same token, it's a mistake to go overboard to lavish extra attention on a prospect even if you suspect she's a fair housing tester.

QUESTION #2

Correct answer: a

Reason: Rule #2 applies here:

Rule #2: Incorporate Fair Housing into Your Community's SOP

Enforcement officials and private fair housing advocates are monitoring online advertising, so it's important to follow standard advertising policies whenever you post a vacancy. Advertising a particular unit as perfect for singles could suggest a preference against families with children—which may be enough to trigger a broader fair housing investigation.

QUESTION #3

Correct answer: a

Reason: Rule #3 applies here:

Rule #3: Ensure Consistency in the Leasing Office

Testing often focuses on differences in the information provided to prospects about the availability of units, so you could face a fair housing problem for failing to disclose all available one-bedroom units to the prospect because of his disability. Moreover, even if well-intended, guiding him to a particular unit—and away from other suitable units—could be considered unlawful steering.