

Hanover Miscellaneous Professional Advantage

Drafting a Policy is a Worthy Effort – Now is the Time

Why do we write things down? We could think of multiple answers to this question, but perhaps the most basic reasons are a) so that we don't forget them, and b) because they are important. It is a mental shortcut. For example, when we go to the grocery store with a few things in mind, inevitably we get to the checkout or car and have a mini moment of paranoia – *wait, what am I forgetting??* Contrast that with a concise, well-thought out list that details what we need and does not include anything we do not. In the second scenario there is considerably less mental strain (unless your grocery store has rearranged the shelves for the umpteenth time).

This dynamic is what we want to keep in mind as we confront what is often a challenging topic: discrimination. Property managers already familiar with fair housing laws should be on alert. On June 1, the White House issued a statement noting it would propose rules to “align federal enforcement practice with the congressional promise in the (FHA) to end discrimination in housing and will collectively provide the legal framework for HUD to *require* private and public entities alike to rethink established practices that contribute to or perpetuate inequities.” Even before this announcement, federal and state enforcement agencies were raising their antennae and filing a HUD complaint is relatively easy. Dealing with a HUD complaint? Not so easy. If you have not already, now may be the time to consider how drafting a formal policy (i.e., “writing it down”) is a benefit to your business. What follows are some practical observations and suggestions for how to attack drafting a policy document. It is important to remember not to confuse a *policy* with a *checklist*. A checklist is a list of steps to be taken. A policy establishes why certain acts are or are not acceptable behavior, from which a checklist or other tools may derive.

Know your business – this is the obvious one. However, when things are obvious, they are often out of sight, out of mind. Therefore, spend some time jotting down both the basics and idiosyncrasies of your operation. You may be surprised by how much you actually do, who is responsible for what, or what gaps in duties exist. If you are a one-person shop (meaning you do “everything”) this exercise gives you a big picture view that may be hard to see during the day-to-day. More importantly, it is difficult to establish a complete policy when you do not understand the breadth of what the policy needs to account for.

Know what laws apply to you – this is the big one. The fair housing rules applicable to a property manager in New York City are likely different than the rules that apply in Omaha. They may even be different than those that apply in Buffalo. The point is, simply being aware of the federal rules are not enough. States often add groups to the federal list of protected classes.

Counties and municipalities that include large metropolitan areas often add to the federal and state lists. Getting legal advice does not have to mean spending a ton on legal fees. Many states have non-profit organizations staffed by attorneys who offer assistance on local fair housing laws. However, do your own diligence and make sure your source is qualified.

Know what discrimination looks like – this is the most difficult one. The legal standard continues to evolve. In some cases, discrimination can be found even where the actor had no ill intent, or the act in a vacuum seemed innocuous enough to most disinterested observers. If you do not have a firm enough grasp on what is questionable behavior, your policy will be missing a key element.

Do not assume all your tenants will be the same – the flip side of knowing what discrimination looks like is understanding you may get an applicant or prospective tenant that differs from who you are accustomed to dealing with. They may have different needs or customs, but fundamentally are looking for reasonable housing like everyone else. From a policy standpoint, your operations should not tacitly or explicitly homogenize your residents to the exclusion of others. The key decision drivers should focus on ability to pay rent, maintain the condition of the property, and not perform acts which are illegal, interfere with other tenants' right to enjoyment, or otherwise violate lease terms. This may require you as the property manager to educate yourself and your staff about what actions and statements may be root cause of discrimination for affected groups which a) are protected by law where you operate, and b) you do not have familiarity with.

If the policy is too long, it will not get used – in the movies when there is an emergency, blaring sirens and yellow lights, and someone yells, “get the manual!!!”, the manual is a five inch thick, three-ring binder. That does not work. Do not try to cover every possible scenario. Do try to create operational principles that are consistent with a stated goal. Do get detailed on foreseeable situations where you want specific steps taken

in a specific order or for specific reasons. Do make sure that what you interpret as “obvious” is understood by your staff in the same manner. Otherwise, one policy becomes *multiple* policies, which in effect is potentially worse than having no policy.

The first contact is not when an applicant walks in – how you advertise is the first interaction. How you solicit tenants should be part of your policy, and the policy should speak to a consistent approach throughout every major interaction in the timeline, including your forms. Solicitation. Application. *Credit and background check*. Lease. Move in. Tenancy and quiet enjoyment. Repairs or requests. Renewal. Move out (including evictions). Security deposit returns.

Writing it down is not the endgame – too often we think that once it is clear and written down, then there is no reason to write down what happens if the policy is violated. But remember: the policy cannot and will not cover every scenario. If we were 100% certain no one would ever do *anything* wrong, there would arguably be no need to write it down in the first place. A clear, succinct policy should provide instruction and framework for those times when stress undermines your ability to take efficient and positive steps to remedy a situation, including a systematic notification response in the event of an allegation of discrimination (e.g., E&O carrier, outside counsel, property owner). Just as important, the policy should also be unambiguous in defining the consequence of committing acts which are unacceptable, against policy, and which ultimately result in lost time, money and/or reputation.

Ignore the voice that says “that will never happen” – just because you have never *been* sued, it does not mean you will never *be* sued. When danger seems remote to us, we tend to discount its potential to impact us. Until it happens to us. The *benefit* of the policy is not that it prepares you for bad outcomes, but that it allows you to exert a degree of control over your business in a way that *maximizes value*. The policy tells prospective tenants, “this is a well-run property where you and your family can feel safe.” The policy tells your staff, “we are serious about running a professional operation.” Finally, the policy tells any potential plaintiff’s attorney that you understand your legal obligations as a property manager, and they will have to work twice as hard to extract value. This is especially true where the allegation has more to do with poor service than actual discriminatory intent.

Deviations should always be documented – if it is too easy for you or your staff to do something other than the policy, then you either have no policy or the wrong policy. In discrimination cases, differentiation based on circumstance is precisely what causes problems. Fair or not, if a deviation from policy is an “open secret” (or worse a hidden secret), the deviation and the outcome from that act will rarely if ever be to your benefit. You will have great difficulty in answering why you or your staff felt it necessary to engage in acts against policy and why you chose to account for those acts in a way that made them hard to detect.

Make clear who makes the call – there should never be a question of who has the last word; who has final responsibility in the event of an internal or external disagreement. If you are both manager and property owner, that simplifies things considerably. However, if your contract requires certain tasks to have approval by the property owner, make sure your policy does not contradict your agreement. Key decisions should *always* be documented – either communicated in writing, or immediately writing down decisions made verbally. This can be as simple as a follow up email, for example, “confirming your directions re: prospective tenant”.

Like our grocery list example, the more effort and thoughtfulness you invest up front, the greater the rewards to you as business owner. These include streamlined decision-making, consistent approach to prospective and actual tenants, and less mental fatigue around “how do I handle this” or “am I doing and saying the right thing”. Drafting a discrimination policy can be as simple or as painstaking as you wish, but perhaps now more than ever the benefits are there.

Contact information

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