

Hanover Miscellaneous Professional Advantage

HUD expands Fair Housing Act enforcement in response to *Bostock*

On February 11, 2021, the Department of Housing and Urban Development (HUD) [announced](#) its intention to extend the Fair Housing Act's (FHA) prohibition on discrimination to include sexual orientation or gender identity. The basis of this change in enforcement stems from HUD's interpretation of the Supreme Court's holding in *Bostock v Clayton County*, and Executive Order 13988, Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation (signed January 20, 2021).

Background

The Civil Rights Act of 1964 lists seven "protected classes" for individuals: race, color, religion, national origin, sex, familial status and disability. The ruling in *Bostock* held that Title VII of the 1964 Act protects *employees* from discrimination on the basis of sexual orientation or gender identity. Although there has been no legislative change to the statutory language of the 1964 Act, the change in enforcement tactics is borne from the belief that the analysis under *Bostock* is not and should not be limited solely to employees. All property managers should understand the implications of such an interpretation, and how failure to pay heed may potentially result in becoming party to a claim alleging discrimination.

What is changing?

The key language under FHA is (and has always been) "discriminatory housing practices". However, the FHA – like many other laws – has not historically been interpreted to include sexual orientation or gender identity. Prior to the HUD announcement, some states had already attempted to close this gap by extending civil or equal rights protections on the basis of sexual orientation or gender. For residents of states which do not constitutionally or statutorily protect on the basis of sexual orientation or gender, there is now potentially federal recourse that previously did not exist. While this does not mean that HUD's enforcement plan will ultimately result in a damage award, it should at minimum highlight the need for all property managers (regardless of state of operation) to understand the changing environment. Recent [polls](#) indicate that an increasing number of individuals identify as LGBTQ+. Now is a good time to evaluate how prepared you are and whether you might perform acts which inadvertently raise the potential for a claim.

Do some research

Under normal circumstances, understanding what constitutes a discriminatory housing practice is not straightforward in most cases. The complexity rises if you are not familiar with the

LGBTQ community, never believed you had to engage that conversation, or simply do not know where to start. One helpful introduction to the nature and scope of gender and identity discrimination is your or another state's civil, equal or human rights website. Often these sites have educational resources on the LGBTQ community, links to other informational sites, as well as tools to avoid lawsuits that businesses may consider. For example, the Human Rights Commission for the State of Washington has created a self-assessment and best practices [checklist](#) specifically designed for housing transactions. Although it is based on Washington state discrimination laws, the checklist – which is meant to help landlords and property managers limit the likelihood a discrimination suit – may provide you with a starting point on how to evaluate your own operation in this area.

Look at your vendors

When you use third parties to pre-screen potential tenants or conduct credit checks, do those vendors conduct those inquiries in a non-discriminatory manner? Do you know whether you receive information on candidates that has, in effect, already incorporated the seeds of discrimination into the results? Should a candidate feel discrimination was the root of a denial decision, it is not safe to assume the ensuing lawsuit will be limited to your vendor and somehow exclude the property owner or manager.

Look at your application and processes

Does your application force a potential tenant into a binary choice or one that maybe does not include an option for how they or their family members personally identify? Does your application presume that spouses or significant others automatically fall into a man+woman designation? Does your application insidiously tell someone they do not exist?

Is there any aspect of your process – from application to move-out – that treats any tenant or potential tenant differently on a basis other than ability to pay rent, adhere to lease terms, or

otherwise be a tenant that does not adversely affect the quiet enjoyment of other tenants? Do you have a complaint process or tenant manual/move-in package that may need revisiting?

Look at your marketing and staff

Do your brochures or does your online presence give a potential tenant the impression that only a certain “type” of tenant is welcome at your property?

When potential and existing tenants interact with your staff, are they treated with respect and acceptance? How do you know? Does your staff understand the concepts of stereotypes, bias and microaggressions? Unlike skin color or physical identifiers that highlight the presence of commonly understood protected classes, gender identity or sexual orientation may not be outwardly discernable. Off-hand comments or poor word choice, even if not intended to be hurtful, may be interpreted in a manner that puts a property manager in a precarious position. Consider external training for your staff as a general proposition (for ongoing awareness of trends in discriminatory practices) and specifically if your staff are not versed on the realities of LGBTQ tenants and applicants.

Conclusion

In large part, any property manager should ask themselves, “Does any part of my operation ‘devalue’ the applicant or someone the applicant cares about/is responsible for?” Outside of a handful of states, the risk of a suit alleging discrimination on identity or orientation grounds was relatively low. This may no longer be the case going forward. If HUD (and the DOJ) is successfully able to prosecute claims of discrimination on the basis of gender identity or sexual orientation, this development will out of necessity change the way all participants in the rental housing market operate. Being proactive *now* is key to making sure your organization is prepared.

Contact information

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