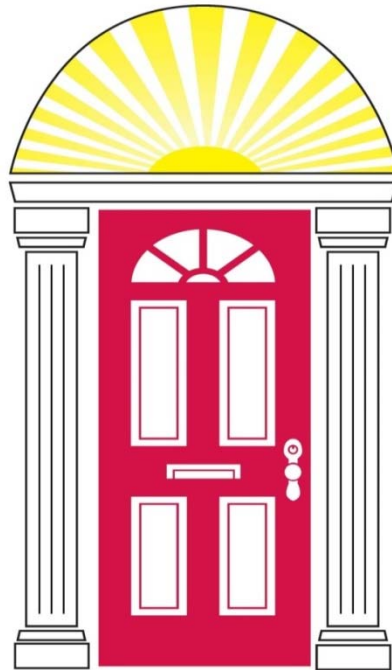


B R E A K F A S T B R I E F S



Fair Housing Works for You! Why Community Association Leaders and Managers Need to Understand Fair Housing Laws

The program is approved by the Community Association Managers International Certification Board (CAMIC) to fulfill continuing education requirements for the Certified Manager of Community Associations® (CMCA) certification.

This program is approved by the Common Interest Community Board for 2.0 credit hours as a Virginia Fair Housing Common Interest Community Management Training Program.



M E R C E R T R I G I A N I



BREAKFAST BRIEFS

Preliminary Overview of the Fair Housing Laws

MERCERTRIGIANI



Statutory Foundation – In General

- ✱ Federal Fair Housing Act of 1968 and the Fair Housing Amendments of 1988 (42 U.S.C. Sections 3601 *et seq.* as amended)
- ✱ Virginia Fair Housing Law (Section 36-96.1 *et seq.* of Code of Virginia and 18 VAC 135-50-10 of the Virginia Administrative Code)
- ✱ Local Fair Housing-Related Ordinances may apply



Federal Fair Housing Act

The Federal Fair Housing Act prohibits **housing providers** from discriminating in any aspect of the sale or rental of a dwelling unit, or in the provision of services or facilities in connection therewith, on the basis of:

- ✱ Race
- ✱ Color
- ✱ Religion
- ✱ National origin
- ✱ Sex
- ✱ Familial status (under the age of 18)
- ✱ Handicap/disability



Virginia Fair Housing Law

The provisions of the Virginia Fair Housing Law mirror those of the federal Fair Housing Act, except that the Virginia Fair Housing Law adds an additional “protected class” – the elderly (55 or older).



Classes Not Protected by Federal or State Law

There are several groups that are not protected under either the state or federal fair housing law. For example, students and smokers are not protected. Income status, sexual orientation, and marital status (unmarried couples) are also not protected groups.

But, these classes may be protected under a local ordinance.



Applicability to Community Associations

Courts have applied fair housing laws to both homeowners and condominium associations, determining that each is a **housing provider**.



Contrast with the American with Disabilities Act

The American with Disabilities Act (ADA) prohibits discrimination on the basis of disability by operators of **places of public accommodation**.

The ADA generally has limited application to community associations.



Who Enforces the Fair Housing Laws?

- ✱ Department of Justice (DOJ) - federal
- ✱ Department of Housing and Urban Development (HUD) - federal
- ✱ Virginia Fair Housing Office - state
- ✱ Local governments to extent local ordinances have been passed - county/city

(more about enforcement later...)



Disability

MERCERTRIGIANI



History

- ✦ In 1988, Congress extended the protections of the federal Fair Housing Act to persons with physical and mental disabilities.
- ✦ In 1991, the General Assembly added handicap as an additional protected class to the Virginia Fair Housing Law.



Joint Statements

The DOJ and HUD issued Joint Statements in 2004 and 2008 to provide guidance regarding the rights of individuals with disabilities and the obligations of housing providers under the federal Fair Housing Act



Disability Defined

The Fair Housing Act defines a person with a disability as an:

- ✦ individual with a **physical or mental impairment** that *substantially limits* one or more **major life activities**;
- ✦ individual who is regarded as having such an impairment; and
- ✦ individual with a record of such an impairment.



Physical or Mental Impairment Defined (Continued)

The Joint Statements provide that the term “physical or mental impairment” includes, but is not limited to:

- * Orthopedic, visual, speech and hearing impairments
- * Cerebral Palsy
- * Autism
- * Epilepsy
- * Muscular dystrophy
- * Multiple sclerosis
- * Cancer
- * Heart disease
- * Diabetes
- * HIV
- * Mental retardation
- * Emotional illness
- * Drug addition (other than illegal use of controlled substance)
- * Alcoholism
- * Hoarding



Major Life Activity Defined

The Joint Statements provide that the term “major life activity” means those activities which are of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, caring for one’s self, learning and speaking.



What the Fair Housing Laws Require

The fair housing laws *require* housing providers to:

- ✦ make **reasonable accommodations** in rules, policies, practices, or services that are **necessary** to afford disabled individuals an equal opportunity to use and enjoy their **dwelling**; AND
- ✦ make **reasonable modifications** of existing premises that are occupied by disabled individuals if such modifications are **necessary** to afford disabled individuals with an equal opportunity to use and enjoy their **dwelling**.



What the Fair Housing Laws Require (Continued)

But, housing providers are only required to provide a reasonable accommodation/modification if a reasonable accommodation/modification is requested.



Reasonable Accommodation vs. Reasonable Modification

Under the Fair Housing Act, a **reasonable modification** is a *structural change* made to the premises, whereas a **reasonable accommodation** is a *change, exception, or adjustment to a rule, policy, practice, or service*.



What is Reasonable?

What constitutes a **reasonable accommodation** or “reasonable modification” is determined by a facts and circumstances test which takes into consideration the resources of the entity required to provide the accommodation or modification.



What is Reasonable? (Continued)

Courts have generally held that an accommodation/modification is **reasonable** if the accommodation/modification would not impose an undue hardship or burden upon the entity making the accommodation/modification, and would not undermine the basic purpose that the requirement seeks to achieve.



Necessity of Accommodation or Modification

To determine whether a requested accommodation or modification is necessary, there must be an identifiable relationship, or nexus, between the requested accommodation or modification and the individual's disability.



Use and Enjoyment of Dwelling

Case law suggests that
use and enjoyment of dwellings
extends to areas outside of the units.



Who Pays?

As a general rule, the association is responsible for the costs to make reasonable accommodations and the requesting party is responsible for the costs to make reasonable modifications.



What You CAN Ask

- ✦ If the disability is NOT obvious, the housing provider may ask for information that:
 - is necessary to verify that the person is disabled
 - describes the needed accommodation/modification
 - shows the relationship between the person's disability and the need for the requested accommodation/modification
- ✦ If the disability IS obvious, but the need for the modification is not readily apparent or known, the housing provider may only request information that is necessary to evaluate the disability-related need for the modification.



What NOT To Ask

The housing provider may not ask about the nature or severity of an individual's disability.



Race, Color, Religion, National Origin, and Sex

MERCERTRIGIANI



Race

It is illegal to deny someone a housing opportunity because that individual is, for instance, Caucasian or African American.



Race (Continued)

According to statistics from the Virginia Fair Housing Office, while the majority of fair housing complaints received are based on race, race-based claims have decreased slightly from a total of 35 in fiscal year 2009 to 28 in fiscal year 2012.



Color

It is illegal to deny someone a housing opportunity because that individual is, for instance, a darker complexion.



Religion

It is illegal to deny someone a housing opportunity because that individual practices a certain religion, such as Islam or Christianity.



Religion (Continued)

Religious discrimination covers instances of overt discrimination against members of a particular religion, as well as less direct actions, such as zoning ordinance designed to limit the use of private homes as places of worship.



National Origin

It is illegal to deny someone a housing opportunity because of an individual's national origin.

Such discrimination can be based either upon the country of an individual's birth or where his or her ancestors originated.



Sex

It is illegal to deny someone a housing opportunity based on the gender of that individual.



Sex (Continued)

Sexual orientation and gender identity (transgender) are not protected classes under either the Fair Housing Act or the Virginia Fair Housing Law.

In February 2012, HUD implemented a policy to ensure that its core programs are open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status.



Familial Status

MERCERTRIGIANI



Familial Status

- ✦ The Fair Housing Act, with some exceptions, prohibits discrimination in housing against families with children under 18.
- ✦ In addition to prohibiting an outright denial of housing to families with children, the Act also prevents housing providers from imposing any special requirements or conditions on residents with custody of children.



Familial Status (Continued)

- ✦ Housing providers may not discriminate against families in which one or more children under 18 live with:
 - A parent;
 - A person who has legal custody of the child or children; or
 - The designee of the parent or legal custodian, with the parent or custodian's written permission.
 - Women who are pregnant; and,
 - Anyone securing legal custody of a child under 18.



Familial Status Impact on Rule-Making

- ✦ Community associations must be careful to create objective descriptions of rules, policies, and restrictions.
- ✦ For example, the following rules will likely be found to violate fair housing law:
 - Children may not play on the common area;
 - Children under the age of 15 must be accompanied by a person over the age of 18;
 - Children must wear diapers in the pool.



Age-Restricted Communities – An Exception to the Rule

- ★ Congress enacted Housing for Older Persons Act (“HOPA”) in 1995.
- ★ HOPA creates an exemption to the Fair Housing Law prohibition on discrimination based on familial status for housing providers “intended and operated for occupancy by persons 55 years of age or older.”



Types of Age-Restricted Communities

Two types of age-restricted communities are permitted by HOPA:

- ✦ 100% of the units must be *occupied* by at least one person 62 years of age or older; or,
- ✦ At least 80% of the units must be *occupied* by at least one person 55 years of age or older (the 80/20 Rule).



Ownership v. Occupancy

Age-restriction percentages required by HOPA only account for *occupants*, not owners.



HOPA – Other Requirements

- ★ Housing must also be specifically designed for and occupied by elderly persons under a Federal, State or local government program, and
- ★ Adhere to a policy that demonstrates intent to house persons who are 55 years of age or older.



HOPA – Discriminating Based on Age

- ✦ Community associations which qualify for the HOPA exemption to the Fair Housing Laws may discriminate against residents based on age.
- ✦ Once qualified, community associations may prohibit residents of a specific age, oftentimes those under the age of 19.



Board Authority to Waive Age Restrictions

- ✦ If established by recorded governing documents, occupancy prohibitions based on age cannot be easily changed.
- ✦ Absent an amendment to the recorded governing documents, the Board and membership have little authority to waive the rule.
- ✦ Permitting such waivers of the governing documents, while not a violation of the 80/20 Rule, may be considered when determining whether the association's policies demonstrate an intent to house persons who are 55 years of age or older.



Verification of HOPA Percentages

- ★ A community association claiming exemption under HOPA must be able to verify to HUD that that the community meets HOPA percentage requirements.
- ★ HUD regulations require that community associations update the resident list at least every two years to ensure that the 80% requirement is met.



Surveying Residents

- When surveying residents, community associations must collect reliable documentation from all residents 55 or older
- The following documentation is considered reliable by HUD:
 - a current driver's license with photo,
 - government issued passport,
 - immigration card,
 - military identification card,
 - birth certificate, or
 - any other government document that shows a date of birth.



Maintaining Adequate Records

- ✦ All collected survey information should be retained and made available for inspection by HUD (HUD inspections are currently not common).
- ✦ The collected information may also be used in any court or administrative proceeding to show compliance with the HUD regulations in a familial status discrimination case.
- ✦ Otherwise, keep the information safe and confidential.



Four Things to Remember about HOPA

- ✦ **Review Your Governing Documents.** Governing documents establish what percentage of occupants must be 55 (or 62) years of age or older and may contain other age restrictions.
- ✦ **The 80/20 Rule.** Keep an accurate record of the current occupancy percentage.
- ✦ **Survey Residents** at least every two years to ensure compliance with the 80/20 rule and that the association otherwise complies with HOPA regulations.
- ✦ **Remember its *Occupancy*, not *Ownership*.** HOPA restricts who may occupy a dwelling, not who may own it. Ownership does not affect the 80/20 rule.



Enforcement, Penalties for Noncompliance, and Recommendations



Enforcement Options

- ✦ Individuals can file a complaint with HUD.
- ✦ Individuals can file a complaint with the Virginia Fair Housing Office (VFHO).
- ✦ Individuals can file their own lawsuit in federal or state court.



Enforcement Options (Continued)

- ★ The DOJ may bring a lawsuit where it has reason to believe that a person or entity is engaged in a **pattern or practice** of discrimination or where a denial of rights to a group of persons raises an issue of **general public importance**.



“Pattern or Practice” Defined

Courts have found a “pattern and practice” when the evidence establishes that the discriminatory actions were the defendant’s regular practice, rather than an isolated instance.



“General Public Importance” Defined

Courts have held that the Attorney General has discretion to decide what constitutes an issue of “general public importance,” and courts will not second-guess the Attorney General’s decision.



Complaints Filed with HUD

- ✱ Complaints filed with HUD must be filed within one year of the incident.
- ✱ If HUD determines that reasonable cause exists to believe that a discriminatory housing practice has occurred, then either the complainant or respondent may have the case heard in federal court.
- ✱ The DOJ will bring the case on behalf of the individual complainant.



Complaints Filed with VFHO

- ✦ The VFHO is the investigative branch of the Virginia Fair Housing Board and Real Estate Board (Board).
- ✦ Any aggrieved person may file a complaint with the VFHO, but the complaint must be filed no later than one year after the alleged discriminatory housing practice occurred or terminated.
- ✦ The Board must, within 100 days after the filing of the complaint, determine, after consultation with the Attorney General, whether reasonable cause exists to believe that a discriminatory housing practice has occurred.



Complaints Filed with VFHO (Continued)

- ✦ If the Board determines reasonable cause exists, the Board must issue a “charge” and refer the charge to the Attorney General for civil action in the appropriate circuit court.
- ✦ The Board may not issue a charge after the beginning of a trial of a civil action commenced by the aggrieved party under an Act of Congress or a state law seeking relief with respect to that discriminatory housing practice.



Individually Filed Actions

An individual may commence a civil action in the appropriate United States district court or state court not later than two years after the occurrence of the termination of an alleged discriminatory housing practice.



Penalties for Noncompliance

Damages available under the Virginia Fair Housing Law include:

- ✦ Actual damages
- ✦ Punitive damages
- ✦ Injunctive relief
- ✦ Attorneys' fees and costs

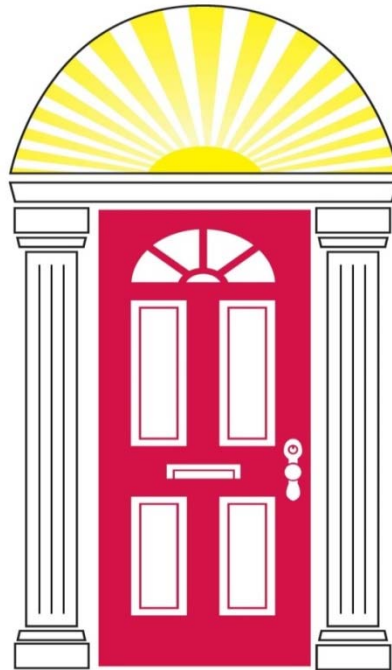
Recommendations to Ensure Compliance with the Fair Housing Laws

- ✦ Adopt a fair housing policy for your community
- ✦ Review the association governing documents and rules and regulations to confirm they do not effectively discriminate against a protected class of people

Recommendations to Ensure Compliance with the Fair Housing Laws (Continued)

- ✦ Confirm with the association's insurance carrier that the association has adequate directors and officers insurance in place to cover violations of the fair housing laws
- ✦ Respond promptly to fair housing-related unit owner requests and inquiries

B R E A K F A S T B R I E F S



Fair Housing Works for You! Why Community Association Leaders and Managers Need to Understand Fair Housing Laws

The program is approved by the Community Association Managers International Certification Board (CAMIC) to fulfill continuing education requirements for the Certified Manager of Community Associations® (CMCA) certification.

This program is approved by the Common Interest Community Board for 2.0 credit hours as a Virginia Fair Housing Common Interest Community Management Training Program.



M E R C E R T R I G I A N I



BREAKFAST BRIEFS