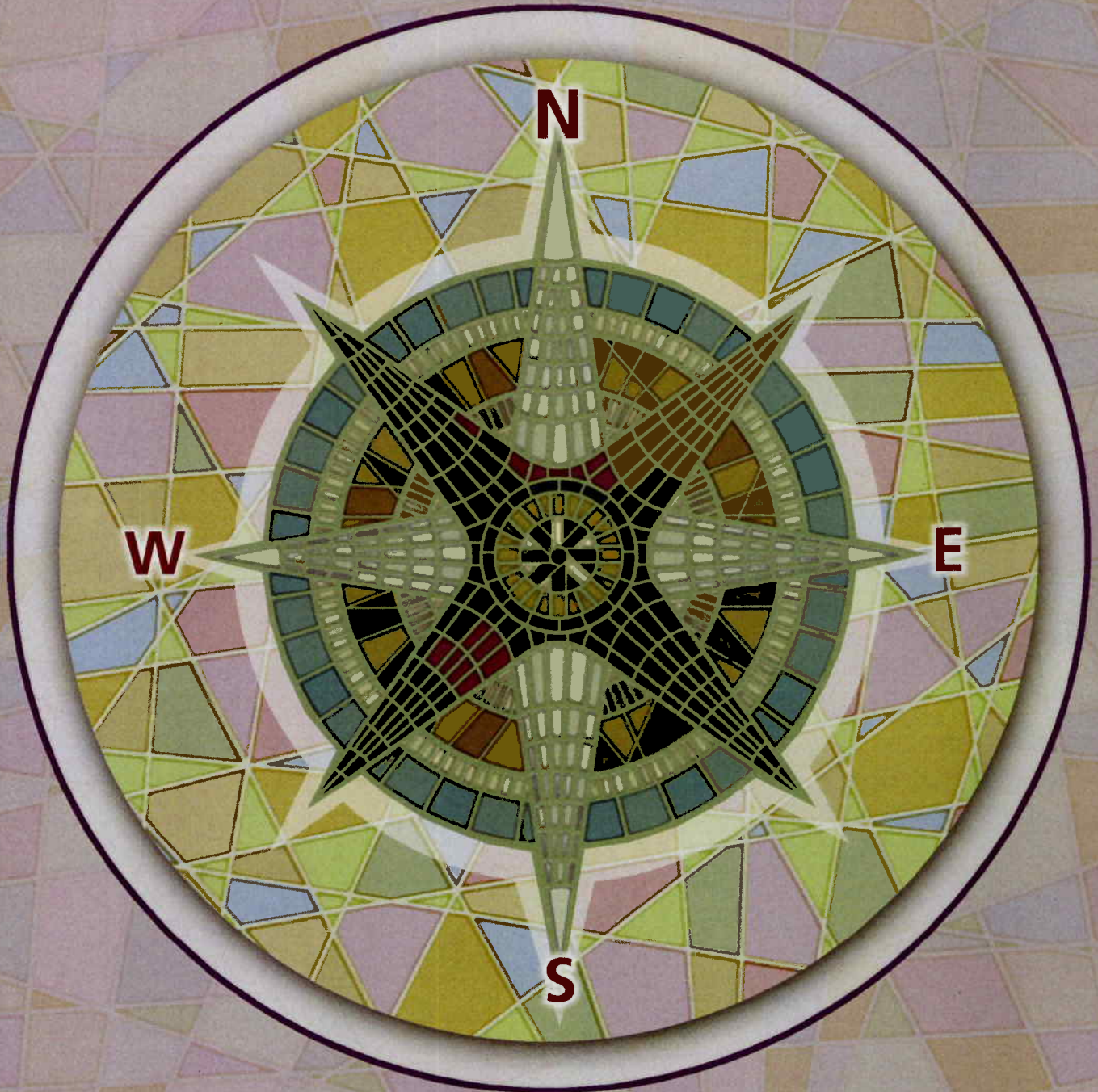


FAIR HOUSING COMPLIANCE GUIDE

Charting The Way

Fourth Edition



American
Seniors
Housing
Association



HansonBridgett

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FOURTH EDITION

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COMPLIANCE

ABOUT THE AUTHOR

Paul Gordon is a partner in the 150-attorney San Francisco law firm of Hanson, Bridgett, Marcus, Vlahos & Rudy. He is the author of the book *Seniors Housing and Care Facilities: Development, Business and Operations* (Urban Land Institute 1998). He is a member of the Executive Board and General Counsel to the American Seniors Housing Association and is former Chair of the Legal Committee of the American Association of Homes and Services for the Aging. Mr. Gordon's entire law practice is devoted to representation of seniors housing and long-term care operators, developers, investors and related organizations. For more information, visit the www.SeniorCareLaw.com website.

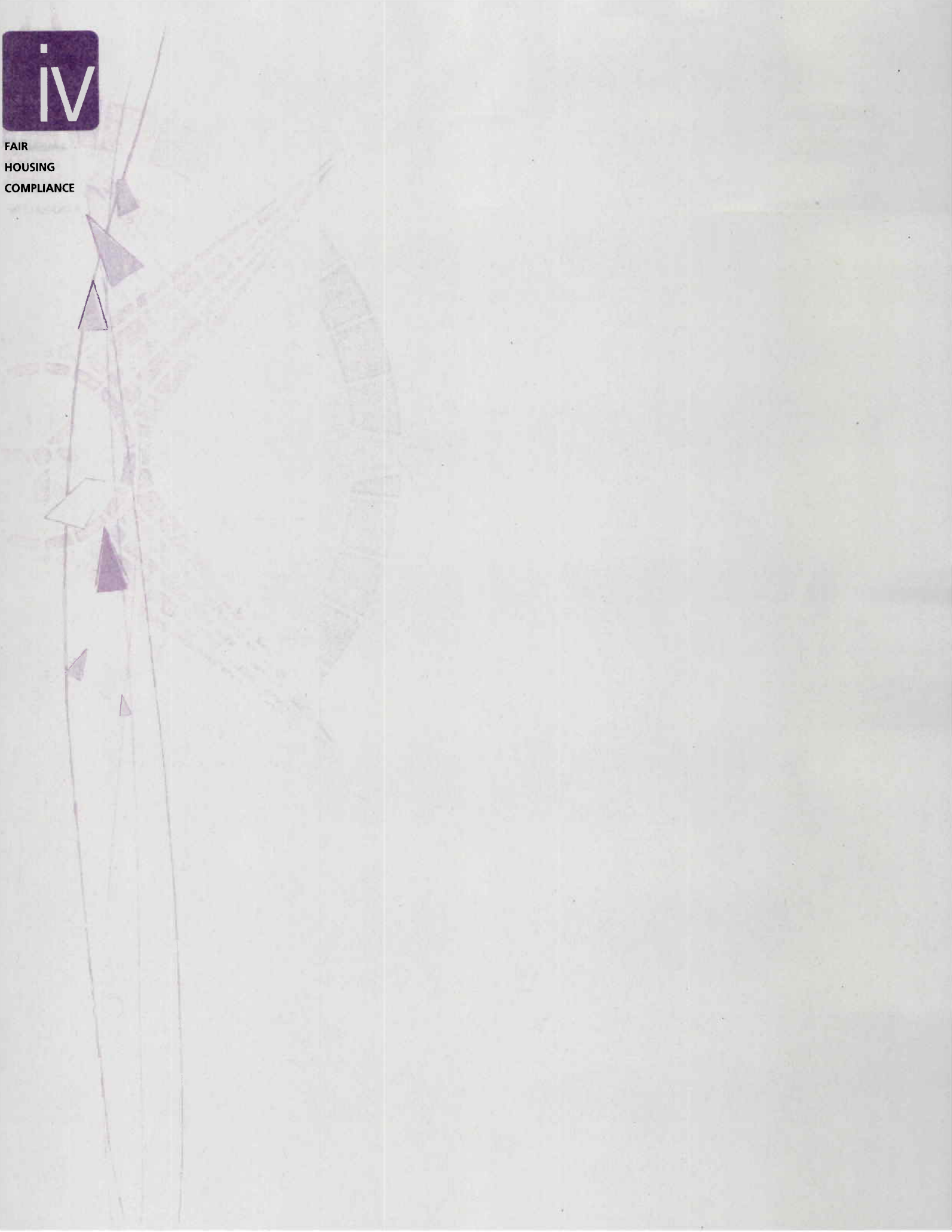


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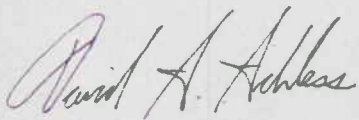
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INTRODUCTION

As a leading voice for the nation's professional owners and managers of seniors housing, the American Seniors Housing Association (ASHA) is pleased to present this updated and expanded edition of the *Fair Housing Compliance Guide*. This publication is part of a long-standing communications effort by ASHA to update members with timely information about evolving issues regarding fair housing compliance.

I am confident you will find this publication an invaluable and practical resource to enhancing operational compliance. We are especially fortunate to have Paul Gordon's expertise in this area, and his thoughtful, comprehensive analysis of the issues and practical approaches to fair housing.



David S. Schless
President
American Seniors Housing Association

EXECUTIVE SUMMARY

The seniors housing industry has come under increasing scrutiny in recent times regarding its fair housing practices. Since the last edition of this manual was published, fair housing advocates nationwide have stepped up the level of litigation directly targeting seniors housing properties. The U.S. Department of Justice also continues to file suit against seniors housing owners and managers regarding policies affecting residents and prospective residents who are disabled. Courts struggle with the subtle dividing lines between discrimination and legitimate safety and quality-of-care concerns. Race, religion, marital status, sexual orientation and age are also key areas in which there may be liability for the unwary operator.

Seniors housing owners and managers need to carefully review their advertising, policies and practices regarding new resident intake and contract termination, resident contracts and handbooks, and factors that might restrict a resident's access to facilities and services, and determine that they comply with federal and state fair housing laws. It is important to involve legal counsel in such a process, as the issues can be subtle and complex.

Each organization should also have a process for accepting and responding to requests for "reasonable accommodation." Training for key employees is also important, as they can unwittingly increase liability through their words and actions.

Fair housing is a contentious and rapidly evolving area. Executives should familiarize themselves with the basic issues and take action that results in a comprehensive and thorough risk management audit for their organizations on this subject.

USE OF THIS GUIDE

This Guide is designed to identify fair housing issues and approaches for seniors housing properties, including senior apartments, independent living,¹ assisted living and continuing care retirement communities. Subjects include federal statutory, regulatory, and case law dealing with discrimination on the basis of age, health care status/disability, religion, income and race.² Typical operational situations for retirement communities, such as advertising, screening and acceptance of residents, access of occupants to facilities and services at the community, and relocation of residents are identified and discussed.

This is a constantly expanding subject with sweeping laws that contain few details outlining the boundaries of appropriate conduct. The guidance presented in this handbook is based upon the statutory language and major case holdings and is not intended to constitute legal advice. Often, the issues are so subtle, and the guidance of the courts and enforcement agencies so complex, fact-specific, or even contradictory, that it is difficult to articulate a course of action that is clearly right under a given set of circumstances. Retirement communities should consult legal counsel in determining how best to minimize the risk of a discrimination claim, and to respond to any actual claim.

¹ Independent living properties, unlike senior apartments, usually offer hospitality services, which may include dining, housekeeping, transportation and recreational programs. Misapplication of the term "independent living" can raise disability discrimination issues (see *Section VII.B.*).

² The Guide does not attempt to discuss in detail the architectural standards for handicap accessibility, zoning and planning issues, or state or local anti-discrimination laws. The issues and regulations particular to the development and operation of skilled nursing facilities and detailed discussion of U.S. Department of Housing and Urban Development (HUD) tenant selection standards are beyond the scope of this Guide.

FEDERAL ANTIDISCRIMINATION STATUSES

I. THE FAIR HOUSING ACT

A. The 1968 Act

The Fair Housing Act, enacted as Title VIII of the Civil Rights Act of 1968, prohibits discrimination in the sale or rental of dwellings on the basis of race, color, sex, religion or national origin. This law applies to all housing in the United States and is enforced by the U.S. Department of Housing and Urban Development (HUD), whether or not the housing has been financed with federal funds or supported by loan guarantees.³

Discrimination on a prohibited basis in the financing of housing, provision of brokerage and appraisal services, or in the creation, printing or publication of any notice, statement or advertisement is also unlawful. Most of the disputes involving allegations of race or religious discrimination in the seniors housing setting have focused on advertising and marketing practices. *See Section VI.*

B. The Fair Housing Amendments Act of 1988

In 1988, Congress adopted the Fair Housing Amendments Act to add "familial status" and "handicap"⁴ to the list of prohibited grounds for discrimination.

1. Familial Status

The familial status provisions were designed to prevent discrimination by housing providers against families with children. However, the law exempts "housing for older persons" from the prohibition.

³ State fair housing laws may supplement federal requirements and should always be consulted. While federal law is controlling in the event of a conflict, state anti-discrimination laws that are stricter than federal requirements must be observed.

⁴ Although the Act uses the terms "handicap" and "handicapped," the more widely-accepted terms today are "disability" and "disabled."

The following kinds of housing qualify as housing for older persons:

- (a) housing provided under any state or federal program determined by HUD to be specifically designed and operated to assist elderly persons [such as housing established under the Section 202 program], or
- (b) housing intended for, and solely occupied by, persons 62 years of age or older, or
- (c) housing intended and operated for occupancy by at least one person 55 years of age or older per unit.

In determining whether housing is intended and operated for occupancy by at least one person 55 years of age or older per unit under subpart (c) above, (1) the Secretary of HUD must find that at least 80% of the occupied units contain at least one person age 55 or older, (2) the owner must publish and adhere to policies and procedures demonstrating such an intent, although the procedures need not be set forth in writing, and (3) the owner must comply with HUD rules for verification of age.⁵

A new community, or one converting from non-seniors housing, may qualify by asserting the exemption and reserving all unoccupied units for residency by at least one person age 55 or older, until at least 80 percent of the units are occupied by such a person. Previously, properties seeking to qualify under subpart (c) were also required to show that they provided "significant facilities and services" specifically designed to meet the physical or social needs of older persons, or that such facilities and services were not practicable. However, the significant facilities and services rule was repealed by Congress on December 28, 1995.⁶

2. Disabilities

(a) Definition

Disabilities protected by the Fair Housing Act are very broadly defined to include any physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment, or being regarded as having such an impairment. Debilitating conditions such as heart disease, arthritis, blindness, Alzheimer's disease and nonambulatory status are examples of covered disabilities. In addition, clinically recognized mental and addictive conditions such as depression and alcoholism are within the definition. Current use of illegal drugs is

⁵ The HUD Occupancy Handbook (Appendix 3) references a valid passport, birth or baptismal certificate, social security printout and certain other documents, but not a driver's license, as proof of age.

⁶ Pub. L. 104-76.

expressly excluded from coverage,⁷ but a “recovering” user most likely will be protected. Conditions, such as HIV status, that may not currently be incapacitating, are covered if they limit or are perceived to limit major life activities. Longstanding ailments with periodic debilitating flare-ups, such as migraine headaches, are likely to be covered, while transitory illnesses, such as the flu, are not.⁸ Federal courts applying discrimination laws to seniors housing and care facilities have tended to find that most or all of the residents are disabled for purposes of being protected by the laws.⁹

(b) Application in General

Fair Housing Amendments Act applies to all residential buildings with four or more dwelling units, but not to transient occupancies, such as hotels. HUD has clarified that the Act applies to CCRCs even though they include health care and other services along with the housing component.

The Fair Housing Amendments Act’s disability discrimination provisions are based in large part upon Section 504 of the Rehabilitation Act of 1973, which covered only programs receiving federal funds. For seniors housing purposes, Section 504 has been eclipsed by the Fair Housing Act and the Americans with Disabilities Act, but the case law interpreting Section 504 is useful in interpreting the newer disability discrimination laws.¹⁰

Most of the disability discrimination issues affecting seniors housing under the Fair Housing Act have related to the occupancy criteria or policies governing residents’ access to facilities and services offered by the community. See *Sections VII and VIII*.

(c) Access to Facilities and Services; Reasonable Accommodation

Under the Fair Housing Act, discrimination on the basis of disability is defined to include:

- (1) a refusal to permit reasonable modifications of existing premises paid for by the disabled person, if the modifications are necessary to afford the person full enjoyment of the premises, except that in a rental unit, the property owner/manager may condition permission for a modification on the renter’s agreement to restore the premises to its original condition except for reasonable wear and tear;

⁷ A federal Court of Appeals held that property owners do not have a duty to reasonably accommodate a resident’s medical marijuana use, *Assenberg v. Anacortes Housing Auth.*, 268 Fed. Appx. 643 (9th Cir. Wash. 2008) cert. den. 129 S. Ct. 104, 172 L. Ed. 2d 84 (2008).

⁸ But see ADA Amendments Act of 2008, discussed in Section II, below.

⁹ See cases cited in footnotes 28 and 29 below.

¹⁰ For example, courts often rely on the Rehabilitation Act to explore what accommodations are reasonable for qualified handicapped individuals. (State ex. rel. Henderson v. Des Moines Municipal Housing Agency, 2007 Iowa App. LEXIS 1328 (Iowa Ct. App. Dec. 28, 2007).

- (2) a refusal to make "reasonable accommodations" in rules, policies, practices, or services, when such accommodations are necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling; and
- (3) for multifamily dwellings designed and constructed for first occupancy after March 13, 1991, failure to provide certain design features that enhance accessibility for the disabled.¹¹

(d) Prohibited Inquiries

Regulations under the Fair Housing Act's disability discrimination provisions state that it is unlawful to make an inquiry to determine whether an applicant for occupancy or any person associated with the applicant has a disability, or to inquire as to the nature or severity of a disability. An exception is made for inquiries into the "applicant's ability to meet the requirements of ownership or tenancy," so long as such inquiries are made of all applicants equally, whether or not they are disabled. A further exception is made for inquiries "to determine whether an applicant is qualified for a dwelling available only... to persons with a particular type of handicap."

C. Religious/Private Club Exemptions

General exemptions from the Fair Housing Act are available to certain religious organizations and private clubs. However, the religious and private club exceptions have been narrowly construed by the federal courts.¹²

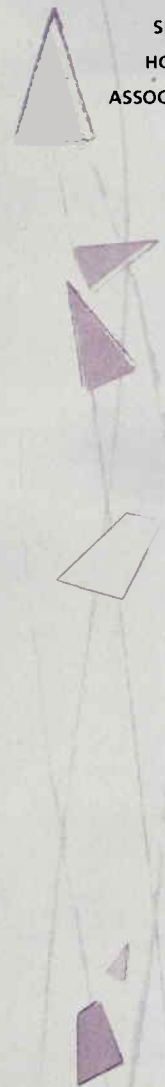
Dwellings owned or operated by a religious organization or by a non-profit organization that is operated, supervised, or controlled by or in conjunction with a religious organization, may be exempt from the Fair Housing Act if the housing is operated for a *non-commercial purpose*. In such cases, the organization may limit the sale, rental, or occupancy of housing to persons of the particular religion so long as membership in the religion is not itself restricted because of race, color, sex or national origin. While a convent or home for retired missionaries probably qualifies as a dwelling owned or operated by a religious organization for a non-commercial purpose, religiously-affiliated retirement communities that do not maintain a significant religious atmosphere may be subject to classification as commercial enterprises and therefore not be exempt.

¹¹ This Guide does not address in detail the architectural or construction standards required under the Fair Housing Act or the Americans with Disabilities Act.

¹² See, e.g. *United States v. Columbus Country Club*, 915 F. 2d 877 (3rd Cir. 1990); but compare to *McKeon v. Mercy Healthcare Sacramento*, 19 Cal. 4th 321 (1998) (finding that a religiously affiliated hospital is exempt from the California Fair Employment and Housing Act).



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Similarly, a private club that is not open to the public and provides lodging that the club owns or operates for non-commercial purposes, may limit rental or occupancy to its members or give a preference to members "as an incident to its primary purpose or purposes." Note that lodging implies a short-term occupancy, like a hotel, rather than long-term residence of the kind offered by most retirement communities.

D. Enforcement of the Fair Housing Act

People who believe that they have been discriminated against may file a complaint with the regional office of HUD or a state fair housing agency, or may initiate a lawsuit in federal court. State fair housing agencies may also refer complaints to federal authorities. If an administrative complaint is filed, HUD will conduct an investigation and attempt to reach an agreement with the parties. HUD may also bring discrimination charges before an administrative law judge. Either the complainant or respondent may elect to have any HUD claim of discrimination resolved in federal court.

Administrative law judges may award compensatory damages, plus civil penalties of up to \$11,000 for a first offense, up to \$27,500 for a second offense within a five-year period, and up to \$55,000 for a third offense in a seven-year period. Plaintiffs may recover compensatory and punitive damages in a civil lawsuit. Attorneys fees are also recoverable by the prevailing party in either the administrative or the federal court forum. The Equal Access to Justice Act¹³ permits a prevailing defendant to recover attorneys' fees and costs against the United States where the government's position was not "substantially justified."

II. THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA), enacted in 1990, prohibits discrimination on the basis of physical or mental disability in "public accommodations operated by private entities."¹⁴ A public accommodation includes an inn, hotel, motel, or other place of *lodging* (which denotes a shorter duration of occupancy than does "residence"). A senior citizen center or other social service center, and other service establishments, such as professional offices of a health care provider or hospital, are also considered public accommodations. Long-term care facilities and nursing homes are expressly covered by ADA regulatory guidelines.

For properties that are *purely* residential in character, such as senior apartments with no services, the Fair Housing Act's disability discrimination provisions, rather than the ADA, will apply. See *Section I*. Where a retirement community has elements that include both residential dwellings and service facilities or other areas that may be considered

¹³ 28 U.S.C. §2412.

¹⁴ The ADA also covers discrimination in employment, telecommunications, and public services.

public accommodations, such as independent living (with services), assisted living or CCRCs, a hybrid analysis under both the Fair Housing Act and the Americans with Disabilities Act should be applied.

The architectural standards required by the Fair Housing Act and the Americans with Disabilities Act are quite different. The ADA imposes an affirmative obligation to take reasonable steps to retrofit covered properties regardless of the year of construction, requires new construction to be "readily accessible" and imposes detailed accessibility standards including specific dimensions of interior design features. These standards have been enforced against seniors housing properties.¹⁵ The architectural standards are very complex and beyond the scope of this handbook.

The anti-discrimination provisions of the ADA that affect the operations of seniors properties are similar to those of the Fair Housing Act. Under the ADA, prohibited discrimination includes:

1. denying participation to a disabled person, affording unequal benefits, or setting up different or separate benefits for disabled people unless it is "necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others."
2. failure to provide services, facilities, etc., in the *most integrated* setting appropriate to the needs of the individual, and even if there are separate or different programs for the disabled, denying a disabled person "the opportunity to participate in such programs or activities that are not separate or different."
3. imposition or application of eligibility criteria that tend to screen out disabled people unless such criteria can be shown to be necessary for provision of the services or other amenities being offered.
4. failure to make reasonable modifications in policies, practices or procedures when such modifications are necessary to afford services and privileges to disabled people, unless the entity can demonstrate that making such modifications "would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages or accommodations."

The Americans with Disabilities Act permits discrimination where the physical or mental disability results in the person posing a "direct threat" to others. This concept has been narrowly construed in regulations and by the courts. See *Section VII.D*.

Another exception to the ADA permits distinctions based on health status and financial underwriting considerations, such as the risk calculations used by health insurers in determining eligibility for medical insurance coverage.

¹⁵ See, e.g., *U.S. v. Lytton IV Housing Corp., et al.*, (Consent Decree; N.D. Calif. 2003). U.S. Department of Justice disability complaints, settlements and consent decrees can be found at <http://www.usdoj.gov/crt/casebrief.php>.

Private clubs and religious organizations are exempted from coverage of the Act on a basis similar to that described above with respect to the Fair Housing Act.

Violations of the Americans with Disabilities Act are investigated and prosecuted by the U.S. Department of Justice. Remedies include injunctive relief, monetary damages, and civil penalties of up to \$50,000 for a first violation and up to \$100,000 for a subsequent violation.

In 2008, Congress passed the ADA Amendments Act¹⁶ which rejects several Supreme Court cases that strictly interpreted the definition of a disability covered by the Act. The Amendments expand the scope of the major life activities and bodily functions that, if impaired, will be covered by the law.¹⁷ The law also states that mitigating measures, such as medication and assistive services or devices, other than eyeglasses and contact lenses, shall not be considered in assessing whether a disability is present. An impairment that is episodic or in remission will be covered, but impairments that are transitory (up to 6 months) and minor, are not included. The Act further specifies that a reasonable accommodation need not be made to a person who is only "regarded" as being disabled.

III. THE AGE DISCRIMINATION ACT OF 1975

The Age Discrimination Act of 1975 provides that no person shall, on the basis of age, be excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving federal financial assistance. Federal financial assistance may be in the form of funds or the services of federal personnel. For example, projects involving direct loans or mortgage insurance processed through HUD must comply with the Act, and so must facilities constructed solely with private funds but that receive Medicare or Medicaid reimbursement.

There are four exceptions to the Act:

1. The Act does not apply to age distinctions established under the authority of any law that provides benefits or establishes criteria for participation on the basis of age or in age-related terms (for example, the Medicare program, where benefits begin at a certain age). State licensure laws that govern the provision of care to people over a particular age may also fit into this exception.
2. A second exception is for policies that reasonably take into account age as a factor necessary to the "normal operation," or the achievement of any "statutory objective," of the program or activity. To meet this exemption: (a) age must be used as a measure or approx-

¹⁶ P.L. 110-324.

¹⁷ Major life activities now include, for example, caring for oneself, sleeping, reading, bending, and communicating. Major bodily functions now include, for example, immune system, bowel, bladder, cell growth, hemological, brain, respiratory, circulatory, endocrine and reproductive functioning.

