SENIORS HOUSING GUIDE
to Fair Housing and ADA Compliance

SIXTH EDITION | BY PAUL GORDON, ESQ.

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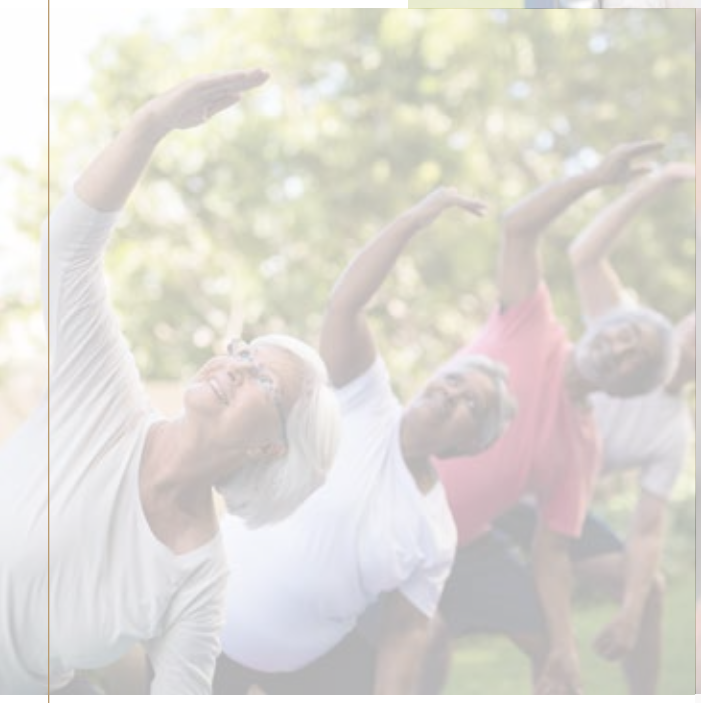

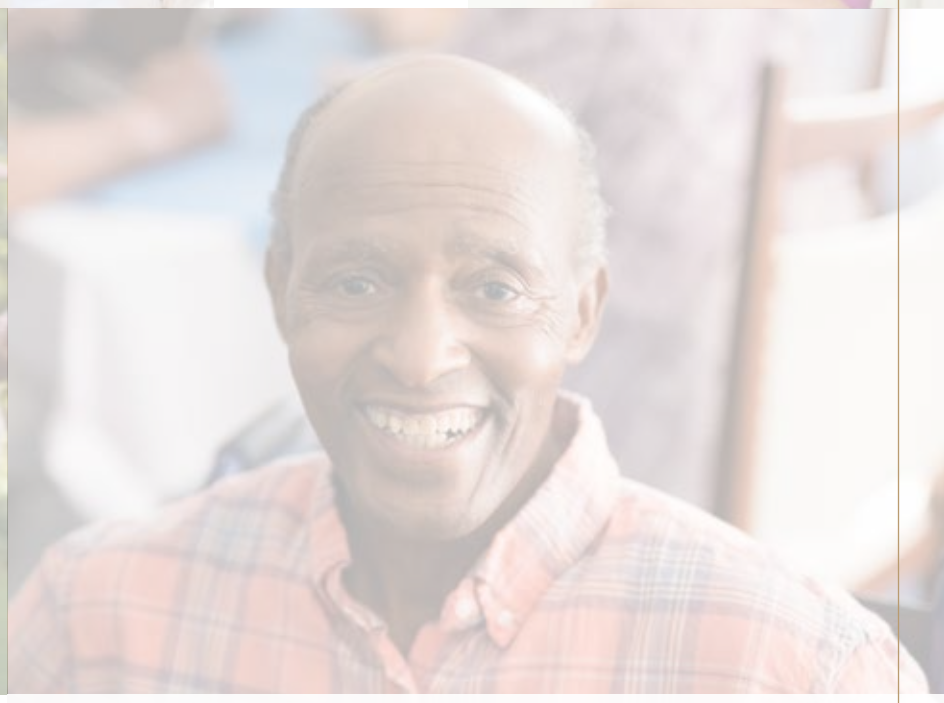

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table of contents

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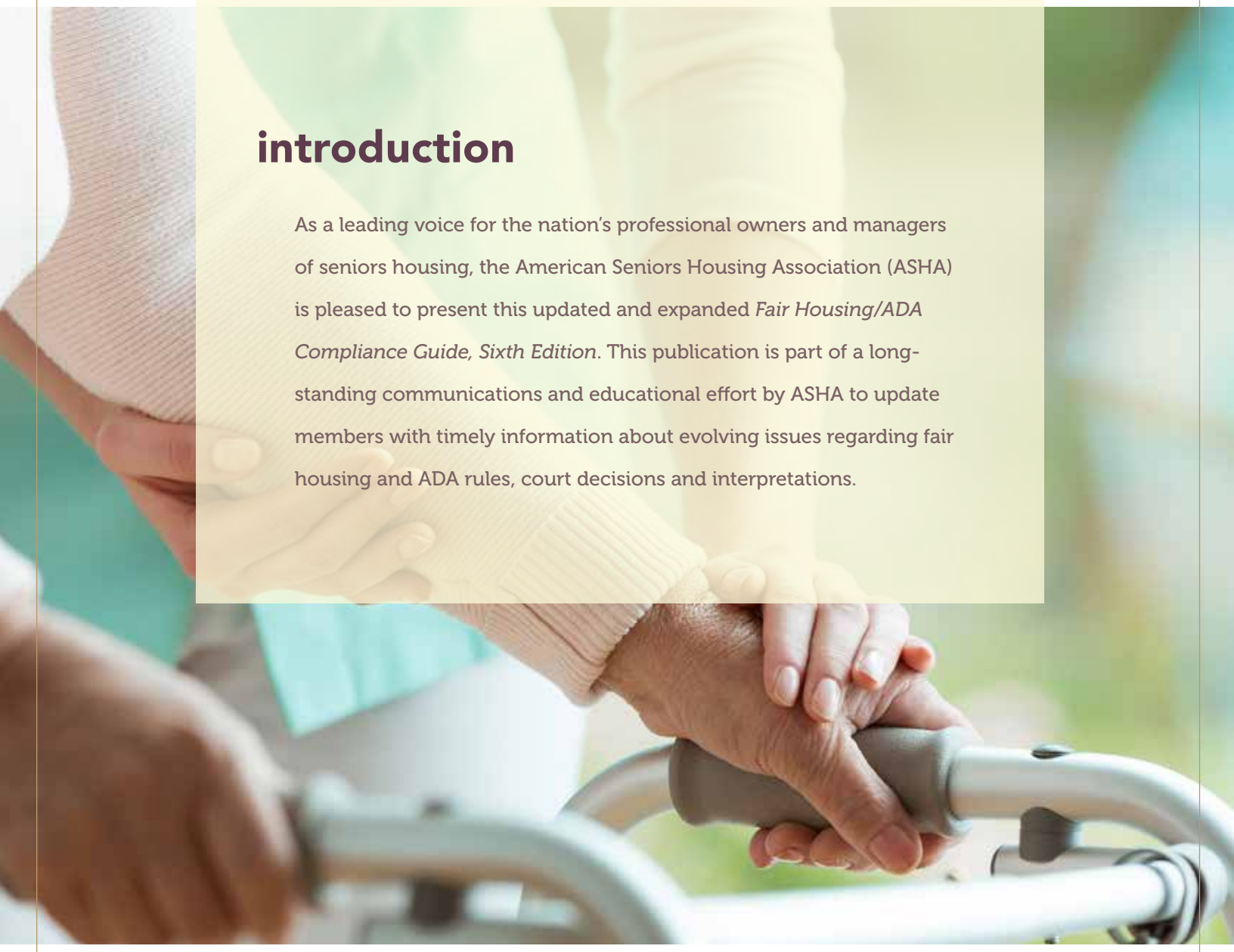
Paul Gordon is a partner in the 189-attorney San Francisco law firm of Hanson Bridgett LLP. He is the author of the book *Seniors Housing and Care Facilities: Development, Business and Operations*, 3d edition (Urban Land Institute 1998). He is a member of the Executive Board and General Counsel to the American Seniors Housing Association and is former Chair of the Legal Committee of LeadingAge. 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.HansonBridgett.com website.



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 *Fair Housing/ADA Compliance Guide, Sixth Edition*. This publication is part of a long-standing communications and educational effort by ASHA to update members with timely information about evolving issues regarding fair housing and ADA rules, court decisions and interpretations.

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 making the subject matter relevant to your day to day operations.

David S. Schless
President
American Seniors Housing Association

executive summary

The seniors housing industry continues to face scrutiny and challenges regarding its fair housing practices. Since the 5th Edition of this Guide was published:

- lawsuits have challenged senior living communities' policies regarding the availability of American Sign Language interpreters,
- demands have been made to make senior living websites more accessible to vision-impaired users,
- programs that sort market data according to protected categories, such as race and sex have been successfully challenged;
- there have been significant developments in the area of sexual orientation discrimination,
- federal government publications on assistance animals have been updated, and
- the COVID pandemic has raised discrimination questions about the treatment of residents and staff at risk of contracting or spreading the virus.

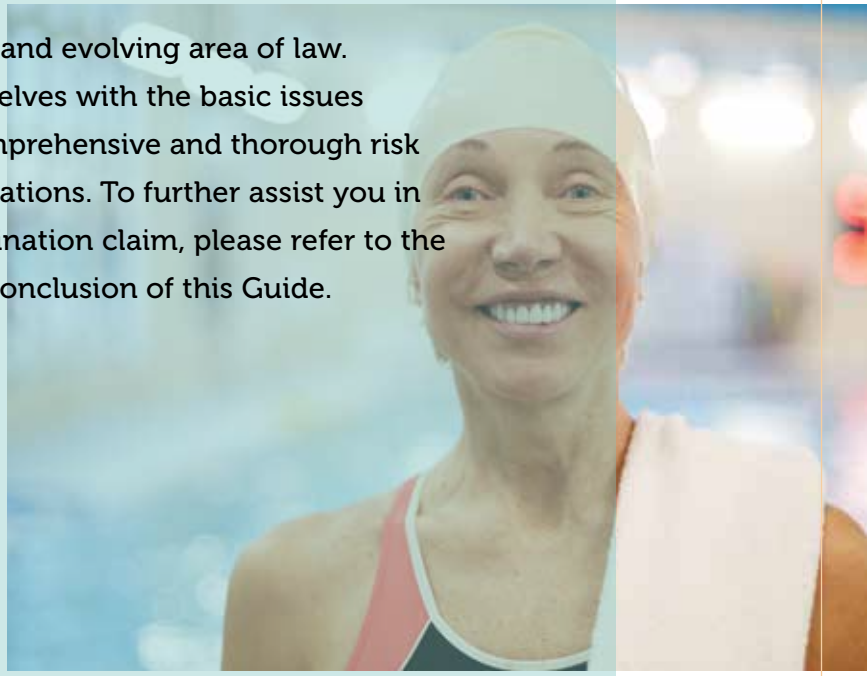
The Department of Justice continues to pursue discrimination allegations against senior living communities that seek to restrict the use of motorized scooters or impose mobility criteria as a condition of occupancy, with settlement funds and fines ranging in excess of $300,000. And the private sector has responded to abuses of the rights of legitimately disabled persons --airlines have become less accommodating of emotional support animals on airplanes, and states have made it a crime to falsely represent an emotional support animal to be a trained service animal.

At the same time, courts struggle with the subtle dividing lines between discrimination and legitimate safety policies and practices and quality-of-care concerns. In addition to disability, race, religion, marital status, sexual orientation and age are key areas in which there may be liability.

Seniors housing owners and operators would be well-advised 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 consult with legal counsel in such a process, as the issues can be subtle and complex.

Every organization also should have a process for accepting and responding to requests for "reasonable accommodation or modification." Training for key employees, particularly marketing staff and operations managers, is also important, as uninformed front line employees can unwittingly increase liability through their words and actions. Moreover, staff who have initial contact with prospective residents frequently are the targets of "testers," who may claim to have a [fictional] relative with a disability, solely to determine if the targeted business has any discriminatory policies regarding the availability of facilities or services.

Fair housing remains a contentious and evolving area of law. Executives should familiarize themselves with the basic issues and take action that results in a comprehensive and thorough risk management audit for their organizations. To further assist you in protecting against risk for a discrimination claim, please refer to the recommendations provided at the conclusion of this Guide.



use of this guide

This Guide is designed to identify fair housing issues and approaches to compliance for seniors housing properties, including senior apartments, independent living,[1] assisted living and continuing care or "life plan" communities. Subjects covered include federal statutory, regulatory, and case law dealing with discrimination on the basis of age, health care status/disability, religion, national origin, sexual orientation, income and race.[2] Typical operational situations for seniors housing 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.

In addition, this version updates issues regarding reasonable accommodations for support animals, guidance on website accessibility compliance, provision of sign language interpreters, and recommendations for successfully navigating COVID-19.

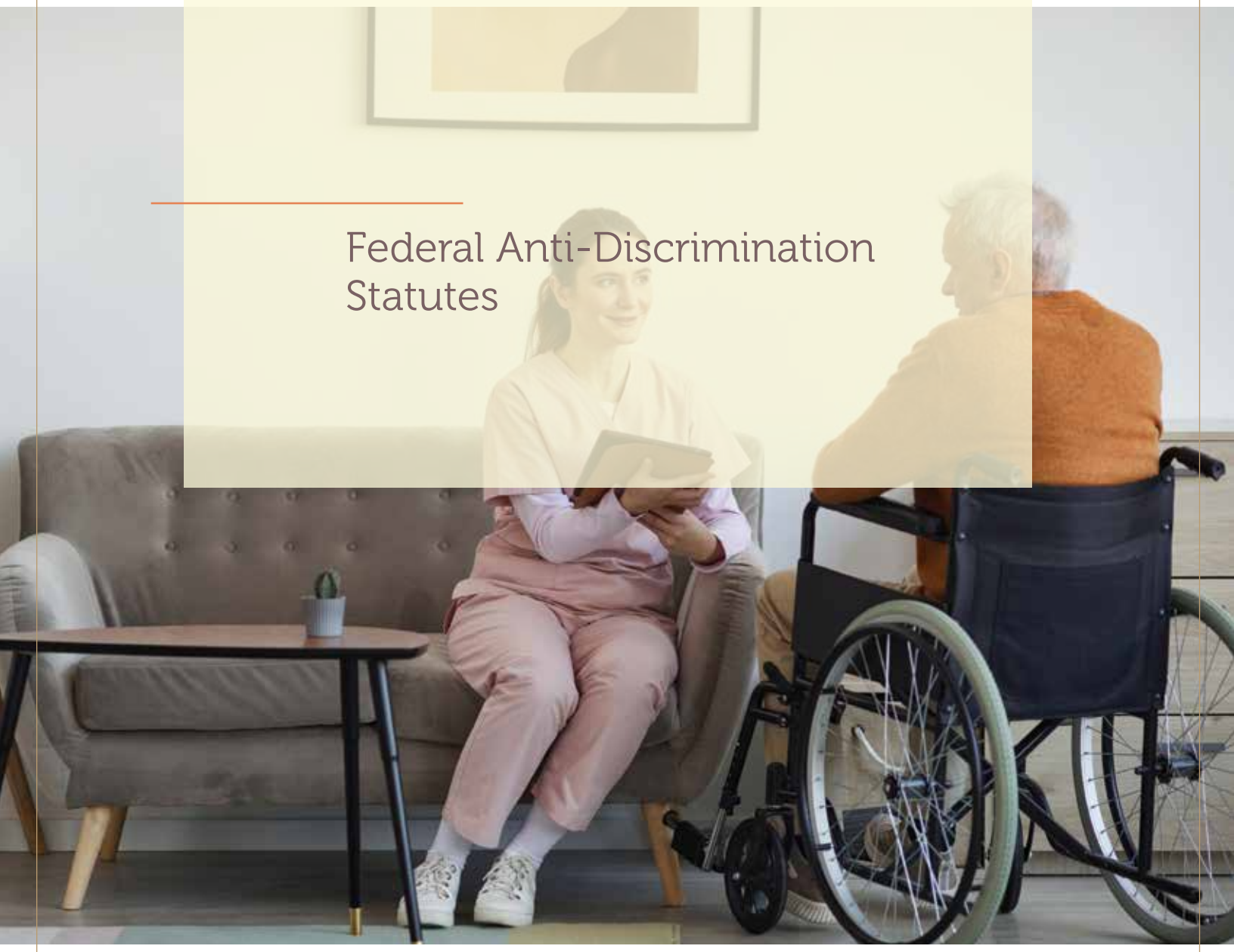
This is a constantly expanding subject with sweeping laws that contain few details outlining the boundaries of appropriate conduct. This compliance guide is based upon the statutory language and major case holdings and is not intended to constitute legal advice. Often, the issues are so subtle, and the 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.

Seniors housing owners and operators should consult legal counsel in determining how best to minimize the risk of a discrimination claim, and to respond to any actual complaint.

[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 askilled 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 Anti-Discrimination Statutes



1. The Fair Housing Act

A. The 1968 Act

The Fair Housing Act, enacted as Title VIII of the Civil Rights Act of 1968[3], 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 HUD, whether or not the housing has been financed with federal funds or supported by loan guarantees[4].

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"[5] to the list of prohibited grounds for discrimination[6].

1. Familial Status

The familial status provisions were designed to prevent discrimination by housing providers against families with children.[7] However, the law exempts "housing for older persons" from the prohibition. 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 designed and operated specifically 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.[8]

In determining whether housing is intended and operated for occupancy by at least one person 55 years of age or older per unit

[3] 24 USC §2000d.
[4] State fair housing laws may supplement federal requirements and always should 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.
[5] Although the Act uses the terms "handicap" and "handicapped," the more widely-accepted terms today are "disability" and "disabled."
[6] 42 U.S.C. §§3604 et seq.
[7] Recent examples of enforcement in this area include *United States v. Dominic Properties, LLC,* (D. Minn. 2017https://www.justice.gov/crt/housing-and-civil-enforcement-cases?search_api_views_fulltext=dominic+&items_per_page=10 (requiring defendants to pay $15,000 to the plaintiffs for violating the FHA. Defendants enacted and enforced overly restrictive rules limiting children's presence in the hallways and common areas. HUD conducted an investigation, and issued a charge of discrimination, which the defendants settled); *United States v. Carmer (D. Or. 2020)* https://www.justice.gov/crt/case/united-states-v-carmer-d-or (plaintiffs alleged that single-family home owner violated the FHA on the basis of familial status. The settlement agreement required defendant to obtain FHA training and notify the public of her non-discrimination policy.)
[8] 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. Pub. L. 104-76. The co-existence of 62-year and 55-year age thresholds does not make much sense without an understanding of the 1995 change in the legislative history. In addition, it raises the question of whether an age limitation that is above these minimums (such as all occupants required to be 65 and older) is acceptable, and it appears that such policies have not been challenged by the federal agencies as discriminatory.

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.[9]

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.

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 expressly excluded from coverage,[10] 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.[11] Having the COVID-19 virus might be considered a temporary condition, like the flu, that is not a disability. However, it also may have longer term effects ("long COVID") which can be considered a disability.[12] 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.[13]

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.

(b) Application in General

The 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

[9] HUD now allows age verification via a "birth certificate, drivers license, passport, immigration card, military identification, or any other state, local, national or international documentation, provided it contains current information about the age or birth of the possessor." https://www.hud.gov/sites/documents/DOC_7769.PDF

[10] 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).

[11] But see ADA Amendments Act of 2008, discussed in Section II, below.

[12] See Section VIII.G below for a more detailed discussion of COVID-19.

[13] See cases cited in Note 61 below.

to life plan or continuing care retirement communities (CCRCs) even though they include health care and other services along with the housing component. See Section VII.C.2.

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 all practical 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.[14]

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;
(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.[15]

(d) Prohibited Inquiries / Requirements of Tenancy

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

[14] 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).

[15] This Guide does not address in detail the architectural or construction standards required under the Fair Housing Act or the Americans with Disabilities Act. But see Section II.C. for a general discussion of architectural standards.

equally, whether or not they are disabled. *See Section VII.A.* 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.[16]

...the religious and private club exceptions have been narrowly construed by the federal courts.

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.

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."[17] 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.

As of 2021, administrative law judges may award compensatory damages, plus civil penalties of up to $21,663 for a first offense, up to $54,157 for a second ,

[16] See, e.g. *United States v. Columbus Country Club*, 915 F. 2d 877 (3rd Cir. 1990) (private club's rental of cottages only to Roman Catholics was unlawful because not operated "in conjunction with" the church); 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).

[17] *42 U.S.C. § 3607.*

and up to $108,315 where there are more than two prior offenses.[18] 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 Act[19] permits a prevailing defendant to recover attorneys' fees and costs against the United States where the government's position was not "substantially justified."

The DOJ also has enforcement authority over cases involving a "pattern or practice" of discrimination.

[18] *See 88 Fed. Reg 14370, March 16, 2021.*
[19] 28 U.S.C. §2412.

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."[20]

A. Covered Disabilities

In 2008, Congress passed the ADA Amendments Act[21] which rejected 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.[22] 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.

B. Businesses Subject to the Act

As defined in the ADA, a place of public accommodation is a facility whose operations affect interstate commerce. It 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 places of public accommodation. Long-term care facilities and nursing homes are expressly covered by ADA regulatory guidelines. The compliance obligations of properties that are purely residential in character, such as senior apartments with no services, will be dictated primarily by the Fair Housing Act's disability discrimination provisions, rather than the ADA.

See Section I. Where a retirement community has elements that include both residential dwellings and service facilities or other areas that may be considered public accommodations, such as independent living (with services), assisted living or CCRCs, a hybrid analysis under both the Fair Housing Act and the ADA should be applied.

C. Architectural Standards

Historically, disability discrimination laws have required that the building as a whole -- not every unit -- be designed for use by wheelchair users.

Under Section 504 of the Rehabilitation Act of 1973[23] (applicable to government subsidized dwellings) and still good law, new multi-family housing projects

[20] The ADA also covers discrimination in employment, telecommunications, and public services.
[21] P. L. 110-325.
[22] 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.
[23] 29 USC 794.

(including public housing projects) must be designed and constructed to be readily accessible to and usable by individuals with handicaps. This means that a minimum of five percent (5%) of the total dwelling units or at least one unit in a multi-family housing project, whichever is greater, shall be made accessible for persons with mobility impairments.

The more recent Fair Housing Act prescribes the following requirements in all units within the community and common areas for disabled persons' access to residential housing. The regulations reflect a distinction between readily accessible and adaptable features of the building.

> "All covered multifamily dwellings for first occupancy after March 13, 1991 with a building entrance on an accessible route shall be designed and constructed in such a manner that-- (1) The public and common use areas are readily accessible to and usable by handicapped persons; (2) All the doors designed to allow passage into and within all premises are sufficiently wide to allow passage by handicapped persons in wheelchairs; and (3) All premises within covered multifamily dwelling units contain the following features of adaptable design: (i) An accessible route into and through the covered dwelling unit; (ii) Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (iii) Reinforcements in bathroom walls to allow later installation of grab bars around the toilet, tub, shower, stall and shower seat, where such facilities are provided; and (iv) Usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space."[24]

The requirements for disabled access through "adaptable design" features in kitchens are purposely vague. There is no regulation with specific measurements or rules regarding access to sinks or appliances. Rather, HUD has published "Fair Housing Accessibility Guidelines" which, if followed, are considered a "safe harbor" that assure the building owner that the requirement has been met.

The ADA imposes an affirmative obligation to take reasonable steps to remove "barriers" to accessibility of covered properites.

The ADA imposes an affirmative obligation to take reasonable steps to remove "barriers" to accessibility of covered properties regardless of the year of construction, requires new construction and alterations to be "readily accessible," requires alterations 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,[25] and in 2020, the Department of Justice has actively pursued architectural barrier cases against housing providers in the courts.[26] The architectural standards are very complex and beyond the scope of this guide.

[24] 24 CFR 100.205(c) (emphasis added).

[25] 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.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#disabil.

[26] *United States v. Miller- Valentine Operations* (S.D. Ohio 2020) https://www.justice.gov/crt/case/united-states-v-miller-valentine-operations-sd-ohio (United States filed a consent order in response to allegations that Ohio-based Miller operations failed to design multifamily housing in accordance with the FHA. The properties lacked accessible routes to covered units, pedestrian routes, routes into and through dwelling units, and adaptive designs for bathrooms and kitchens. The Order required an injunction, FHA training, and a settlement fund of $400,000); *The Ability Center of Greater Toledo v. Moline Builders, Inc.* (N.D. Ohio 2020) https://www.justice.gov/crt/case/ability-center-greater-toledo-v-moline-builders-inc-nd-ohio (arguing that the FHA only has an obligation to "provide accessible route into the unit." However, the United States filed a Statement of Interest arguing that front doors and walkways are "public use and common use portions" and therefore must be accessible regardless of whether there is another accessible route into the unit.")

D. Prohibited Discrimination

The key 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 ADA excludes from coverage circumstances 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.[27]

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.

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.

Allegations of violations of the ADA are investigated and prosecuted by the U.S. Department of Justice. Remedies include injunctive relief, monetary damages, and civil penalties of up to $75,000 for a first violation and up to $150,000 for a subsequent violation.[28]

[27] See discussion in Section VIII. A. and C.
[28] 28 C.F.R. §36.504

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 approximation of one or more other characteristics; (b) the other characteristics must need to be measured or approximated in order for normal operation of the program to continue or to achieve its statutory objective; (c) the other characteristics must be capable of being reasonably measured or approximated by the use of age; and (d) the other characteristics must be impractical to measure directly on an individual basis. For example, while age may not be a good measure of a person's ability to live independently (according to HUD), it probably is a good indicator of actuarial life expectancy. Thus, if life expectancy is a characteristic that must be approximated in order for a program to operate normally, age should be an acceptable criterion for participation.
3. The third exemption is for reasonable distinctions based on criteria other than age, such as health status, even though such other criteria may have a disproportionate impact upon people based upon their age.
4. A final exemption is available for programs that provide "special benefits" to the elderly or children (for example, a senior citizen's discount).

...while age may not be a good measure of a person's ability to live independently (according to HUD), it probably is a good indicator of actuarial life expectancy.

IV. Income Discrimination

There is no federal statute prohibiting housing providers from assessing whether prospective residents are financially capable of paying occupancy or service charges. Generally, it is not a violation of the Fair Housing Act to require applicants for residence to meet income standards, even if such screening may have a disparate impact upon a protected class, such as a racial minority. However, a property owner may be required to waive certain fees, or financial criteria for admission, as a reasonable accommodation of a disability. See Section VII.E. Providers of federally subsidized housing must follow tenant income verification procedures, and some federally financed properties may be restricted in their ability to require a resident to purchase services (such as meals) as a condition of occupancy.

...a property owner may be required to waive certain fees, or financial criteria for admission, as a reasonable accommodation of a disability.

Providers of nursing services and other services that may be eligible for coverage under the Medicaid program must avoid conditioning admission or continued occupancy upon a requirement that the prospective resident, or someone on behalf of the resident, supplement the government benefit or enter into a "private pay agreement" guaranteeing payment at a level other than the government rate. The rules on this subject are very complicated, include federal criminal penalties and other sanctions, and are beyond the scope of this Guide.

V. Marital Status, Sexual Orientation

While discrimination on the basis of sex is prohibited, federal civil rights laws generally do not expressly prohibit discrimination on the basis of marital status or sexual orientation, and historically most successful discrimination claims have been based on state or local laws. For example, reported court cases[29] from Alaska, California, Maryland, Michigan, New Jersey, New York, North Dakota, Washington, and Wisconsin have reviewed marital status discrimination claims under state or municipal statutes or ordinances. Several have held that the parties violated marital status discrimination laws based on the particular facts of the case, and a few found no violation. Nevertheless, sometimes distinctions based on marital status were construed to be sex discrimination.[30]

Prior to 2020, the Department of Justice, Civil Rights Division, recognized that the federal Fair Housing Act does not expressly prohibit discrimination on the basis of a person's sexual orientation, but stated that it would investigate complaints on a case-by-case basis to determine whether another form of discrimination is present, such as sex discrimination. In its discussion of federal antidiscrimination laws the DOJ noted that "Although these laws do not explicitly refer to sexual orientation or gender identity, they prohibit sex discrimination, which protects all people (including LGBTI people) from gender-based discrimination, including discrimination based on a person's failure to conform to stereotypes associated with that person's real or perceived gender."[31]

Nevertheless, in one 2019 case[32] involving Friendship Village, a faith-based continuing care retirement community in Missouri, a lesbian couple filed suit in federal court after being denied occupancy under a policy of admitting only those "couples who have a marriage consisting of one man and one woman." The District Court, finding no sexual orientation protections in state or federal law, decided in favor of the defendant. In 2020, the U.S. Supreme Court decided the case of *Bostock v. Clayton County* in which a gay county employee brought a Title VII sex discrimination action against the county, alleging sexual orientation discrimination. In a landmark decision, the Court emphatically declared that sexual orientation discrimination is unlawful sex discrimination.[33]

...sexual orientation discrimination is unlawful sex discrimination.

[29] 33 ALR 4th 964
[30] See, *e.g.*, 34 ALR Fed. 648.
[31] Department of Justice Civil Rights Division, "Protecting the rights of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Individuals," (2009).
[32] *Walsh v. Friendship Village of South County* (E.D. Mo. 2019) 352 F.Supp.3d 920, vacated and remanded (8th Cir., July 2, 2020, No. 19-1395) 2020 WL 5361010.
[33] *Bostock v. Clayton County,* 140 S.Ct 1731 (2020); *Bostock v. Clayton County Board of Commissioners* (11th Cir. 2018) 894 F..3d 1335.

Shortly thereafter, the Friendship Village decision was vacated and remanded by the Court of Appeal[34] and reportedly settled on terms favorable to plaintiffs.

Following *Bostock*, the U.S. Department of Housing and Urban Development (HUD) released a memorandum stating that, "while the *Bostock* decision did not analyze the FHA, it held that 'sex' discrimination under Title VII includes discrimination based on sexual orientation and gender identity. The FHA's sex discrimination provisions are comparable to those of Title VII and likewise, prohibit discrimination based on sexual orientation and gender identity."[35]

Even with this new change, not all housing discrimination on the basis of sex or sexual orientation is unlawful. In 2012, the 9th Circuit federal Court of Appeals ruled that federal and state discrimination laws do not prohibit a roommate referral service from asking participants to designate their sex, sexual orientation and familial status and preferences. Essentially, the Court found that the laws' reach stops at the perimeter of a dwelling and does not apply to the sharing of space inside a dwelling, where constitutional rights to privacy allow residents to discriminate in ways they could not do elsewhere.[36]

Seniors housing operators can now assume that discrimination against prospective and existing residents on the basis of marital status or sexual orientation will be considered a violation of the Fair Housing Act, whether or not there is a comparable state law protection.

[34] *Walsh v. Friendship Village of South County* (E.D. Mo. 2019) 352 F.Supp.3d 920, vacated and remanded (8th Cir., July 2, 2020, No. 19-1395) 2020 WL 5361010.
[35] Laurel Brasil, HUD Announces Sexual Orientation & Gender Identity are Protected by Federal Fair Housing Act, Fair Housing Project (Feb. 9, 2021).
[36] *Fair Housing Council v. Roommate.com*, LLC, 666 F.3d 1216; (9th Cir. 2012).

Managing Seniors Housing Discrimination Issues

VI. Advertising

A. In General

Advertising and marketing activities in connection with the sale or rental of housing may raise issues regarding discrimination on the basis of race, color, national origin, religion, sex, disability, age or familial status. The use of language or imagery in newspaper, magazine or internet advertising, promotional brochures and newsletters, television and radio advertisements, telephone directory placements, signage, and even decorations in sales offices or model units, can be construed to overtly or tacitly communicate a preference or limitation that is deemed to be unlawfully discriminatory. Note that the U.S. Supreme Court has held that it is not necessary for discrimination under the Fair Housing Act to be intentional, and that a claim may be brought where the action results in a disparate impact upon the protected group.[37]

B. Language that might Connote a Preference based on Ability, Religion, Age or Other Characteristic

Use of certain terms or phrases in advertising can be considered unlawfully discriminatory if they convey, intentionally or accidentally, a preference or limitation regarding a person's occupancy of the premises or use of its facilities and services, because of a characteristic that is protected under the law. For example, according to civil rights advocates, describing a seniors housing community as being for "active" residents may imply to some readers that physically disabled applicants are unwelcome. By describing its activity program, rather than the prospective resident's abilities, a retirement community can avoid the implication that admissions may be limited based on the applicant's ability to participate. When describing an actual or anticipated resident population, it is preferable to use words that have less of a connotation of physical or mental ability, such as "involved," "engaged" or "lively." Similarly, describing a community as "Christian," "Polish," or "Asian" may connote that applicants are excluded or given a preference based upon their religion, national origin, or race.[38] *See Section VII.B.* regarding use of the words "independent living."

Communities with an ethnic atmosphere (e.g., a distinctly ethnic style of dining, decor or social activities) should be very cautious about their advertising and never limit admissions based on the applicant's race or national origin. One approach is to disclose the cultural or affinity group orientation of the community (e.g., LGBTQ, Danish, Jewish) but emphasize that all applicants are welcome.

[37] *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 192 L. Ed. 2d 514; 2015 U.S. Lexis 4249 (2015).

[38] See *United States v. J & R Associates* (D. Mass. 2017) https://www.justice.gov/crt/housing-and-civil-enforcement-cases?search_api_views_fulltext=J+%26+R+associates&items_per_page=10 (the owner and operator of the Royal Park Apartments, settled with the United States surrounding allegations that they violated the FHA. Plaintiffs allege that J & R discriminated against tenants of South Asian descent. Under the terms of the agreement, J & R Associates will establish a $70,000 fund to compensate victims of discriminatory practices).

Some have even suggested that use of a religious symbol, such as a cross, without any further explanation, may communicate a discriminatory preference. Although retirement communities often are sponsored by religiously affiliated groups or ethnic or cultural societies, advertising copy should be written carefully to make it clear that the message is not unlawfully discriminatory. For example, unless the community clearly fits within the religious exemption from the Fair Housing Act, a project with a religious name can reduce its risk by specifying that people of all faiths are welcome.

Seniors housing residences may discriminate on the basis of age and familial status if they qualify as housing for older people under the Fair Housing Act, which specifies age 55 and age 62 as the applicable thresholds, Other age thresholds above age 55 also appear to be acceptable to the federal enforcement agencies. State licensing laws and anti-discrimination laws should be checked with respect to any other age criteria. See Section VII.F. regarding life expectancy, Medicare participation, and other factors that might serve as justification for different age criteria.

C. Human Images

The most prominent claims of discrimination in the marketing of seniors housing have involved graphic advertisements in which the racial composition of people appearing in photo images was alleged to indicate a bias in the property's occupancy policies. Some advertising discrimination claims have led to significant judgments or settlements against senior living communities or other multifamily housing providers, including a 1997 arbitration award against a Michigan retirement community for $569,000.[39] The use of all-white models in advertising can be dangerous when the people depicted do not reasonably reflect the racial composition of the area in which the property is located, particularly if multiple photographs are used and if a series of advertising placements is made. The danger is particularly enhanced if non-white models appear in advertising only as servants or other employees, and not as residents.

To sustain a claim of discrimination, a plaintiff need not show that the defendant had an intent to discriminate.

To sustain a claim of discrimination, a plaintiff need not show that the defendant had an intent to discriminate. A successful claim also may be brought by showing that the advertising has the effect of communicating a preference or limitation twhich has a discriminatory impact upon prospective applicants. Therefore, it is risky for seniors housing communities to take comfort in the idea that their advertising may safely depict actual residents or applicants for occupancy who all "happen to be white." The effect of such advertising upon readers can be the same as an intentionally discriminatory publication. Moreover, the fact that all residents are white may tend to support an allegation that a policy of discrimination exists and has been successfully implemented. Advertising only in selected zip codes or media that may reflect a racial or other unlawful preference, should also be avoided.[40]

[39] *Fair Housing Center of Metropolitan Detroit v. Henry Ford Village* (unreported) (1997).
[40] See Section VI.D. regarding electronic data screening.

Advertising discrimination claims based on disability are less prevalent than those based on race. Nevertheless, seniors housing communities, which serve a population with a high incidence of physical disabilities, would be wise to consider incorporating some representations of disabled people into their marketing.[41] This not only can help avoid a discrimination claim, but also may more accurately represent the actual population in whose midst residents can expect to live.

D. Market or Data Targeting

Senior living providers should be cautious of their marketing and advertising practices on all platforms. A recent court settlement between civil rights organizations and Facebook highlights the importance of ensuring non-discriminatory advertising and marketing.[42] The settlement with Facebook is a result of a complaint alleging Facebook's online housing advertisements were discriminatory. Specifically, the complaint alleged that Facebook's advertising platform allowed marketers to include or exclude certain people from receiving ads by using pre-populated lists of characteristics such as sex, age, interests, behaviors, or demographics associated with protected classes.

Under this settlement agreement, Facebook may not select audiences based on the above listed categories. Senior living providers similarly should be careful that their data collection and marketing practices do not exclude potential customers based on protected classes such as race, national origin, sex, or disability, but be aware that it may be appropriate for a senior living operator to screen for age or family status.[43]

E. Website Accessibility

In addition to other forms of advertising, senior living communities must also ensure equal access to their web and mobile platforms. Recently, they have become targets of discrimination allegations that their websites failed to provide equal access to blind and vision-impaired users. According to the Department of Justice (DOJ), websites are considered public accommodations because they are "places where the public gets . . . goods or services."[44] The DOJ regulations require that all public accommodations "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."[45]

...senior living communities must also ensure equal access to their web and mobile platforms.

Website accessibility lawsuits typically arise when gaps in effective communication are alleged, often including a claim that a website failed to

[41] For example, one DOJ consent order required a senior living operator to include in every advertisement depicting five or more people, the image of a person using a motorized ambulation aid. See Section VIII.A.
[42] ASHA: Facebook Housing Discrimination Settlement May Have Impact on Seniors Housing, Seniors Housing Bus. (April 1, 2019), https://seniorshousingbusiness.com/asha-facebook-housing-discrimination-settlement-may-have-impact-on-seniors-housing; *National Fair Housing Alliance v. Facebook,* (S.D.N.Y. 2018) https://www.justice.gov/crt/case-document/file/1089231/download.
[43] See discussion in Section VI.B.
[44] *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019). See also, Jill A. Steinberg & Michele L. Gipp, FHA and ADA Developments in Senior Housing and How to Avoid Discriminatory Practices, American Seniors Housing Association (2020).
[45] Id. at 904.

implement accessibility features for images and graphics such as "alternative text."[46] Alternative text consists of invisible descriptions of images that are read aloud to blind users using a screen reader.

A recent case, *Robles v. Domino's Pizza*, explored this exact issue. In that case, a blind customer brought an action against a pizzeria operator, alleging that the operator's website and mobile application for ordering pizza were not fully accessible to him. The court held that the Americans with Disabilities Act (ADA) applied to the operator's website and mobile application, requiring the operator to include appropriate auxiliary aids for effective communication.[47]

Seniors housing providers can limit exposure to such lawsuits by ensuring compliance with the Web Content Accessibility Guidelines (WCAG). WCAG provides series of guidelines to make web content more accessible to people with disabilities. Used internationally, WCAG provides a "stable technical standard" across platforms. To improve accessibility, WCAG may recommend that a website create audio files for the end user, or that the website include high-contrast or enlarged typeface or graphics.

Numerous senior living providers have been pursued by plaintiffs' lawyers who use publicly available website audit programs to find instances of nonconformance to the WCAG standards and then threaten suit and seek compensation in the form of statutory damages for discrimination, plus attorneys' fees. Senior living providers can get ahead of these litigation threats and conduct self-audits using one of the WCAG-based audit programs.[48] These audits will help improve accessibility, and may help deter any threats of litigation.

F. Precautionary Steps

Seniors communities may take some steps to reduce the risk of a claim of advertising discrimination, such as: (1) avoiding language and symbols that can be misinterpreted to imply a prohibited preference or limitation on occupancy, (2) including a prominent Equal Housing Opportunity slogan, logo or statement in all advertising copy, (3) using human models who reasonably reflect the racial makeup of the surrounding metropolitan area and realistically depict the kinds of disabilities encountered in the targeted senior population, (4) taking affirmative steps to place advertising in media that are oriented to minority and disabled populations, (5) avoiding use of market data that differentiates targets based on protected classes, and (6) making websites accessible to disabled users. In determining what racial or other demographics should be reflected in photographic advertisements, marketers should look to the overall community, and not to selected zip code areas where more affluent prospects may reside. Note, however, that it is permissible to use income criteria when screening prospects for admission, even if it has a disparate impact upon a racial minority. *See Section IV.*

[46] HUD Policy on Section 508 of the Rehabilitation Act and Accessible Technology, U.S. Department of Housing and Urban Development (Jan. 19, 2017).

[47] *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019)..

[48] UserWay or AccessiBe are examples of vendors that provide electronic audit and compliance program "widgets" that can be useful in identifying and correcting website access issues. After identifying any deficiencies, the same vendor will then sell a "plug-in" program to correct them.

VII. Occupancy Criteria

A. Requirements of Tenancy; Reasonable Accommodation

The Fair Housing Act, the ADA, and the case law arising under those Acts, all acknowledge that inquiries can be made of applicants for residence, and conditions placed on occupancy, to assure that they will meet the "requirements of tenancy."[49] For example, an owner/operator may inquire whether applicants are capable of paying rent, of living peaceably in a group setting,[50] and of keeping the premises clean and safe. Such inquiries must be made of all applicants and not just those who appear to be disabled. However, see *Section VII.C.3.* regarding making limited financial exceptions as a reasonable accommodation.

The resident screening and occupancy decision process can be a minefield relative to compliance with the anti-discrimination laws, particularly in the areas of disability and age. Resident selection policies and practices that may be acceptable for one type of community may not be lawful for another, depending upon differences in their licensure status, applicable fire safety and zoning laws, and the types of facilities, services and amenities offered. For example, questions about a person's health care needs may be appropriate for a licensed assisted living facility that offers personal care, but inappropriate for an unlicensed senior apartment complex with no care component. Likewise, a continuing care retirement community or "CCRC" [sometimes called a "life plan" community], that bears financial risks associated with its residents' care needs may be entitled to impose age and health status criteria that would be inappropriate in a fee-for-service retirement community. In general, when establishing resident selection, retention, and eviction/transfer policies, seniors housing operators should consider:

1. whether the conditions placed upon an applicant's occupancy are necessary for the applicant to meet the "requirements of tenancy" and of participation in the community's care program, if any;
2. whether the community can make a "reasonable accommodation" in its policies or procedures to permit the prospective resident to meet the requirements of occupancy and enjoy full access to the facilities and services of the community; and
3. whether "reasonable modifications" to the premises can be made to afford the applicant full enjoyment of the housing and facilities.

Every senior living community should have a reasonable accommodation policy.

Every senior living community should have a reasonable accommodation policy. Generally, HUD rules[51] place the initial burden on residents to make the request and to propose the specific accommodations they wish to see implemented. The operator is then responsible for determining whether the requested accommodations

[49] This concept is similar to the Section 504 requirement that disabled people be treated equally if they are "otherwise qualified" for the job or benefit. See Section VII.C.1.
[50] However, see Section VII.D.1. regarding safety and disruption issues attributable to a mental disorder or other disability.
[51] HUD's Occupancy Handbook 4350.3 includes Chapter 2. Civil Rights And Nondiscrimination Requirements, which contains 45 pages of requirements for HUD-subsidized housing providers. While the handbook does not directly apply to owners and operators of housing that is not subsidized, it reflects HUD's interpretation of fair housing laws that are applicable to all covered dwellings nationally.

are reasonable, and if so, implementing them. A tenant must prove that the requested accommodation is necessary to afford him/her an equal opportunity to use and enjoy the dwelling.[52] Generally, property owners must absorb any additional costs associated with accommodations made in their policies and procedures. However, if the request is for a modification of the physical plant the resident is responsible for associated costs.[53]

In response to a request for a reasonable modification, a housing provider may request reliable disability-related information that: (1) is necessary to verify that the person meets the Act's definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed modification, and (3) shows the relationship between the person's disability and the need for the requested modification. If the requester's disability is known or readily apparent to the provider, but the need for the modification is not, the provider may request only information that is necessary to evaluate the disability-related need for the modification. The Fair Housing Act provides that while the housing provider must permit the modification, the tenant is responsible for paying for it.[54]

Several court decisions have required property owners and managers to attempt a dialogue with residents about proposed accommodations, before rejecting them as unreasonable, even when the occupant posed a health or safety risk to others.[55] It is unclear whether courts will similarly shift the responsibility to explore reasonable accommodation options in other factual contexts.

B. Independent Living Communities

1. Capacity to Live Independently

In an early case under the Fair Housing Amendments Act, a federal court ruled that it was a violation of the Act to require that applicants for public housing be capable of "independent living," on the ground that this standard, as applied, was too broad and excluded disabled people.[56]

The HUD Occupancy Handbook[57] states unqualifiedly that "It is unlawful for an owner to make inquiries designed to determine whether an applicant may live independently."

On the other hand, HUD guidelines[58] permitted a property owner to ask if an applicant can live independently, provided that owners consider the ability of the prospective resident to have the necessary functions performed by another person, such as a spouse, live-in aide, or outside social services agency, and if the applicant can obtain such assistance, to treat him or her as qualified for occupancy.

[52] *Coronado v. Cobblestone Village Community Rentals, L.P.*, 163 Cal. App. 4th 831 (Cal. Ct. App. 2008); *Bell v. Tower Mgmt. Serv., L.P.*, 2008 U.S. Dist. LEXIS 53514 (D. N. J. July 15, 2008).
[53] *Fagundes v. Charter Builders, Inc.*, 2008 U.S. Dist. LEXIS 9617 (N.D. Cal. Jan. 29, 2008) (unpublished).
[54] March 5, 2008 Joint Statement of HUD & DOJ - *Reasonable Modifications under the Fair Housing Act.*
[55] *Douglas v. Kriegsfeld Corp.*, 884 A. 2d 1109 (D.C. Ct. App. 2005) (severe sanitation problems). See also *Roe v. Housing Auth. of City of Boulder,* 909 F. Supp. 814 (D. Colo. 1995) (battery and threats); *Arnold Murray Construction, LLC v. Hicks*, 621 N.W. 2d 171 (S.D. 2001) (offensive speech).
[56] *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990).
[57] HUD Occupancy Handbook 4350.3, Section 2-31.
[58] *60 Fed. Reg. 2,658 at 2,600*, Jan. 10, 1995.

The term "independent living" is ubiquitous in the senior living field to describe a type of living environment where hospitality-type services are provided, but care is not. Significantly, the federal tax code[59] refers to an "independent living unit" as an integral part of a continuing care retirement community. The DOJ seems to interpret the law to prohibit a requirement that a resident live "independently" only when that means "without assistance from another person."[60]

Use of an "independent living" admission criterion can be confusing, and if interpreted to mean that a person must live without assistance from any source, is unlawful. Accordingly, some properties instead refer to qualifications for "residential living." See also, *Section VII.G.*, regarding application forms.

Use of an "independent living" admission criterion can be confusing, and if interpreted to mean that a person must live without assistance from any source, is unlawful.

Courts generally have assumed that residents of retirement communities where care is offered are disabled within the meaning of the Fair Housing Amendments Act.[61] However, one case suggests that residents of a to-be-developed continuing care retirement community may not be considered de facto disabled when they enter the CCRC as "independent living residents," and that, in those circumstances, a local municipality is not required to approve a special planning permit as a reasonable accommodation to disabled persons.[62]

Characterization of a proposed senior living project as "independent living" may help secure zoning and planning approvals if the goal is to convince reviewers that the project is not a commercial activity. However, such a characterization may be counter-productive if the intent is to use the disability discrimination laws to obtain more favorable treatment under restrictive ordinances.

2. Care Needs in Unlicensed Accommodations / Private Aides / Acuity Creep

Communities that do not provide care, such as independent living properties, nevertheless may be required to admit residents who need care, for example, where the resident is able to meet her care needs with the help of a third party. *See Section VII.B.1.* However, such scenarios are not without risk. Under negligence law, a community could be held responsible for foreseeable harm to a resident, visitor or staff person, if the harm could be prevented by reasonable intervention, and even if the intervention is not promised in the resident's occupancy agreement. If the community does not provide care and its resident is not adequately meeting his or her own care

[59] See 26 U.S.C. §7872, which defines a continuing care facility as one in which a resident "will first--reside in a separate, independent living unit . . . then will be provided long-term and skilled nursing care as the health of such individual or individual's spouse requires."

[60] See *Oakmont Senior Communities of Michigan* order, Section VII.B.3.

[61] *Sunrise Development v. Town of Huntington*, 62 F. Supp. 2d 762, 773, n.6 (E.D.N.Y. 1999); *Potomac Group Home v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993); *Casa Marie v. Superior Court*, 752 F. Supp. 1152, 1168 (D.P.R. 1990) reversed on other grounds, 988 F. 2d 252 (1st Cir. 1993)).

[62] *Budnick v. Town of Carefree*, 518 F. 3d 1109 (9th Cir. 2008).

needs, the operator is exposed to potential liability and should encourage, or possibly require, the resident and his or her family to take care of any obviously unmet needs. If the resident and his or her representatives do not cooperate, it may become necessary to evict the resident.[63] *See Section VIIB.3.* regarding danger to oneself.

Because of the increasing disabilities that often accompany increasing age, independent living properties tend to face the same challenges related to residents' disabilities as do care facilities, but without the regulatory or contractual parameters or guidance that care facilities have in place. While not offering care, independent living providers often have safety measures in place, such as a 24-hour emergency call system, availability of an automated external defibrillator (AED), or a daily safety check to determine that the resident is not incapacitated in the apartment. In addition, private duty aides are often delivering care in residents' unlicensed independent living apartments. These measures can blur the lines between independent and assisted living levels of care[64] and contribute to "acuity creep" and residents' perception that they have a "right" to "age in place" in their apartments and never need to move to a care facility. Indeed, some unlicensed independent living providers may have more difficulty transferring a resident to a needed higher level of care without scrutiny than a licensed facility that is subject to regulations defining the limits of occupancy.

3. Limits on Management Efforts to Intervene in Resident Care Needs

Independent living managers face a dilemma in their desire to maintain a safe and attractive environment for their residents, without unduly inquiring into and trying to manage residents' disabilities. In general, appearances or aesthetics cannot be a reason to limit access to facilities and services, but safety and disruption issues can be addressed.

...federal authorities more recently have severely limited the degree to which an independent living operator can interfere with a resident's self-management of his or her care needs.

For example, some courts have upheld the right of an independent living property operator to limit the occupancy of residents whose care needs exceed reasonable safety considerations. In one ruling that received national attention, a federal district court held that an independent living property had a reasonable business justification for its policy of terminating the occupancy of disabled residents whose unmet care needs posed a danger to themselves or others.[65] Similarly, a court found that a six-hour limit on private duty aides imposed by an "independent living" housing complex for severely disabled people was not unlawfully discriminatory.[66]

On the other hand, federal authorities more recently have severely limited the degree to which an independent living operator can interfere with a resident's self-management of his or her care needs.

[63] See *Greater Napa Fair Housing v. Harvest Redwood Ret. Residence, L.L.C.*, 2007 U.S. Dist. LEXIS 76515 (N.D. Cal. Oct. 1, 2007).
[64] See Section VII.B.2.
[65] *Greater Napa Fair Housing v. Harvest Redwood Ret. Residence, L.L.C.*., 2007 U.S. Dist. LEXIS 76515 (N.D. Cal. Oct. 1, 2007).
[66] *La Flamme v. New Horizons, Inc.*, 514 F. Supp. 2d 250 (D. Conn. 2007).
[67] https://www.hud.gov/sites/documents/14-1577561-V1-CONCIL.PDF (2014).

In November, 2014, HUD announced a conciliation agreement[67] with Oakmont Senior Communities of Michigan and Huntington Management regarding practices that HUD alleged violated the Fair Housing Act's disability discrimination prohibitions. Among other things, the unlicensed independent living manager collected medical information from residents and required them to be screened before returning from a hospitalization.

In the conciliation agreement, the community was required to cease: (1) health status reviews of residents returning from the hospital; (2) requiring residents to sign in and out of the premises; (3) routine safety checks (e.g., for failure to appear for a meal); (4) routine monitoring or restriction of resident diets; (5) mandatory liability insurance coverage for motorized mobility devices; (6) requiring residents to disclose medical information; (7) policies requiring residents to be capable of living independently, without needing "continuous nursing care," feeding assistance or other personal care assistance; (8) policies conditioning occupancy on compliance with "reasonable behavior requirements," not being a "flight risk to wander away from the building," maintaining bowel and bladder control, and other similar criteria.

The agreement does allow for the development of policies that: (a) provide for voluntary safety check and dietary programs; (b) require renter's insurance covering damage to the resident's unit and common areas, (c) inform residents that management is not responsible for providing care, (d) require that residents not disrupt other residents' quiet enjoyment of the premises, and (e) limit the number of residents who use certain areas to prevent overcrowding for safety reasons. The manager was also required to pay $35,000 to a former employee who allegedly was terminated for reporting the fair housing issues.

Retirement communities that do not offer services designed to care for people with disabilities, such as senior apartments or independent living communities, are not required to fundamentally alter their businesses by initiating a service program in order to accommodate a disabled person. However, they should admit disabled residents who show that they are ready, willing and able to meet the requirements of tenancy even if they need assistance from a third party in their daily activities. And, management should make reasonable accommodations (such as waiving the age requirement for a live-in aide) to allow the resident to meet the requirements of tenancy. See VIII.E.

C. Residences Providing Care

1. Admission and Retention Restrictions

Properties that provide care should establish the criteria for admission, continued stay, and transfer of residents to higher acuity settings according to licensing regulations, fire safety rules, customs and practices in the industry, and the retirement community's own capacity to provide accommodations, staffing, services and amenities.

However, in some cases, courts have found that fire regulations were overly broad and unreasonably restricted the occupancy of disabled applicants.[68] In addition, disability discrimination laws have been used to require licensed care facilities to retain residents whose condition and conduct push the limits of the care routinely available in such a setting.[69]

On the other hand, some courts have concluded that disability discrimination laws should not be used to alter care-related decisions made in licensed healthcare facilities. In *Johnson v. Thompson*,[70] the 10th Circuit federal court found that "where the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say . . . that a particular decision was 'discriminatory.'" The court relied on the concept that, for a person to be discriminated against on the basis of disability, he or she must be "otherwise qualified" for the particular activity. This is analogous to the "requirements of tenancy" concept in the Fair Housing Act.[71]

When making resident admission and transfer decisions, licensed care facilities should rely primarily upon licensing regulations. Contract terms and industry standards and customs may further define the limits of care routinely provided at the community, but these may be subject to a myriad of exceptions and reasonable accommodations. See, for example, *Section VIII.C.*

2. Multi-Level Care Settings

Some care facilities, such as CCRCs or "Life Plan" communities, offer multiple levels of care that may include independent living, assisted living, memory care and skilled nursing care. CCRCs are recognized by federal law to consist of levels of care through which residents move as their health needs change.[72]

In multi-level settings, proposed resident transfers to higher levels of care often lead to controversy

In multi-level settings, proposed resident transfers to higher levels of care often lead to controversy because of the reluctance of residents to move and the availability of private duty aides who can assist the resident with daily living activities. In such cases, reliance on licensing regulations, strong, clear language in the residence agreement, and work with physician and family are important factors in reaching a resolution.

An initial question for such businesses is whether the Fair Housing Act or the ADA, or both, apply, and whether different programs and facilities within the retirement community are treated differently by the two laws.

The DOJ, in its preamble to regulations for the ADA, analyzed the interplay of the Fair Housing Act and the ADA. It specifically reviewed residential facilities that include social services and similar programs for their residents and concluded that *both* the Fair Housing Act and the ADA should apply.

[68] See *Potomac Group Home v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993), and cases cited in Note 130.
[69] See *Wagner v. Fair Acres Geriatric Center*, 859 F. Supp. 776 (E.D. Pa. 1994), *rev'd* 49 F.3d 1002 (3d Cir. 1995).
[70] 971 F.2d 1487, 1492 (10th Cir. 1992) cert. den. 507 U.S. 910, 113 S. Ct. 1255, 122 L. Ed. 2d 654, 1993 U.S. LEXIS 1129, 61 U.S.L.W. 3581 (1993)
[71] 24 C.F.R. 100.202(c); See discussion in Section VII.A.
[72] See 26 U.S.C. §7872, which defines a continuing care facility as one in which a resident "will first--reside in a separate, independent living unit . . . then will be provided long-term and skilled nursing care as the health of such individual or individual's spouse requires."

Even though the Fair Housing Act applies to dwellings, the DOJ found that "residential facilities that provide social services, including homeless shelters, shelters for people seeking refuge from domestic violence, nursing homes, residential care facilities, and other facilities where persons may reside for varying lengths of time . . . would be considered a 'social service center establishment' and thus covered by the ADA as a place of public accommodation, regardless of the length of stay of the occupants."[73]

In *Herriot v. Channing House*, a resident in the licensed independent living section of a CCRC claimed that it was a violation of the Fair Housing Act and the ADA for management to attempt to move her to skilled nursing, even though it was alleged that she needed 24-hour care from private duty aides with all activities of daily living.[74] Plaintiff was assisted by legal counsel from the AARP. The defendant contended that it was fundamental to the operation of a CCRC for the manager to make level of care transfer decisions and that state regulations required the move. The court determined that the CCRC could not reasonably accommodate the plaintiff by allowing her to remain in independent living because it would violate state regulations. After analyzing the plaintiffs' claims under both the Fair Housing Act and the ADA, the court concluded that the fundamental aspects of the CCRC model involve offering to "every resident . . . a degree of certainty with respect to a resident's medical costs and contemplates transfers along a 'continuum of care' designed to meet residents' healthcare needs." (Emphasis added).[75]

In an earlier ruling in the same case, the court found that a policy of transferring a resident from one level of care to another based on her deteriorating health condition was not discriminatory because it did not "apply less favorably to disabled individuals as a group." All residents, disabled or not, were subject to the same policies and all agreed contractually to abide by them.[76]

In one state that permits so-called "checkerboard" licensing, whereby individual apartments can become licensed for assisted living so that residents can stay in the same rooms as their care needs change, the DOJ alleged that it was unlawful discrimination to establish separate areas in the building for residents receiving licensed care and for those who do not.[77]

Level of care placement is perhaps the most complex of all seniors housing discrimination issues. For the most part, the issues are inherently about disability, the responsibility of senior care providers to manage the quality of care and use resources appropriately, and the desire of some residents to remain in a more residential setting than is available in many licensed care facilities. Such cases challenge the most fundamental distinctions,

[73] 56 Fed. Reg. 35,544, 35,551-2 (July 26, 1991).
[74] *Herriot v. Channing House,* 2009 U.S. Dist. LEXIS 6617 (N.D. Cal. 2009); 2008 U.S. Dist. LEXIS 65871 (N.D. Cal. 2008). See also, *Bell v. Bishop Gadsden*, (U.S.D.C., S. Carolina 2006) in which an independent living resident, also represented by AARP, made a similar claim. The case settled after plaintiff died and before the court could rule on the merits.
[75] *Herriot v. Channing House*, 2009 U.S. Dist. LEXIS 6617 (N.D. Cal.)
[76] *Herriot v. Channing House*, 2008 U.S. Dist. LEXIS 65871 (N.D. Cal. 2008).
[77] See *U.S. v. Vancouver Housing Authority, Emeritus, Sunwest*, et al (Settlement Agreement; W.D. Wa. 2004). U.S. Department of Justice disability complaints, settlements and consent decrees can be found at http://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#disabil.

reflected in state and federal health and safety laws, between unlicensed properties and different types of licensed care providers. It is important for seniors housing providers to disclose to residents and their families in detail the kinds of service and care needs that can be accommodated in residential apartments and when it may become necessary to require transfer to higher levels of care.

See also, discussion in *Section VIII.B.3.* regarding the respective rights of occupants of residential apartments and care venues within a CCRC to use the facilities and employ private caregivers.

3. Health Benefit Underwriting

The ADA exempts providers of medical benefit plans from prohibitions against discrimination on the basis of disability[78] Exempted are:

> "an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law;"

CCRCs, particularly those that provide pre-paid or reduced rate care in assisted living or nursing, offer and administer a benefit plan that has been recognized as fitting within the ADA exemption for health care underwriting activities.

If a community offers care on a fee-for-service basis, health questions should be limited to those that will elicit whether the operator is capable of providing needed care, considering the capacity and configuration of the physical plant, the number and qualifications of staff, and licensure restrictions.

On the other hand, if a CCRC helps cover the cost of future care through entrance fees or pooled periodic fees, the provider should be able to inquire about health conditions and predispositions that bear upon the risk that an unusually high degree of care or care for an unusually long time will need to be furnished. Questions about personal and family health history that would indicate whether an unacceptably high risk of health care expenses or high utilization of health care resources is present should be lawful under the health insurance underwriting exception set forth in the ADA, provided that legitimate underwriting criteria are applied.

...it is not discrimination under the Fair Housing Act for providers of continuing care contracts to medically screen applicants for admission...

HUD has recognized that it is not discrimination under the Fair Housing Act for providers of continuing care contracts to medically screen applicants for admission to a retirement community that offer such contracts.

[78] 42 U.S.C. §12201(1) (Emphasis added)..

In two similar Opinions,[79] the Director of the Office of Fair Housing and Equal Opportunity for HUD Region VI recognized that continuing care residents initially apply for occupancy in the "independent living" portion of the retirement community, and then are provided long-term care and nursing services as their needs change.[80] The CCRCs required applicants to complete a medical questionnaire and be evaluated by a staff nurse, and imposed as a condition of occupancy that they be "capable of living independently" by themselves or with a home care worker. The HUD Regional Office cited HUD and DOJ authority to the effect that, because of its health care program, a continuing care retirement community should not be analyzed solely under the Fair Housing Act, but also under the ADA.[81] The Office determined that one of the requirements of tenancy was participation in a managed health services program and that. because the medical questions were asked of all applicants equally, there was no fair housing violation. It further concluded that medical screening of applicants is authorized under the ADA provision permitting insurers and "similar organizations" offering health benefit programs to underwrite, classify and administer risks.

Although there is authority supporting health screening of prospective residents by CCRCs, all health screening documents should be carefully reviewed for compliance with antidiscrimination laws. General health questions unrelated to legitimate health benefit underwriting considerations and that are not germane to the CCRC's services and amenities should be eliminated.

When an applicant for admission to a CCRC fails to qualify because of a health condition or history that creates a high risk of expensive health care costs, management should consider what reasonable accommodations might be made to allow the applicant to be admitted despite the disqualifying condition, such as: (1) admitting the applicant on a fee-for-service basis, (2) excluding certain types of health care from the resident's benefit plan, or (3) requiring the resident to privately retain and pay for an aide to care for certain disqualifying medical conditions. A community need not fundamentally alter its program by abandoning its health criteria, but may find that a few exceptions will not have that effect.

...management should consider what reasonable accommodations might be made to allow the applicant to be admitted...

D. Assistance Animals

1. Generally

Guide animals needed by a disabled person, including both seeing eye dogs and hearing dogs, must be allowed in housing that otherwise has a no-pet rule.[82] In certain circumstances, animals that provide emotional support to a resident with a mental disability must also be permitted.[83]

[79] Longhorn Village and Westminster Manor "No Reasonable Cause" determinations, HUD Region VI, June 12, 2012 and April 21, 2014.
[80] citing 26 USC §7872.
[81] 56 Fed. Reg. 35,544, 35,551-2 (July 26, 1991).
[82] See, e.g., *Bronk v. Ineichen*, 54 F. 3d 425 (7th Cir. 1995) (deaf resident).
[83] *Janush v. Charities Housing Development, Corp.*, 169 F. Supp. 2d 1133 (N.D. Cal. 2000); *Exelberth v. Riverbay Corp.*, HUD ALJ 02-93-0320-1 (1994).

Historically, the law regarding the right of disabled people to bring animals into housing and public accommodations was established by case law. Some residents seeking accommodation for a guide or support animal were made to demonstrate that the animal had received proper training in assisting disabled individuals.[84] In the case of a mental disorder, the animal at issue had to be peculiarly suited to ameliorate the unique problems of the mentally disabled. In other instances, however, courts did not require evidence of proper training, as long as the plaintiff can demonstrate that, considering all of the circumstances, it is a reasonable accommodation to allow the animal to remain on the premises.[85] Only accommodations that are "reasonable" were required, and a property owner could require that a service animal not be a nuisance.[86] Courts focused on whether the animal's potential benefit to the tenant outweighs the owner's interest in excluding the animal. Generally, evidence of training was not required for emotional support animals if the animal helps mitigate the symptoms of a tenant's mental illness.

This is an area of law that has evolved over the years and it is now better defined due to publications and enforcement activity from both HUD and DOJ.

2. Service Animals in Public Accommodations

Service animals must be allowed in all public accommodations covered by the ADA.

DOJ's revised ADA regulations define "service animal" narrowly as any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability. Emotional support animals are expressly precluded from qualifying as service animals under the ADA.[87]

Emotional support animals are expressly precluded from qualifying as service animals...

Under the ADA, public accommodations may perform a "task or function" inquiry to determine whether the animal is a service animal or what tasks the animal has been trained to perform, but cannot require special identification cards for the animal or ask about the person's disability.[88]

A service animal "must be permitted to accompany the individual with a disability to all areas of the facility where persons are normally allowed to go, unless (1) the animal is out of control and the animal's handler does not take effective action to control it; or (2) the animal is not housebroken.[89]

[84] See *Prindable v. Assoc. of Apartment Owners of 2987 Kalakua*, 304 F. Supp. 1245 (D. Haw. 2003); *In Re: Kenna Homes Coop. Corp.*, 557 S.E. 2d 787 (W.Va. 2001); *State ex rel. Henderson v. Des Moines Mun. Housing Agency*, 2007 Alas. LEXIS 80 (Alaska July 25, 2007)

[85] See *Green v. Housing Authority of Clackmas County*, 994 F. Supp. 1253 (D. Or. 1998); *Oras v. Housing Authority of the City of Bayonne*, 861 A. 2d 194 (N.J. Super. 2004).

[86] *Gilbert v. Simonka*, 2007 Alas. LEXIS 80 (Alaska July 25, 2007); *Frechtman v. Olive Executive Townhomes Homeowner's Ass'n.*, 2007 U.S. Dist. LEXIS 811125, (C.D. Cal. Sept 24, 2007).

[87] See 28 C.F.R. § 36.104.

[88] *DiLorenzo v. Costco Wholesale Corp.*, 515 F. Supp. 2d 1187 (W.D. Wash. 2007).

[89] 28 C.F.R. § 36.302(c).

3. Assistance Animals in Housing

The Fair Housing Act requires accommodation of a disabled person's "assistance animal," (which includes service animals and emotional support animals) but HUD guidelines[90] circumscribe the kinds of animals that will qualify:

"Assistance animals are not pets. They are animals that do work, perform tasks, assist, and/or provide therapeutic emotional support for individuals with disabilities."[91] Assistance animals perform many disability-related functions, including but not limited to, "guiding an individual who is blind or has low vision, pulling a wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability."[92]

Therefore, "housing providers are obligated to permit, as a reasonable accommodation, the use of animals that work, provide assistance, or perform tasks that benefit persons with disabilities, or provide emotional support to alleviate a symptom or effect of a disability."

To qualify an "emotional support animal," the housing provider may ask for documentation "from a person's health care professional that confirms a person's disability and/or need for an animal when the provider has personal knowledge of the individual." As a best practice, an individual seeking an accommodation should request that a health care professional supply information related to whether the animal "provides therapeutic emotional support to alleviate a symptom or effect of the disability of the patient/client."[93]

The Fair Housing Act does not require an accommodation where "the tenancy would constitute a direct threat to the health and safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. Therefore, the request to accommodate an animal may be denied "if the specific animal poses a direct threat that cannot be eliminated or reduced to an acceptable level through actions the individual takes to maintain or control the animal (e.g., keeping the animal in a secure closure)."[94] Breed, size, and weight limitations may not be applied to an assistance animal.

Breed, size, and weight limitations may not be applied to an assistance animal.

According to HUD, "before denying reasonable accommodation requests due to lack of information confirming the individual's disability or disability related need for an animal, the housing provider is encouraged to engage in a good faith dialogue with the requestor called the 'interactive process.'" [95]

When the disability of a person requesting an accommodation is "not readily apparent or known" a housing provider may ask the person to submit reliable

[90] HUD Notice FHEO-2020-01; "Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act;" Jan. 28. 2020.
[91] HUD Notice FHEO-2020-01, supra, note 90.
[92] HUD Notice FHEO-2020-01, supra, note 90.
[93] HUD Notice FHEO-2020-01, supra, note 90.
[94] HUD Notice FHEO-2020-01, supra, note 90.
[95] HUD Notice FHEO-2020-01, supra, note 90.

documentation of a disability and their disability-related need for an assistance animal.

The HUD guidelines mention that some businesses may be subject to both the service animal requirements of the ADA and the reasonable accommodation provisions of the Fair Housing Act, including assisted living facilities.

4. Scope and Limits of Assistance Animal Rights

As it stands, a majority of cases have ruled in favor of plaintiffs' right to have an emotional support animal remain in the housing facility.[96]

However, a number of court cases have questioned assistance animal claims, reviewing topics such as: the qualifications of animals as legitimate assistance animals, and supporting documentation,[97] what kinds of questions can be asked about disability and the need for an animal,[98] the credibility, or lack thereof, of the person making the request,[99] the conditions under which an otherwise-qualified animal may or may not be permitted to remain on the premises,[100] and what constitutes denial of an accommodation.[101]

In senior living properties, where both the Fair Housing Act and the ADA may apply, it is important to acknowledge the difference between service animals and emotional support animals. Generally, while a disabled person has the right to bring a service animal into a public accommodation, such as a restaurant, that right does not extend to an emotional support animal. Senior living facilities may well take the position that emotional support animals are permitted in a resident's apartment, but not in the dining room, indoor recreation areas or other common areas.

[96] *United States v. Friedman Residence, LLC* (S.D.N.Y 2017)https://www.justice.gov/crt/case/united-states-v-friedman-residence-llc-sdny(finding that shared housing residence violated the Fair Housing Act on the basis of disability by refusing to allow a resident with a psychiatric disability to live with an emotional support dog); *Calvillo, et.al v. Baywood Equities, L.P., et al*, (2019) https://www.justice.gov/crt/case/calvillo-et-al-v-baywood-equities-lp-et-al (concluding in a settlement agreement allowing a resident to keep their emotional support animal and requiring defendants to implement a new reasonable accommodation policy); *United States v. Glenwood Management* (S.D.N.Y 2019) https://www.justice.gov/crt/case/united-states-v-glenwood-management-sdny (resulting in a settlement agreement allowing a resident to keep their emotional support animal); *United States v. Dorchester Owners Association* (E.D. Pa 2020)https://www.justice.gov/crt/case/united-states-v-dorchester-owners-association-ed-pa; *United States v. Las Vegas Jaycees Senior Citizens Mobile Home Community* (D. Nev.,2020) https://www.justice.gov/crt/case/united-states-v-las-vegas-jaycees-senior-citizens-mobile-home-community-et-al-d-nev (resulting in a settlement agreement allowing a resident to keep their emotional support animal).[91] HUD Notice FHEO-2020-01, supra, note 90.

[97] Preliminary injunction granted against removal of dog where tenant with diabetes and depression has a physician declaration that caring for the dog would improve his mental and physical health by providing companionship, motivating exercise and enhancing diabetic control. *Frechtman v. Olive Executive Townhomes Homeowner's Association*, 2007 U.S. Dist. LEXIS 81125 (C.D. Cal. 2007): Summary judgment for defendant denied; plaintiff need not have a trained service animal when making a claim under the Fair Housing Act, as he would if the claim were made under the ADA; companion dog to facilitate psychological treatment qualifies under HUD rules; *Overlook v. Spencer*, 666 F. Supp. 2d 850 (S.D. Ohio 2009).

[98] Defendant is allowed to obtain sufficient information to determine if animal is necessary because of a disability; defendant was offered the opportunity and chose to disregard the offer. *Overlook v. Spencer,* 666 F. Supp. 2d 850 (S.D. Ohio 2009).

[99] Summary judgment for defense affirmed where the plaintiff supplied letters from a psychologist and chiropractor that a dog was medically necessary and describing certain tasks the dog could perform [notifying of intruders, bringing shoes and water, calming tenant after a panic attack] but the tenant had previously said it was a "pet" and the defense asked for more information about how it was necessary to afford him an equal opportunity to enjoy the dwelling. *Hawn v. Shoreline Towers*, 347 Fed. Appx. 464 (11th Cir. 2009).

[100] Dog to be kept on a leash, tenant to accompany at all times in common areas, clean up, retain financial responsibility, not disturb others, etc. *Frechtman v. Olive Executive Townhomes Homeowner's Association*, 2007 U.S. Dist. LEXIS 81125 (C.D. Cal. 2007); summary judgment upheld for hospital where dog created risk of infection to other patients due to poor hygiene, odor, incontinence, insufficient supervision. *Roe v. Providence Health System*, 655 F. Supp. 2d 1164 (D. Or. 2009): .

[101] Summary judgment for defense upheld where court found accommodation was never actually denied; managers had only asked for more information regarding the tenant's condition. *DuBois v. Association of Apartment Owners of 2987 Kalakaua, 453 F.3d 1175* (9th Cir 2006).

Certainly, there has been abuse of the broad license given to emotional support animals in housing, and some animal owners have falsely represented their emotional support animals to be service animals, in an effort to gain access for them to restaurants and other public accommodations. Harnesses declaring a dog to be a "service animal" are readily available on the internet, without any verification requirement. In fact, in at least one state, it is a crime to falsely claim that a dog is a service animal in order to take it to an apartment or service establishment.[102] While some providers of public accommodations, such as airlines, have allowed emotional support animals on board in the past, many have more recently reversed their policies and now no longer accept emotional support animals. The HUD guidelines mention that some businesses may be subject to both the service animal requirements of the ADA and the reasonable accommodation provisions of the Fair Housing Act, including assisted living facilities.[103]

E. Paying for Reasonable Accommodation

Whether a disabled person must bear the costs or charges associated with a reasonable accommodation will be decided based upon a balancing of the burdens and benefits to the parties. For example, a federal court held that a disabled person may bring suit against a housing provider for charging a long-term guest fee to the resident's live-in aide, even though the fee was also charged for the guests of non-disabled residents, on the ground that reasonable accommodation of the disabled person might include waiving such a nominal fee.[104] However, at trial, the plaintiff failed to show that the fee posed a barrier to her equal access to the housing and judgment was entered in the defendant's favor.[105] On the other hand, where it was found that a disabled resident could not afford a $25 maintenance fee that the property owner had suggested as a reasonable accommodation, the resident was not required to pay the fee.[106]

...a disabled person may bring suit against a housing provider for charging a long-term guest fee to the resident's live-in aide, even though the fee was also charged for the guests of non-disabled residents...

Property owners often establish specific financial criteria for applicants, such as minimum income requirements, to ensure that prospective occupants will be able to afford rent. Several cases have held that property owners could reject disabled applicants due to their failure to meet such criteria, even when the applicant's financial status was directly attributable to a disability.[107] The courts reasoned that the rejected applicants' financial status, not their disabilities, prevented them from qualifying for the rentals. In

[102] California Penal Code §365.7.
[103] Hannah Sampson, 8 Questions about Flying with Emotional Support Animals, The Washington Post (Jan. 14, 2021) https://www.washingtonpost.com/travel/2021/01/14/emotional-support-animal-airlines-restrictions/.
[104] *U.S. v. California Mobile Home Park Management*, 29 F. 3d 1413 (9th Cir. 1994).
[105] 107 F. 3d 1374 (9th Cir. 1997). See also *Lanier v. Ass'n of Apt. Owners of Villas of Kamali'i*, 2007 U.S. Dist. LEXIS 18867 (D. Haw. March 16, 2007) in which an apartment owner was granted summary judgment against a disabled plaintiff who alleged that a fee for installation of equipment should be waived, but who failed to show that "but for" the waiver of the fee, she would be unable to enjoy the housing.
[106] *Boulder Meadows v. Saville*, 2 P. 3d 131 (Co. Ct. App. 2000).
[107] See, e.g., *Hemisphere Bldg. Co. v. Village of Richton Park*, 171 F.3d 437 (7th Cir. 1999); *Salute v. Stratford Greens Apartments*, 136 F. 3d 293 (2d Cir. 1998); *Schanz v. Village Apartments*, 998 F. Supp. 784 (E.D. Mich. 1998).

one case, however, when a disabled tenant could not meet a monthly income requirement, but his mother could meet it and offered to co-sign the lease, a federal appeals court required the owner to waive the income requirement and policy against co-signing as a reasonable accommodation of the applicant's disability.[108]

F. Age Restrictions

By definition, planned seniors communities limit occupancy on the basis of age, usually by means of an entry-level minimum threshold set at age 55 or 62 in accordance with the exemption to the Fair Housing Act's familial status discrimination provisions. See Section I.B. However, some communities may also wish to establish age-based admission criteria related to other laws, such as participation in Medicare (age 65), or to ages referenced in state licensing laws.

Occasionally, seniors housing communities set a maximum age limit for initial entry, for example, when age is used as an indicator of life expectancy and health care utilization (e.g., as in a CCRC). An older person with a shorter life expectancy may have an impact on a community's ability to cover its residents' health care costs because the resident may have fewer healthy years to contribute financially to the system before drawing down health benefits. Another legitimate concern in a multi-level-of-care property is that, if too many residents develop care needs over a short time span, there may be insufficient staffing and facilities to provide the care for which the residents contracted. The legitimacy of age-of-entry restrictions than than those explicitly set forth in the Fair Housing Act has not been litigated, but the Department of Justice appears to accept senior living age criteria, so long as they are above the statutory minimums. In general, the criteria set forth in the second exemption under the Age Discrimination Act of 1975 (see Section III) are a good barometer of whether an age limitation will withstand scrutiny.

G. Contents of Application Forms

When developing admissions screening forms for a seniors housing community, caution must be exercised to distinguish between: (1) questions designed to determine the person's eligibility for occupancy, and (2) information needed to provide appropriate services to the resident after he or she is accepted for occupancy at the community. Providers should avoid soliciting more information from the resident than is necessary to make a determination regarding a prospective resident's eligibility for occupancy or appropriate level of care.[109]

For example, it may be improper to ask a person's religion on a form used to determine his or her eligibility for entry to the community. On the other hand, once the person has been accepted for occupancy, an optional question about religious preferences may be appropriate to enable staff to refer the resident to

[108] *Giebler v. M & B Assoc.*, 343 F. 3d 1143 (9th Cir. 2002).

[109] *LaFlamme v. New Horizons, Inc.*, 514 F. Supp. 2d 250 (D. Conn. 2007) holding that an independent living community may not inquire into the physical and mental health history of an applicant beyond that necessary to determine eligibility.

clergy in an emergency, transport the resident to religious services, make funeral arrangements, etc. Similarly, a health question about the applicant's need for 24-hour nursing care may be an appropriate pre-acceptance question because of licensure limitations, but a question about drug allergies might be proper only *after* acceptance for occupancy because it has no bearing on the person's eligibility for admission.

In determining whether medical questions are included in the application-for-admission forms, retirement community operators should look to limitations imposed by any licensure regulations and consider the property's staffing, services, and physical capacity. General medical histories that inquire about health conditions that are not strictly related to fundamental requirements of the community's care program may be overly broad and unlawful.

VIII. Access to Facilities and Services

Eligibility criteria for initial occupancy and continued residence in a seniors housing property are not the only source of discrimination claims. Policies governing access to and use of the various facilities, services and amenities offered by a community may also form the basis for a discrimination claim and often will present the most complex and widespread array of operational challenges.

A. Walkers, Wheelchairs and Motorized Carts

A major motivation behind the disability discrimination laws was to protect ambulation-impaired users of wheelchairs and similar appliances. Seniors housing communities that refuse occupancy, or limit access to facilities or services, to residents who use walkers or wheelchairs are at significant risk of a discrimination challenge, particularly if the reason for the restriction is aesthetics, decorum, or the wishes of the other residents (e.g., as opposed to compliance with specifically applicable fire codes, or legitimate safety concerns). However, under a specific exemption to the Fair Housing Act, housing operators may inquire about such things as wheelchair use when seeking to fill a unit that is specially designed for a mobility-impaired person.[110]

Federal enforcement agencies have aggressively pursued fair housing claims against retirement communities where they thought that applicants with disabilities were denied admission solely because of wheelchair use.[111] Residential communities (senior apartments and independent living communities) should refrain from steering applicants using ambulation aides to care facilities if they can be reasonably accommodated in the residential setting.[112] For example, such residents, if they need assistance, can obtain it from private aides, even if the seniors housing provider does not offer such services.

Indoor use of motorized carts presents a more complex problem because of their speed and weight and the resulting potential danger to slow-moving, possibly cognitively impaired, residents who might be in close proximity. Outright prohibition of motorized scooters by a retirement community is considered unlawful by the DOJ.[113] However, restrictions on the time, place and manner of use of mobility scooters in a retirement community, because of concern for the safety of other frail residents, have been upheld when they did not result in any limitation upon the disabled person's access to facilities and services.[114]

[110] See 24 C.F.R. §100.202(c)(2).
[111] *U.S. v. Resurrection Retirement Community*, (consent order with a $200,000 fine; N.D. Ill. 2002). U.S. Department of Justice disability complaints, settlements and consent decrees can be found at http://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#disabil.
[112] See *U.S. v. Covenant Retirement Communities*, (consent order; E.D. Cal. 2007). http://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#disabil.
[113] See *U.S. v. Savannah Pines* (consent decree; D. Neb. 2003), where a motorized cart exclusion policy was challenged as unlawfully discriminatory. http://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#disabil.
[114] *U.S. v. Hillhaven*, 96 F. Supp. 259 (D. Utah 1997), where summary judgment was entered for the retirement community defendant.

In one HUD Administrative Law Judge's opinion, it was deemed a violation of the Fair Housing Act for a retirement community to require that motorized cart users maintain liability insurance. The rationale was that, while the community had a legitimate interest in promoting safety, the insurance requirement was unrelated to that interest.[115] Other enforcement agencies have also declared that imposition of a fee or security deposit as a condition of using an electric scooter is a fair housing violation, while a charge for repairing actual damage is deemed lawful.[116]

In one case brought by the DOJ against a continuing care provider, it was alleged that motorized scooter users were unlawfully discriminated against by being required to: a) present a physician's certification of need, b) demonstrate competence to operate the scooter, c) provide personal liability insurance, and d) not operate the scooter in certain common areas of the building. The Consent Order, which required establishment of a $530,000 fund for aggrieved claimants, enjoined the provider from placing any restrictions on motorized scooter use unless such use would present a direct threat to the health or safety of another or cause substantial property damage.[117]

In another DOJ Consent Order,[118] a retirement community that prohibited motorized wheelchairs or scooters in the dining room or in residents' apartments was required to: (1) adopt a policy permitting such devices everywhere in the building, (2) not require residents to prove that they need such aides or that they are competent to operate them; (3) not require residents using such devices to eat at specified tables; and (4) in advertising depicting five or more human models, show at least one person using a motorized aid.

In a 2020 Consent Order an independent living community operated by Heritage Senior Living was alleged to have violated the Fair Housing Act by (1) requiring residents who use wheelchairs to transfer from their wheelchairs into a dining room chair, (2) requiring residents who use motorized and non-motorized wheelchairs to pay a non-refundable deposit, and (3) requiring an initial physical assessment as a prerequisite to occupancy and threatening eviction if a tenant develops health conditions.

In addition, the senior living community listed the "current requirements for residency," to include that residents be able to "get to and from the dining room on their own accord."[119]

Under the Consent Order, Heritage Senior Living was required to rescind its discriminatory policies and adopt a Resident Handbook provision in which it "recognizes that some residents may require the use of a motorized electric cart in order to maintain a higher independence and functioning level as a means of mobility."

[115] *Grassi v. Country Manor Apts.* (2001 WL 1132715; HUD ALJ).
[116] Joint statement of HUD and the Department of Justice (May 2004).
[117] *U.S. v. Covenant Retirement Communities*, (consent order; E. D. Cal. 2007). http://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#disabil.
[118] *U.S. v. Rathbone Retirement Community* (S.D. Ind. 2009) http://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#disabil.
[119] *Newell v. Heritage Senior Living, LLC* (E.D. Pa., Feb. 3, 2016, No. CV 12-6094) 2016 WL 427371, at *2.

Additionally, defendants were required to (1) pay a minimum of $200,000 and a maximum of $325,000 into a settlement fund, (2) pay a $55,000 civil penalty to the United States, (3) attend FHA training, (4) appoint an FHA compliance offer, and (5) implement new policies related to reasonable accommodation and motorized wheelchair policy.[120] The Consent Order is to remain in effect for three years.

Some restrictions concerning the use of walkers, wheelchairs and canes may be appropriate, but legitimate safety concerns about such devices are likely to be much more limited than for motorized vehicles.[121] *See Section VIII.B.* below for further discussion of limitations on the use of walkers, wheelchairs and motorized carts in dining rooms and other common areas.

B. Dining Rooms and Other Common Areas

1. Mobility Aids

Common dining rooms are often the stage for access discrimination claims...

Common dining rooms are often the stage for access discrimination claims in retirement communities, because they are the places where residents most frequently and routinely gather together. Restrictions such as "no wheelchairs in the dining room" are likely to raise claims of discrimination, and if the rationale for such a policy is aesthetics, decorum, or the preferences of other residents, the rule is probably indefensible.

Requiring a resident to transfer from a wheelchair to a dining room chair was found to violate a state's fair housing law. Although management argued that fire safety concerns justified the policy, the court focused on evidence tending to show that the real motivation was to maintain a "disability-free atmosphere."[122] In another case, a retirement community resident who was injured while being required to transfer from a wheelchair to a dining room chair was awarded $500,000 after a jury trial.[123]

Claims that a "no-wheelchairs" policy is necessary for fire safety reasons have not been litigated but are likely to be unavailing. On the other hand, a policy of having staff remove canes and walkers from a table area after residents have been seated, in order to avoid a trip hazard for waiters and other residents, should be easier to justify.[124]

Restrictions on the use of motorized carts around the dining room and other common areas of an independent living residence during congested periods were upheld, where management had a concern for the safety of other residents, many of whom were themselves mobility-impaired, and where reasonable accommodations were made to help cart-users maintain access to the community's facilities.[125]

[120] *Weinstein v. Cherry Oaks Retirement Community*, 917 P. 2d 336 (Colo. Ct. App. 1996).
[121] For example, the DOJ has permitted "valet parking" of walkers in senior living dining rooms. See *Sedgebrook* case discussion in Section VIII.B.3.
[122] *Weinstein v. Cherry Oaks Retirement Community*, 917 P. 2d 336 (Colo. Ct. App. 1996).
[123] *Morgan v. Retirement Unlimited*, (No. 139189, Va. Cir. Ct. 1995).
[124] See, *Hyatt v. Northern California Presbyterian Homes and Services*, (U.S.D.C. N.D. Cal, #C08-03265, 2008) which challenged limitations on use and storage of walkers in crowded dining room areas and settled on terms that permitted such restrictions. The DOJ has approved a consent order permitting walkers to be removed after a resident is seated and returned after the meal is finished. See Sedgebrook, Note 101, below.
[125] *United States v. Hillhaven*, 960 F. Supp. 259 (D. Utah 1997).

Even though courts have reached differing conclusions about restrictions on the use of mobility devices in dining rooms, based on the particular facts, DOJ and HUD have strictly scrutinized any policies that limit the use of wheelchairs or motorized carts.

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2. Access of Residents in Care to Independent Living Dining Rooms and other Facilities

In residences that have multiple levels of care, with different dining rooms dedicated to the different levels, a recurrent concern is that residents from one area want to eat in the other dining room (e.g., an assisted living or skilled nursing resident wants to eat in the "main" dining room). In one case,[126] a federal court ruled on summary judgment against a retirement community resident who claimed disability discrimination when barred from being spoon fed in the independent living dining room. The court found that permitting the resident to eat in the main dining room was not a reasonable accommodation because her "behavior patterns could be disruptive of other residents' dining experience."

Other potential grounds for maintaining separate facilities[127] for different care levels include fire safety standards, which usually are different for residential apartments, assisted living units, and skilled nursing facilities, different concentrations and qualifications of staff assigned to the various areas, and other physical plant, equipment and safety features that may vary from one level to another according to regulatory requirements and industry or company standards.

Harbor's Edge

In 2015, the U.S. DOJ filed a fair housing Complaint and Consent Order in the case of *United States v. Fort Norfolk Retirement Community d.b.a. Harbor's Edge*. Interest in the Harbor's Edge dining policy emerged in early 2012 when the *New York Times* ran an article about restrictions on the ability of health center (assisted living, memory care or skilled nursing) residents to dine with their spouses in independent living. Initially, Harbor's Edge placed no restrictions on health center resident access to the independent living dining room. However, after medical incidents in the unregulated independent living dining room raised serious liability concerns, Harbor's Edge adopted a policy prohibiting health center residents from eating in the residential dining room and attending certain events outside of the health center.

The Department of Justice contended that the policy unlawfully discriminated against health center residents in violation of the Fair Housing Act, and the Consent Order required Harbor's Edge to create a claimant's fund of $350,000 and pay a $40,000 fine. In addition, Harbor's Edge was required to adopt a new dining room and events policy, appoint a Fair Housing Compliance Officer, and report on dining room and event participation issues for a period of three years.

[126] *Appenfelder v. Deupree St. Luke*, 1995 U.S. Dist. LEXIS 21960 (S.D. Ohio).
[127] But see *U.S. v. Vancouver Housing Authority*, Note 77 above

The dining room and events policy required that continuing care residents who have moved to the health center be permitted to eat in the residential dining room unless they have a medical condition that may limit their ability to do so safely or in a non-disruptive manner. A decision to refuse access to the residential dining room could be made by the nurse, physician or level of care committee, which would then refer the matter to the Fair Housing Compliance Officer who would help determine whether a reasonable accommodation may be made to allow access. Health center residents could be asked to execute a Release of Responsibility for Leave Of Absence from the health center and, in some circumstances, an Against Medical Advice Form and Liability Release.

One concern was that "direct admit" health center residents, who had never signed a continuing care contract or paid the applicable fees for independent living residence, would now be given privileges to eat in the residential dining area. The Consent Order treated all health center residents who had resided at Harbor's Edge for more than 100 consecutive days as having the same dining privileges as independent living residents who paid an entrance fee and entered into a continuing care contract. The Order did not require that future health center residents have such privileges. However, a direct admit health care resident must be allowed to dine in the independent living dining room as a guest of an independent living resident.

...managers should be cautious about condoning or enforcing exclusionary activities by residents that could be seen as discrimination on the basis of disability or other prohibited grounds.

Access of residents receiving care to common areas of an independent living property is not limited to the dining room. Also in 2015, the New York Times reported on an incident in a CCRC where a resident who had moved from independent living to the health center due to increased care needs sought to return to the independent living premises to play bingo with the group she had previously socialized with when a resident in independent living. The group of residents reportedly shunned the health center resident and told her she should not participate in independent living activities. The CCRC reportedly required that she be invited by a resident to be eligible to participate. The Department of Justice reportedly investigated this incident to determine if there had been a fair housing violation and did not file any litigation against the community. Senior living managers should be cautious about condoning or enforcing exclusionary activities by residents that could be seen as discrimination on the basis of disability or other prohibited grounds.

3. Right to Receive Care in Independent Living Common Areas

Later in 2015, the U.S. Department of Justice (DOJ) also published a Consent Order in the matter of *United States v. Lincolnshire Senior Care, LLC, dba Sedgebrook, and Life Care Services LLC.*

Sedgebrook, a CCRC in Illinois, was alleged to have a policy prohibiting residents from eating in the main dining room, unless they could do so without assistance from another person. In addition, the CCRC allegedly did

not permit residents to hire live-in personal service providers but instead required that 24 hour care be provided in eight or twelve hour shifts. The DOJ claimed that these policies constituted unlawful disability discrimination under the Fair Housing Act.

Under the terms of the settlement, the owner and manager of Sedgebrook agreed to amend corporate polices to reflect the following:

- permit residential living residents to receive assistance with eating, or to be fed, by a private attendant or family member,
- permit residents of the assisted living or skilled nursing wings of the CCRC to eat in the residential living dining room as guests of residential living residents, and,
- allow personal caregivers to live with residents in their residential living units on a full-time basis.

The owner and manager was also required to create a settlement fund of $210,000 and pay a civil penalty of $45,000. Similar to the Harbor's Edge Consent Order (see above), the CCRC was required to adopt a new dining room and events policy, appoint a Fair Housing Compliance Officer, and submit reports to DOJ regarding dining room and event participation issues for a period of three years.

The Consent Order permits the CCRC to prohibit a resident from being fed in the main dining room or attending residential living events if a medical condition limits his or her ability to do so safely or in a non-disruptive manner. Healthcare residents who dine in residential living dining areas may be required to sign a liability waiver form. The Order's dining policy also permits the "valet parking" of residents' walkers and includes detailed procedures to follow when a resident wishes to transfer from a wheelchair or cart to a dining room chair.

The DOJ press release stated that Sedgebrook's management company would implement similar policies in over 100 communities it owns or manages across the country.[128]

Safety and Disruption Issues

It is important to recognize a difference between restrictions based on conduct, and those based on a person's *status*. For example, while it may be unlawful to exclude a person on the basis that he or she is an alcoholic, it is not discriminatory to require that residents avoid drunkenness in the common areas and abide by other reasonable rules of conduct.

Retirement communities and other multifamily housing providers generally need not retain residents who are disruptive or pose a danger to themselves or others merely because the disruption or danger is caused by a physical or mental disability.[129] However, courts may strictly constrain the ways in which a property owner responds to such threats.

[128] The *Harbor's Edge* and *Sedgebrook* Consent Orders can be found on the DOJ web site at http://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#disabil

[129] For example, one state court, construing federal and state law, concluded that a resident who engaged in violent activity was not an "otherwise qualified" disabled person, did not need to be accommodated, and could be evicted from a public housing property. *Boston Housing Auth. v. Bridgewaters*, 871 N.E. 2d 1107 (Mass. App. Ct. 2007).

For example, a federal court has ruled that wheelchair-bound Alzheimer's patients, who were incapable mentally and physically of responding to a fire emergency, nevertheless had to be retained in a group home for the elderly in violation of a county ordinance, on the ground that the ordinance was overly broad and because of facts presented at trial showing that the facility could safely accommodate the residents.[130] Likewise, a skilled nursing facility was required to accept a combative Alzheimer's patient where there was evidence that the facility could handle the occasional outbursts without fundamentally altering the nature of its business, and it was shown that a nursing facility setting was appropriate for a person with such a disorder.[131] Moreover, some courts have required property owners to reasonably accommodate even a tenant who poses a direct threat to the health and safety of other tenants, unless the owner can affirmatively demonstrate that no reasonable accommodation would minimize the risk the tenant poses.[132] Thus, where a mentally disturbed resident had already committed a battery against and threatened a resident, and used obscene language with other residents, a housing owner could not obtain enforcement of an eviction notice without first showing that no reasonable accommodation would eliminate or minimize the risk.[133]

The U.S. Supreme Court held (in an employment case) that where job duties posed a danger to an employee's *own* health, it was lawful to discharge or refuse to hire the person.[134] Similarly, if a retirement community resident's unmet needs pose a danger to the resident, denial of admission or discharge can be appropriate, even if other residents are not jeopardized.[135]

In determining whether a resident or prospective resident poses an unacceptable level of disruption or of danger to self or others, the community should consider whether it is licensed and designed to deal with the disruption or danger, and whether the problem can be controlled with medication or by the intervention of the resident's physician, therapist, spouse or other third party.

A property owner is not required to fundamentally alter its program to accommodate a combative or disruptive resident.

A property owner is not required to fundamentally alter its program to accommodate a combative or disruptive resident. Minor or moderate physical alterations to a unit, such as installing a ramp or door, probably would not be considered "fundamental alterations" and thus might be required as reasonable accommodations. One court, however, refused to compel an owner to make a major physical change -- soundproofing the entire apartment -- in response to complaints about noise caused by a mentally ill resident, on the grounds that such a change would constitute a fundamental alteration rather than a reasonable accommodation.[136]

[130] *Potomac Group Home v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993). See also *Buckhannon Board and Care Home, Inc., v. W. Va. Dept. of Health and Human Resources*, 19 F. Supp. 2d 567 (N.D. W. Va. 1998) (finding that a plaintiff's allegation that a state statute requiring board and care home residents to be able to physically remove themselves from situations involving imminent danger stated a claim of disability discrimination).
[131] *Wagner v. Fair Acres Geriatric Center*, 859 F. Supp. 776 (E.D. Pa. 1994), rev'd 49 F.3d 1002 (3d Cir. 1995).
[132] See, *e.g., Arnold Murray Construction, LLC v. Hicks*, 621 N.W. 2d 171 (S.D. 2001).
[133] *Roe v. Housing Authority of the City of Boulder*, 909 F. Supp. 814 (D. Colo. 1995).
[134] *Chevron USA v. Echazabal*, 536 U.S. 73, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (U.S.S.C. 2002).
[135] *Greater Napa Fair Housing v. Harvest Redwood Ret. Residence, L.L.C.*., 2007 U.S. Dist. LEXIS 76515 (N.D. Cal. Oct. 1, 2007).
[136] *Groner v. Golden Gate Gardens Apartments*, 250 F. 3d 1039 (6th Cir. 2001).

D. Transportation and Parking

Seniors housing communities that offer transportation services are faced with the question of whether some or all buses or vans must be wheelchair accessible. U.S. Department of Transportation regulations require that private entities operating a "fixed route" (as opposed to demand-responsive) system must make all vehicles with a capacity over 16 and ordered after August 25, 1990, readily accessible to people with disabilities, including people in wheelchairs. Those with smaller or older vehicles are subject to the general rule that physical barriers to access must be removed if it is "readily achievable" to do so.

However, the ADA also allows the provision of *separate* transportation for disabled people if it is necessary to afford them a benefit that is as effective as that provided to others. Therefore, it appears acceptable to supplement a non-accessible bus with an accessible van or automobile. Nevertheless, even if a separate system for the disabled is available, the handicapped person must be permitted to participate in the program that is not separate (e.g., ride on the non-accessible bus). Given the high incidence of disabilities among the elderly, senior living communities should consider designing new transportation programs to accommodate mobility-impaired customers wherever possible.

...the ADA also allows the provision of separate transportation for disabled people if it is necessary to afford them a benefit that is as effective as that provided to others.

Courts have held that it is a reasonable accommodation, mandated by federal disability laws, to provide preferred parking spaces to disabled tenants. In one case, a property owner was required to forego its waiting list for garage spots, and instead grant a spot to a disabled resident immediately.[137] In another case, a property owner was found to have violated the Fair Housing Act because it failed to give a disabled resident an assigned space close to his building or provide a sufficient number of handicapped spaces at the apartment complex.[138]

In seniors communities, however, the number of mobility-impaired residents is so high that the granting of parking preferences to all disabled people may be logistically impossible. Still, the distances confronting an impaired resident, especially in a campus setting, can raise real barriers to the use and enjoyment of a community's facilities and services. Practical solutions can include valet parking, a shuttle service, or outdoor use by residents of motorized carts.

E. Swimming Pools

In 2012, the DOJ issued regulations requiring that existing swimming pools in public accommodations be fitted with lifts for disabled users. The rules became effective January, 2013.[139]

The pool lift mandate is an issue confronting all properties covered by the ADA, but it does not apply to properties covered solely by the Fair Housing Act. A concern is whether a senior living community, or more specifically, the

[137] *Shapiro v. Cadman Towers, Inc.*, 51 F. 3d 329 (2d Cir. 1995).
[138] *Jankowski Lee & Associates v. Cisneros*, 91 F. 3d 891 (7th Cir. 1996).
[139] See *ADA Requirements: Accessible Pools;* US Department of Justice, May 24, 2012; see also 28 CFR 36.304.

common areas and amenities in such a community, are housing that is exempt from the law, or public accommodations that are subject to it.

Commentary to the original ADA regulations published by the DOJ[140] mentions residential care facilities as being subject to analysis under both the ADA as a "social service center establishment" and the FHA as "housing."

Some of the commentary to the Title III ADA final rules[141] is instructive :

> "The category of social service center establishments would include not only the types of establishments listed, day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies, but also establishments such as substance abuse treatment centers, rape crisis centers, and halfway houses.
>
> Many facilities, however, are mixed use facilities. For example, in a large hotel that has a separate residential apartment wing, the residential wing would not be covered by the ADA because of the nature of the occupancy of that part of the facility. This residential wing would, however, be covered by the Fair Housing Act.
>
> A similar analysis would also be applied to other residential facilities that provide social services, including homeless shelters, shelters for people seeking refuge from domestic violence, nursing homes, residential care facilities, and other facilities where persons may reside for varying lengths of time. Such facilities should be analyzed under the Fair Housing Act to determine the application of that statute. The ADA, however, requires a separate and independent analysis. For example, if the facility, or a portion of the facility, is intended for or permits short-term stays, or if it can appropriately be categorized as a service establishment or as a social service establishment, then the facility or that portion of the facility used for the covered purpose is a place of public accommodation under the ADA. For example, a homeless shelter that is intended and used only for long-term residential stays and that does not provide social services to its residents would not be covered as a place of public accommodation. However, if this facility permitted short-term stays or provided social services to its residents, it would be covered under the ADA either as a 'place of lodging' or as a 'social service center establishment,' or as both."

Whether a property is a social service center or a dwelling focuses on the temporary versus long-term nature of the stay. It therefore appears that independent living facilities and residential portions of CCRCs, where residents typically live for many years, are not social service establishments just because residents may receive services there. While the case is slightly less compelling for assisted living properties, which tend to have shorter lengths of stay, they still clearly are residential in character and are the permanent homes and mailing addresses of their occupants. Moreover, swimming pools are amenities that

[140] 56 Fed. Reg. 35,551-2 (July 26, 1991).
[141] 28 CFR Part 36, effective March 15, 2011.

tend to be more commonly present in independent living properties. When present in a care facility, they tend to be used for therapeutic purposes, which may warrant use of a chair lift for clinical reasons.

While a purely residential community should not be required to have a pool lift, it may be wise for senior living communities that use pools as part of a therapy program to make pool lifts available to residents.

F. Translation Services

In recent years, some senior housing providers have faced discrimination lawsuits because of their alleged failure to offer auxiliary communication resources, specifically American Sign Language (ASL) interpreters, to hearing impaired customers. In most of these cases, individuals posed as relatives of deaf persons and inquired about the availability of ASL interpreters and other auxiliary services at different senior housing communities. These individuals, called "testers," alleged that several housing providers were not willing to provide the necessary auxiliary support for residents. Similar communication-based claims have been brought by vision-impaired people regarding website accessibility.[142]

For example, in 2015, the Fair Housing Justice Center (FHJC) filed two federal lawsuits against 11 operators.[143] More recently, in 2018, plaintiffs in Arizona filed a similar case against a senior housing provider.[144] Finally, in May 2020, the National Fair Housing Alliance filed a lawsuit against 16 senior living communities in New Mexico and Utah. These cases share a common theme: testers inquired about the availability of ASL interpreters and those services allegedly were denied. As a result, most of these communities paid damages in settlement and restructured their approach to the provision of auxiliary communication services.[145]

To provide effective communication for persons with disabilities, it may not be necessary in each instance to have a live interpreter providing simultaneous translation. Other communication aids include: "1) assistive listening systems and devices; 2) open captioning, closed captioning, real-time captioning, and closed caption decoders and devices; 3) telephone handset amplifiers, hearing-aid compatible telephones, text telephones (TTYs), videophones, captioned telephones, and other voice, text, and video-based telecommunications products; 4) videotext displays; 5) screen reader software, magnification software, and optical readers; 6) video description and secondary auditory programming (SAP) devices that pick up video-described audio feeds for television programs; 7) accessibility features in electronic documents and other electronic and information technology that is accessible (either independently or through assistive technology such as screen readers)"[146] The needed type of

[142] See section VI.E. for a discussion of website accessibility.
[143] Katie Garcia, Fair Housing Rights of Deaf People in Nursing Homes and Assisted Facilities, Fair Housing Justice Center, https://www.fairhousingjustice.org/newsletters/opening-acts-october-10-2018/.
[144] *Southwest Fair Housing Council v. WG Chandler Villas SH, LLC* et al No. 4:18-cv-00210-RM (D. Ariz. April 20, 2018).
[145] *Pierce v. District of Columbia* 128 F. Supp.3d 250 (D.D.C. 2015) (finding that a prison had an affirmative duty to evaluate and grant an inmate's request for an ASL interpreter, and its failure to do so constituted disability discrimination; deaf inmate who communicated with American Sign Language (ASL), but who had been forced to communicate with staff and other inmates only through lip-reading and written notes due to lack of interpreter to assist him.)
[146] "Effective Communication," U.S. Dept. of Justice, Civil Rights Division, Disability Rights Section (2014).

The needed type of communication aid can vary greatly depending on the nature of the communication...

communication aid can vary greatly depending on the nature of the communication, so that, for example, simple written communication will suffice for many types of interactions, but for complicated interactive communications such as medical history, prognosis, treatment plans and complex insurance issues, an ASL interpreter more likely would be required[147] Real time ASL interpretation may be available via live video conference and does not necessarily need to involve face-to-face interaction. The DOJ guidance on this matter centers around "reasonable accommodation" and "effective communication" and the goal is "to ensure that communication with people with disabilities is equally effective as communication with people without disabilities."[148]

G. COVID-19

1. Generally

The COVID-19 pandemic that began to sweep the nation in early 2020, has presented senior living providers with an extra layer of challenges beyond those faced daily in housing and providing services to a population which already presents with a wide array of disabilities.

While COVID-19 could be thought of as a transitory illness, like the flu, that technically does not amount to a disability under the law, it raises many of the same operational issues for senior living providers: what conditions of occupancy can or should be imposed, how and where are services delivered, what are the limits of the service program, what safeguards or interventions can be implemented to protect other residents and staff, etc.? Moreover, it appears that so-called "long-term" COVID may have lasting impacts on health that qualify it formally as a disability.[149] In any event, there seems to be universal recognition that the SARS-CoV-2 virus associated with COVID-19 infections constitutes a "direct threat" to the health and safety of others, and that therefore many of the rights of people with a COVID-related disability are eclipsed by the "direct threat" exception to the disability discrimination laws.[150]

...many of the rights of people with a COVID-related disability are eclipsed by the "direct threat" exception to the disability discrimination laws.

Senior living operators, whether licensed providers of care, or unlicensed managers of housing and hospitality services, have been advised or required by a wide array of federal, state and local government agencies to take aggressive steps to prevent the introduction and spread of the virus within their buildings. Since the initial outbreak, the White House, HHS, CDC, HUD, EEOC, state governors, state licensing agencies, and county health officials have all issued guidance and /or mandates designed to safeguard residents and staff of congregate living properties for seniors. Among the interventions senior living operators have employed include: restricting visitors; screening residents, staff and

[147] ADA Business Brief: Communicating with People Who Are Deaf or Hard of Hearing in Hospital Settings; US Department of Justice (2003)
[148] Effective Communication, supra, note 146.
[149] "'Long Covid' Will Be Covered by Federal Disability Law, Biden Says," (New York Times July 26, 2021) https://www.nytimes.com/2021/07/26/us/covid-americans-with-disabilities-act.html. Also, see discussion in Section VIII.G.2. below
[150] See "direct threat" discussions in Sections II.D., VII.D.3., and VIII.A. and C.

essential visitors for symptoms; use of disinfectants on hands and surfaces; masks, gowns, face shields and other personal protective equipment (PPE); elimination of group dining, recreational and other activities; social distancing; isolation, quarantining and contact tracing for those with or exposed to the virus; lab testing for presence of the virus or of antibodies; and vaccinations.

2. Residents

COVID-positive status does not necessarily fit the definition of a disability as "a physical or mental impairment that substantially limits one or more major life activities."[151] While most instances of COVID infection involve a transitory illness that does not result in a permanent disability, according to the HHS Office of Civil Rights, some infected with COVID may have longer term consequences that fit the definition of a disability.[152]

According to HHS, "examples of common symptoms of long COVID include:

- Tiredness or fatigue
- Difficulty thinking or concentrating (sometimes called "brain fog")
- Shortness of breath or difficulty breathing
- Headache
- Dizziness on standing
- Fast-beating or pounding heart (known as heart palpitations)
- Chest pain
- Cough
- Joint or muscle pain
- Depression or anxiety
- Fever
- Loss of taste or smell

This list is not exhaustive. Some people also experience damage to multiple organs including the heart, lungs, kidneys, skin, and brain."[153]

The HHS publication notes that "long-COVID" is not always a disability, but requires an individualized assessment. If determined to be a disability, a business may need to reasonably accommodate the individual, as with any other disability. HUD's pronouncement on the relationship between COVID and disabilities is that, "persons with disabilities, including those who are older and have underlying medical conditions, are vulnerable and at high risk for a severe, life-threatening response to the virus. These persons may face unique fair housing and civil rights issues in their housing and related services."[154]

HUD also released a statement barring COVID vaccination status as a

[151] Introduction to the ADA, Americans with Disabilities Act, https://www.ada.gov/ada_intro.htm.
[152] Guidance on "Long COVID" as a Disability Under the ADA, Section 504,and Section 1557; HHS Office of Civil Rights (July 26, 2021)
[153] Id.
[154] HUD Statement on Fair Housing and COVID-19, (HUD Apr. 3, 2020) https://www.hud.gov/sites/dfiles/FHEO/documents/secretary%20fh%20statement%20covid-19%204.3.20.pdf.

consideration for housing prioritization.[155]

In 2020 and 2021, senior living providers have been focused on trying to keep COVID out of their buildings, and mitigating the spread of the virus in the event that it does gain entry. Recommendations from the CDC have issued for "retirement communities and independent living facilities," including limiting visitors, screening for symptoms, social distancing and isolation, hygiene practices, use of masks, limiting gatherings[156] Similar guidance has been disseminated by the CDC for assisted living facilities,[157] but most of the COVID-related mandates and recommendations for such businesses have come from state licensing agencies. Local governments have also issued guidelines and recommendations. For example, some counties recommend dividing residents into different "zones." COVID-19 positive residents may be isolated in a "red zone," exposed residents may have to quarantine in a "yellow zone," and those in the remaining "green zone" can continue to participate in community activities.[158]

Since vaccines have become available in early 2021, much of the focus has been on whether vaccines could be mandated as a condition of employment or occupancy. For the most part, existing and new residents have been vaccinated voluntarily, and without challenge or the necessity of mandates. Agency guidance on the subject of mandatory vaccinations has come primarily in the area of staff, where exceptions to a mandatory vaccination policy must be made for those who refuse due to sincerely held religious beliefs, or due to medical reasons, such as an allergic reaction [see below].

On the whole, the disability discrimination laws have had no practical effect on, and certainly have not significantly inhibited, the efforts of senior living operators to mitigate the spread of COVID-19.

3. Staff

The most detailed guidance regarding the interplay of disability discrimination laws and COVID-19 has come from the Equal Employment Opportunity Commission (EEOC) in connection with employer mandates aimed at staff.

In a March 2020 update of its guidance regarding "pandemic planning" in the workplace, the EEOC declared the COVID-19 pandemic to constitute a direct threat that justifies disability-related inquiries and medical examinations.[159] These early guidelines covered topics such as disability related inquiries,

[155] COVID 19 Vaccine Distribution: HUD Message, HUD (Feb. 26, 2021) https://www.hud.gov/sites/dfiles/CPD/documents/COVID-19-Vaccine-Distribution_HUD-Message-2-26-2021-508.pdf

[156] "Considerations for Retirement Communities and Independent Living Facilities" (CDC, updated April 19, 2021) https://www.cdc.gov/coronavirus/2019-ncov/community/retirement/considerations.html

[157] "Considerations for Preventing Spread of COVID-19 in Assisted Living Facilities" (CDC, updated May 29, 2020) https://www.cdc.gov/coronavirus/2019-ncov/hcp/assisted-living.html

[158] COVID 19, Los Angeles County Department of Public Health Guidance for Community Care Facilities, LA County (June 20, 2021) http://publichealth.lacounty.gov/acd/docs/CCFGuidance.pdf; Non-Discrimination in Access to the COVID-19 Vaccine, HHS, https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/index.html.

[159] "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act," U.S. Equal Employment Opportunity Commission (Mar. 2020) https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act

confidentiality of medical information, hiring and onboarding, and returning to work.

By May of 2021, EEOC had compiled a comprehensive review of the steps employers may take to help prevent employees from becoming infected with or transmitting the corona virus, stating that:[160]

> " . . . employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others" and that "[d]uring a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat."

If CDC recommendations are followed, employers may take such steps as taking an employee's body temperature, requiring workers with symptoms to leave the workplace, require a doctor's note to return to duty, administer COVID tests and wear protective gear.

Mandatory vaccinations may also be required, so long as employers "provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business."

Employees can be barred from the workplace if they refuse to cooperate with such measures. The employer also may offer incentives to get vaccinated.

Nevertheless, the employer may not ask about the health status of the employee's family. Screening questions must be asked of all employees equally and an inquiry can be directed to an individual employee only if there is reason to believe he or she might have been infected.Also, it may be necessary to accommodate employees with a disability that puts them at greater risk for contracting COVID.

> "Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace."

An employer does not have to provide the particular accommodation if it poses an "undue hardship," meaning a "significant difficulty or expense." For those who refuse vaccination due to a disability, a determination

[160] "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws;" U.S. Equal Employment Opportunity Commission [Updated on May 28, 2021.]

must be made as to whether the employee's presence at the workplace constitutes a direct threat to others' health and safety or if it reasonably can be accommodated:

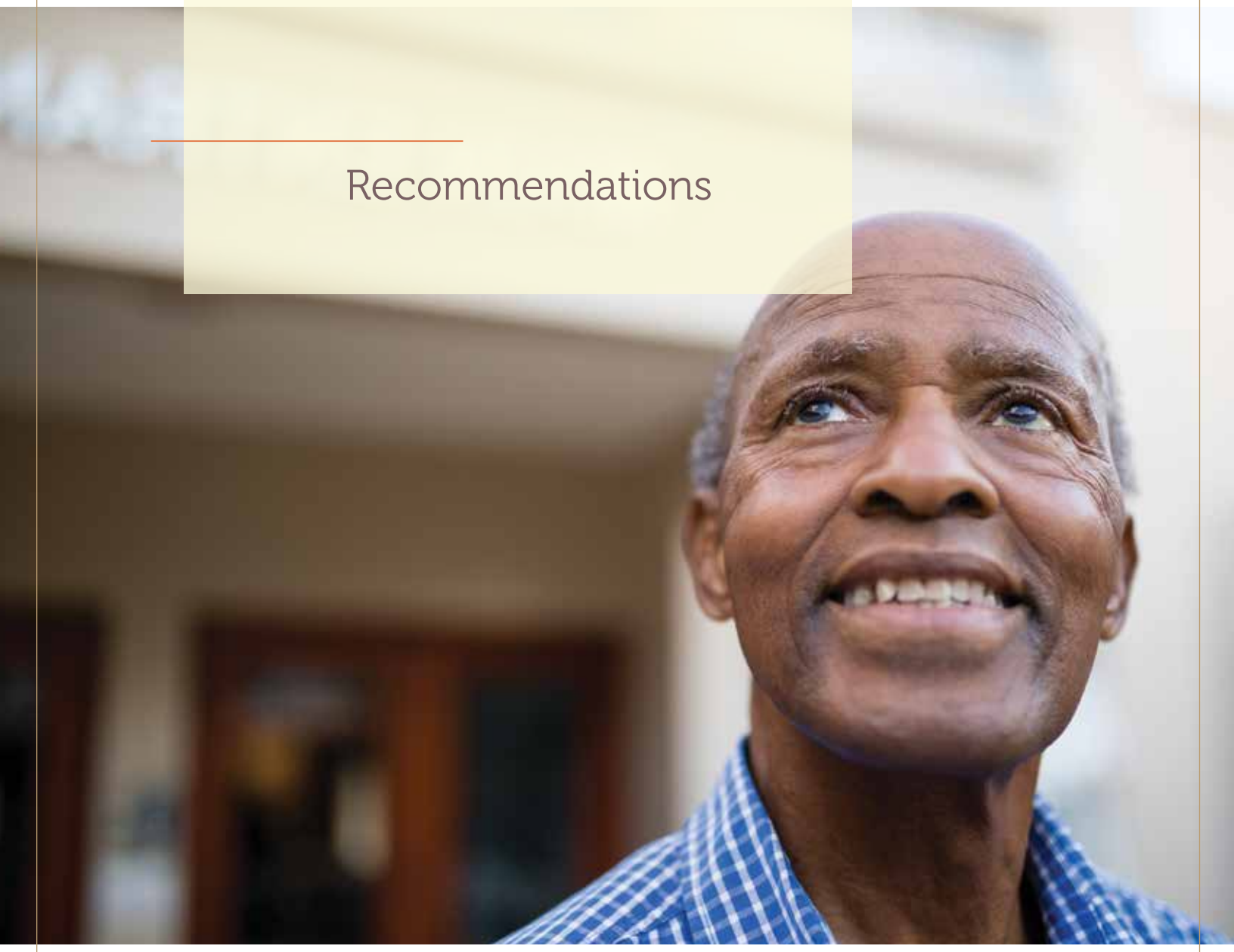
> "To determine if an employee who is not vaccinated due to a disability poses a "direct threat" in the workplace, an employer first must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job. The factors that make up this assessment are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing."

Where an employee's job involves working with a vulnerable population, such as seniors in a care facility, retaining an unvaccinated employee may constitute an "undue hardship."[161]

In mid-2021, just when the senior living industry, and the rest of the nation, thought it was getting a handle on COVID, the Delta variant of the virus, combined with a significant number of still-unvaccinated people, resulted in a resurgence of the pandemic. In addition, many "breakthrough" infections have occurred even among vaccinated populations, although with significantly milder symptoms than for unvaccinated individuals. Opposition to COVID mandates remains strong, and numerous court challenges to an OSHA emergency regulation (requiring employers of 100 or more workers to mandate COVID vaccinations or weekly testing) have been consolidated for review at the U.S. Court of Appeals for the Sixth Circuit.[162] As we enter 2022, the course of the pandemic is still unknown, and its lasting effects on senior living communities and their residents and staff remain to be seen.

[161] Id., Section L.3., updated as of November 17, 2021.
[162] BloombergLaw.com/dailylaborreport, Nov. 16, 2021.

Recommendations



Review Policies and Practices

Seniors housing owners and operators should review their communities' policies and procedures periodically to identify areas of potential risk for a discrimination claim. Items to be reviewed should include:

- advertising copy;
- resident screening and selection policies and practices;
- application procedures and forms;
- policies regarding the use of common area facilities, transportation and equipment;
- rules governing participation in activities and programs;
- resident transfer and eviction policies;
- staff training materials; and
- related documents

Create a Review Team

The review should be conducted by a team including a manager of operations and legal counsel. For health care screening criteria, a medical director and/or a person with medical insurance underwriting experience should be included. Others who can be helpful include housekeeping and dining managers, safety or engineering personnel, directors of nursing or health services, and personnel directors.

Policies and procedures, and related forms, should be analyzed under the laws referenced in this Guide, as well as applicable state law, to identify potentially discriminatory provisions. They should then be edited carefully to eliminate overly broad language and conform to the legitimate and lawful objectives of the community's program.

Train Managers and Marketing Staff

The most common sources of discrimination liability in seniors housing involve scenarios when prospective residents seek occupancy, existing residents' ability to access all the residence's facilities and services is restricted, or when a resident is asked to move within or from the premises. Managers who develop or administer polices regarding suitability for occupancy, access to facilities or services, or grounds for transfer or termination of occupancy must be conversant with the often-subtle principles that have evolved from the fair housing laws. Marketing personnel are especially at risk of making statements, asking questions, or making recommendations to prospective residents or their families that can be construed as discriminatory.

Guiding Principles

It is difficult to generalize in an area as complex as this, and every policy and controversy needs to be examined on its own merits. However, there are some guiding principles that can be gleaned from the body of law that has developed in the area:

1. safety and the ability to reasonably manage the property and the delivery of care or other services are legitimate policy considerations – a desire to maintain a "disability-free ambience" is not;

2. advertising using human images should reasonably reflect the diversity of the population in the surrounding area;

3. discrimination, including preferential treatment, on the basis of protected categories such as race, religion, disability, sex, familial status, national origin and sexual orientation is presumed to be illegal – except for race, rare exceptions may exist for religious organizations and care facilities;

4. inquiries by a housing provider into a person's disability are presumed to be illegal;

5. facilities with a care program may have greater leeway to inquire about disability or establish policies based on health status as a "requirement of tenancy;"

6. even if a disabled person does not meet standards applied equally to all applicants and residents, the housing provider or business must make an exception that reasonably accommodates the individual;

7. no business needs to fundamentally alter its program to accommodate a disabled person;

8. differences between the Fair Housing Act, which applies to dwellings, and the Americans with Disabilities Act, which applies to public accommodations, can determine the lawfulness of policies governing subjects such as the use of assistance animals and eligibility for health benefit programs; and

9. considerations such as the cost of services, availability of staff and facilities, rights of other residents, licensure limitations, and safety may support policy differences based on disability, but each situation must be carefully examined to develop a defensible course of action.

Contact Legal Counsel in the Event of a Claim of Discrimination
In the event of a claim of discrimination, legal counsel should be contacted immediately to help preserve the rights of the property's owner and operator, conduct an investigation, evaluate and respond to the claim, and bring as much of the analysis of the claim as possible within the attorney-client privilege, in the event of possible litigation.

With careful analysis of existing policies and practices, advertising, and staff conduct, and a willingness to modify questionable practices, retirement communities should be able to reduce significantly their risk of a charge of unlawful discrimination.

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