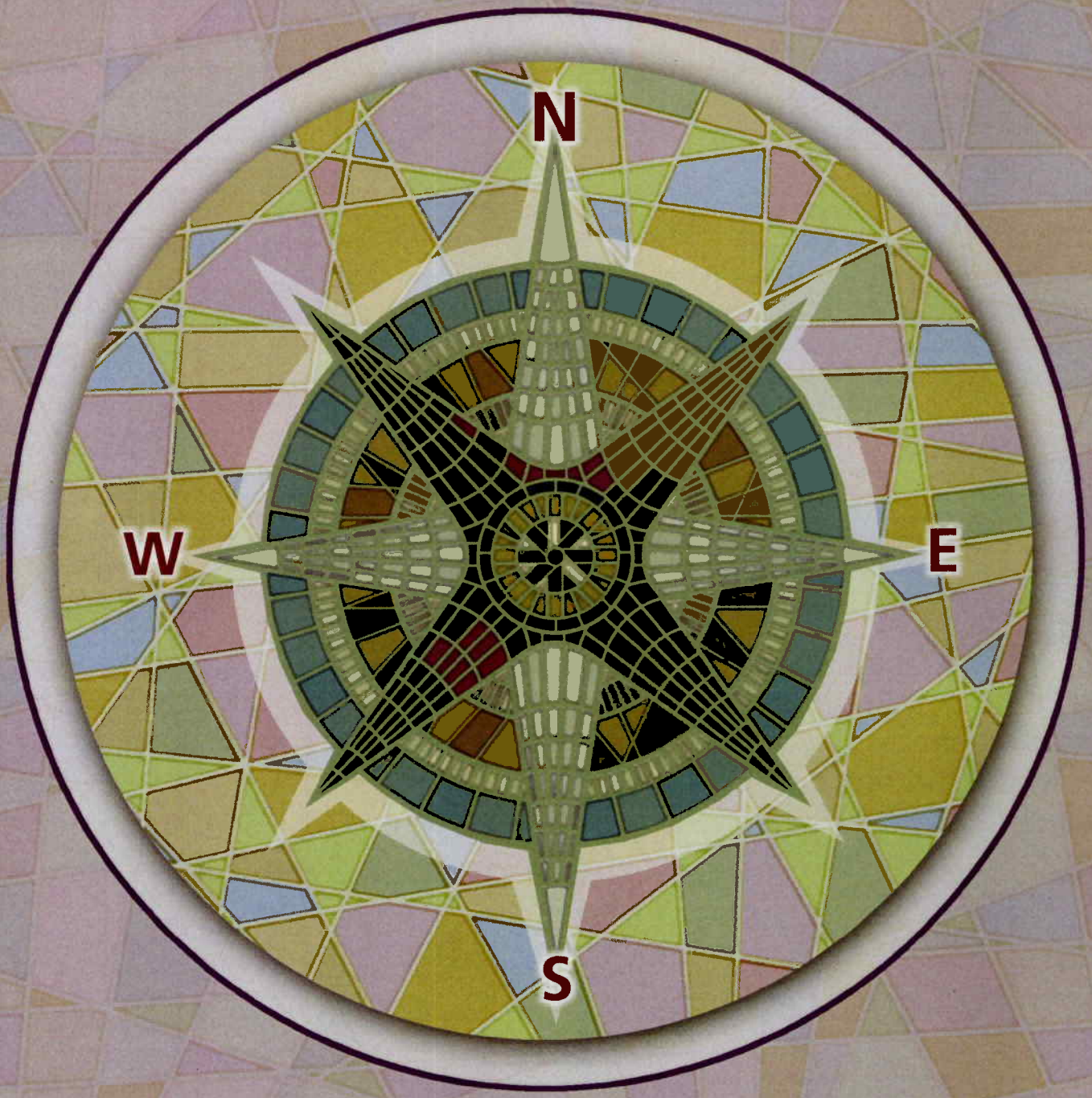
FAIR HOUSING COMPLIANCE GUIDE

Charting The Way

Fourth Edition



American Seniors Housing Association

HansonBridgett

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AMERICAN
SENIORS
HOUSING
ASSOCIATION

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ABOUT THE AUTHOR

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

AMERICAN SENIORS HOUSING ASSOCIATION

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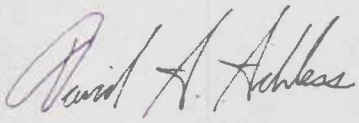
INTRODUCTION

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

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



David S. Schless
President
American Seniors Housing Association

EXECUTIVE SUMMARY

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

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

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

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

USE OF THIS GUIDE

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

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

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

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

FEDERAL ANTIDISCRIMINATION STATUSES

I. THE FAIR HOUSING ACT

A. The 1968 Act

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

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

B. The Fair Housing Amendments Act of 1988

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

1. Familial Status

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

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

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

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

(a) housing provided under any state or federal program determined by HUD to be specifically designed and operated to assist elderly persons [such as housing established under the Section 202 program], or

(b) housing intended for, and solely occupied by, persons 62 years of age or older, or

(c) housing intended and operated for occupancy by at least one person 55 years of age or older per unit.

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

A new community, or one converting from non-seniors housing, may qualify by asserting the exemption and reserving all unoccupied units for residency by at least one person age 55 or older, until at least 80 percent of the units are occupied by such a person. Previously, properties seeking to qualify under subpart (c) were also required to show that they provided "significant facilities and services" specifically designed to meet the physical or social needs of older persons, or that such facilities and services were not practicable. However, the significant facilities and services rule was repealed by Congress on December 28, 1995.[6]

2. Disabilities

(a) Definition

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

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

[6] Pub. L. 104-76.

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

(b) Application in General

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

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

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

(c) Access to Facilities and Services; Reasonable Accommodation

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

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

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

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

9 See cases cited in footnotes 28 and 29 below.

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

(2) a refusal to make "reasonable accommodations" in rules, policies, practices, or services, when such accommodations are necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling; and

(3) for multifamily dwellings designed and constructed for first occupancy after March 13, 1991, failure to provide certain design features that enhance accessibility for the disabled.[11]

(d) Prohibited Inquiries

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

C. Religious/Private Club Exemptions

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

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

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

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

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

D. Enforcement of the Fair Housing Act

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

Administrative law judges may award compensatory damages, plus civil penalties of up to $11,000 for a first offense, up to $27,500 for a second offense within a five-year period, and up to $55,000 for a third offense in a seven-year period. Plaintiffs may recover compensatory and punitive damages in a civil lawsuit. Attorneys fees are also recoverable by the prevailing party in either the administrative or the federal court forum. The Equal Access to Justice Act[13] permits a prevailing defendant to recover attorneys' fees and costs against the United States where the government's position was not "substantially justified."

II. THE AMERICANS WITH DISABILITIES ACT

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

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

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[13] 28 U.S.C. §2412.

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

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

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

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

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

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

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

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

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

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

In 2008, Congress passed the ADA Amendments Act[16] which rejects several Supreme Court cases that strictly interpreted the definition of a disability covered by the Act. The Amendments expand the scope of the major life activities and bodily functions that, if impaired, will be covered by the law.[17] The law also states that mitigating measures, such as medication and assistive services or devices, other than eyeglasses and contact lenses, shall not be considered in assessing whether a disability is present. An impairment that is episodic or in remission will be covered, but impairments that are transitory (up to 6 months) and minor, are not included. The Act further specifies that a reasonable accommodation need not be made to a person who is only "regarded" as being disabled.

III. THE AGE DISCRIMINATION ACT OF 1975

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

There are four exceptions to the Act:

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

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16 P.L. 110-324.

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

imation 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).

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.C.* 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.

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

Federal civil rights laws generally do not prohibit discrimination on the basis of marital status or sexual orientation. However, numerous states and municipalities prohibit discrimination in housing on one or both grounds. For example, reported court cases[18] 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 find no violation. It should also be recognized that distinctions based on marital status are sometimes construed to be sex discrimination.[19]

In addition, while the U.S. Department of Justice, Civil Rights Division, recognizes that the federal Fair Housing Act does not prohibit discrimination on the basis of a person's sexual orientation, it will investigate complaints on a case-by-case basis to determine whether another form of discrimination is present, such as sex discrimination. Some states, such as California, prohibit unreasonable discrimination by business establishments, including discrimination on the basis of sexual orientation.

Seniors housing operators should be very careful when considering enforcement of occupancy conditions based on marital status or sexual orientation, that they fully appreciate and comply with the state and local discrimination laws, as interpreted by the courts, and with federal sex discrimination laws.

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[18] 33 ALR 4th 964

[19] See, e.g., 34 ALR Fed. 648.

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, handicap, 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 book 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.

B. Language

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, describing a retirement 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," or "vivacious." 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. *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.

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 may very well be sponsored by religiously affiliated groups or ethnic or cultural societies, advertising copy should be written in a way that makes 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.

Obviously, seniors housing communities need to describe themselves as targeting applicants within a certain age group. This is permitted if the residence qualifies 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.I. 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 print advertisements in which the racial composition of people appearing in photographs was alleged to indicate a bias in the property's occupancy policies. Some advertising discrimination claims have led to significant judgments or settlements against retirement communities or other multifamily housing providers, including a 1997 settlement with a Michigan retirement community for $569,000. The use of all-white models in retirement community 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.

In order 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 that has a discriminatory impact

upon prospective applicants. Therefore, it is risky for retirement 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.

Advertising discrimination claims based on disability are less prevalent than those based on race. Nevertheless, retirement 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. This can not only help avoid a discrimination claim, but may also more accurately represent the actual population in whose midst residents can expect to live.

D. 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, and (4) taking affirmative steps to place advertising in media that are oriented to minority and disabled populations. 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.*

VII. ACCEPTANCE AND RETENTION OF RESIDENTS

A. In General

Because of the inherent characteristics of most retirement communities, their criteria for screening and accepting prospective residents for occupancy frequently raise discrimination issues, 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 CCRC 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.

Generally, HUD rules place the initial burden on tenants to request accommodation and to propose the specific accommodations they wish to see implemented. The property owner is then responsible for determining whether the suggested accommodations are reasonable, and if they are, for deploying them. A tenant must prove that the requested accommodation is necessary to afford him/her an equal opportunity to use and enjoy the dwelling.[20] Generally, property owners must pay for reasonable accommodations, but not for reasonable modifications.[21]

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.[22]

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[20] *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).

[21] *Fagundes v. Charter Builders, Inc.*, 2008 U.S. Dist. LEXIS 9617 (N.D. Cal. Jan. 29, 2008) (unpublished).

[22] *March 5, 2008 Joint Statement of HUD & DOJ - Reasonable Modifications under the Fair Housing Act.*

Several court decisions have required property owners and managers to attempt a dialogue with problem occupants about proposed accommodations, before rejecting them as unreasonable, even when the occupant posed a health or safety risk to others.[23] It is unclear whether courts will similarly shift the responsibility to explore reasonable accommodation options in other factual contexts.

B. Requirements of Tenancy, Independent Living and Private Aides

The Fair Housing Act, the Americans with Disabilities Act, 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."[24] For example, a property owner may inquire whether applicants are capable of paying rent, of living peaceably in a group setting, 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.* regarding making limited financial exceptions as a reasonable accommodation.

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.[25] Later-developed HUD guidelines 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. However, at times, the HUD Occupancy Handbook has categorically stated that it is unlawful to ask if an applicant is capable of living independently.

In one ruling that received national attention, a federal district court held that an independent living property had a reasonable business justification for having a policy of terminating the occupancy of disabled residents whose unmet care needs posed a danger to themselves or others.[26] 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.[27]

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23 *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).

24 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.

25 *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990).

26 Greater Napa Fair Housing v. Harvest Redwood Ret. Residence, L.L.C.., 2007 U.S. Dist. LEXIS 76515 (N.D. Cal. Oct. 1, 2007).

27 LaFlamme v. New Horizons, Inc., 514 F. Supp. 2d 250 (D. Conn. 2007).

Courts generally have assumed that residents of retirement communities where care is offered are handicapped within the meaning of the Fair Housing Amendments Act.[28] However, one case suggests that residents of a to-be-developed continuing care retirement community may not be considered *de facto* disabled, and that a local municipality need not approve a special planning permit as a reasonable accommodation.[29]

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

Retirement communities that do not offer services designed to care for people with disabilities, such as senior apartment 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. A community offering care to its residents should be able to insist that residents use the community's staff, rather than private aides, so that the quality of care can be managed.

C. Financial Accommodations

Whether a disabled person must bear the cost 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.[30] 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.[31] On the other hand, where it was found that a disabled resident

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[28] *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)).

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

[30] *U.S. v. California Mobile Home Park Management*, 29 F. 3d 1413 (9th Cir. 1994).

[31] 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.

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.[32]

Property owners often establish purely 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.[33] The courts reasoned that the rejected applicants' financial status, not their disabilities, prevented them from qualifying for the rentals. In 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.[34]

D. 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 remain "sober" 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.[35] However, courts may strictly constrain the ways in which a property owner responds to such threats.

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.[36] Likewise, a skilled nursing facility was required to accept a

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[32] *Boulder Meadows v. Saville,* 2 P. 3d 131 (Co. Ct. App. 2000).

[33] 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).

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

[35] 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).

[36] *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).

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.[37] 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.[38] 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.[39]

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.[40] 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.[41]

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. 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.[42]

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37 *Wagner v. Fair Acres Geriatric Center,* 859 F. Supp. 776 (E.D. Pa. 1994), rev'd 49 F.3d 1002 (3d Cir. 1995).

38 See, e.g., *Arnold Murray Construction, LLC v. Hicks,* 621 N.W. 2d 171 (S.D. 2001).

39 *Roe v. Housing Authority of the City of Boulder,* 909 F. Supp. 814 (D. Colo. 1995).

40 *Chevron USA v. Echazabal,* 536 U.S. 73, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (U.S.S.C. 2002).

41 *Greater Napa Fair Housing v. Harvest Redwood Ret. Residence, L.L.C.,* 2007 U.S. Dist. LEXIS 76515 (N.D. Cal. Oct. 1, 2007).

42 *Groner v. Golden Gate Gardens Apartments,* 250 F. 3d 1039 (6th Cir. 2001).

E. Level of Care Needs

Communities that do not provide care 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.* 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 needs, the operator is exposed to potential liability and should encourage 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.[43] *See Section VII.D. regarding danger to oneself.*

For properties that do provide care, licensing regulations, fire safety rules, standards of practice in the industry, and the retirement community's own array of staffing, services and amenities should be used to establish the criteria for admission, continued stay, and transfer of residents.

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. In such cases, reliance on licensing regulations, strong, clear language in the admission agreement, and work with physician and family are important factors in reaching a resolution.

In one significant case,[44] 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. Plaintiff was assisted by legal counsel from the American Association of Retired Persons. 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.[45]

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[43] 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).

[44] *Herriot v. Channing House, 2008 U.S. Dist.* LEXIS 65871 (N.D. Cal. 2008) (not for publication).

[45] 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.

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 U.S. Department of Justice alleged that it was unlawful discrimination to establish separate areas in the building for residents receiving licensed care and for those who do not.[46]

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, 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 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 a higher level of care.

F. Cost of Care and Utilization Levels

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.

All health screening documents should be carefully reviewed for compliance with antidiscrimination laws. General health questions unrelated to the subjects discussed in this Section VII and that are not germane to the seniors housing community'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

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46 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.usdoj.gov/crt/casebrief.php.

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.

G. Walkers, Wheelchairs and Motorized Carts

A major motivation behind the disability discrimination laws was to protect ambulation-impaired users of wheelchairs and similar appliances. Retirement 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). 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.

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.[47] 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.[48] 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 residents who might be in close proximity. Outright prohibition of motorized scooters by a retirement community is considered unlawful by the U.S. Department of Justice.[49] 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.[50]

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47 *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.usdoj.gov/crt/casebrief.php.

48 See *U.S. v. Covenant Retirement Communities,* (consent order; E.D. Cal. 2007). U.S. Department of Justice disability complaints, settlements and consent decrees can be found at http://www.usdoj.gov/crt/casebrief.php.

49 See *U.S. v. Savannah Pines* (consent decree; D. Neb. 2003), where a motorized cart exclusion policy was challenged as unlawfully discriminatory. U.S. Department of Justice disability complaints, settlements and consent decrees can be found at http://www.usdoj.gov/crt/casebrief.php.

50 *U.S. v. Hillhaven,* 960 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 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.[51] 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.[52]

In one case brought by the U.S. Department of Justice 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.[53]

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. *See Section VIII.A.* for further discussion of limitations on the use of walkers, wheelchairs and motorized carts in dining rooms and other common areas.

H. Animals

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.[54] In certain circumstances, animals that provide emotional support to a resident with a mental disability must also be permitted.[55]

Some tenants seeking accommodation for a guide or support animal have been made to demonstrate that the animal has received proper training in assisting disabled individuals.[56] In the case of a mental disorder, the animal at issue must be peculiarly suited to ameliorate the unique problems of the mentally disabled. In other instances, however, courts have not required evidence of proper training, as long as the plaintiff can demonstrate that, considering all of the circumstances, it is

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51 *Grassi v. Country Manor Apts.* (2001 WL 1132715; HUD ALJ).

52 Joint statement of HUD and the Department of Justice (May 2004).

53 *U.S. v. Covenant Retirement Communities,* (consent order; E. D. Cal. 2007). U.S. Department of Justice disability complaints, settlements and consent decrees can be found at http://www.usdoj.gov/crt/casebrief.php.

54 See, *e.g., Bronk v. Ineichen,* 54 F. 3d 425 (7th Cir. 1995) (deaf resident).

55 *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).

56 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)

a reasonable accommodation to allow the animal to remain on the premises.[57] Only accommodations that are "reasonable" are required, and a property owner can require that a service animal not be a nuisance.[58] Courts have focused on whether the animal's potential benefit to the tenant outweighs the owner's interest in excluding the animal. Generally, evidence of training will not be required for emotional support animals if the animal helps mitigate the symptoms of a tenant's mental illness.

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.[59]

I. Age

By definition, planned seniors communities limit occupancy on the basis of age, usually by means of an entry-level 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 higher than those set forth in the Fair Housing Act has not been litigated, but 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.

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[57] 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).

[58] *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).

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

J. Use 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 be cautious in 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.[60]

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 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. *See also Section VII.B.*

V. 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. Dining Rooms and Other Common Areas

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

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60 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.

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."[61] 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.[62]

Claims that a "no-wheelchairs" policy is necessary for fire safety reasons need to be supported by convincing evidence. 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.[63]

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.[64]

In residences that have multiple levels of care, with different dining rooms dedicated to the different levels, a recurrent problem is that residents from one area want to eat in the other dining room (e.g., an assisted living resident wants to eat in the "main" dining room). In at least one case, an operator's policy of requiring certain residents to eat in the separate "dependent" dining room was upheld, where the resident needed assistance with eating and her presence in the main dining room would have been disruptive and interfered with the other residents' peaceful enjoyment of their meals.[65]

Other potential grounds for maintaining separate facilities[66] 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

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61 *Weinstein v. Cherry Oaks Retirement Community,* 917 P. 2d 336 (Colo. Ct. App. 1996).

62 *Morgan v. Retirement Unlimited,* (No. 139189, Va. Cir. Ct. 1995).

63 But see, *Hyatt v. Northern California Presbyterian Homes and Services,* (U.S.D.C. N.D. Cal, #C08-03265, 2008) which challenges limitations on use and storage of walkers in crowded dining room areas.

64 *United States v. Hillhaven,* 960 F. Supp. 259 (D. Utah 1997).

65 *Appenfelder v. Deupree St. Luke,* 1995 U.S. Dist. LEXIS 21960 (S.D. Ohio, Oct. 25, 1995).

66 But see *U.S. v. Vancouver Housing Authority,* note 46 above.

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.

B. 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 a *separate* benefit 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. However, 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, seniors housing communities should consider designing new transportation programs to accommodate mobility-impaired customers wherever possible.

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.[67] 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.[68]

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.

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[67] *Shapiro v. Cadman Towers, Inc.*, 51 F. 3d 329 (2d Cir. 1995).

[68] *Jankowski Lee & Associates v. Cisneros*, 91 F. 3d 891 (7th Cir. 1996).

RECOMMENDATIONS

Review Policies and Practices

Seniors housing communities should periodically conduct an audit of their policies and procedures 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, eviction and resident transfer policies, 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 retirement community's program.

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.

American Seniors Housing Association

5100 Wisconsin Avenue, NW Suite 307 ▾ Washington, DC 20016
Phone: 202.237.0900 ▾ Fax: 202.237.1616
www.seniorshousing.org