

Seniors Housing Guide to Fair Housing and ADA Compliance

Fifth Edition | By Paul Gordon, Esq.



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BALANCING RIGHTS AND RISKS



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**AMERICAN
SENIORS
HOUSING
ASSOCIATION**

Living Longer Better



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For more information, visit the www.SeniorCareLaw.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, Fifth 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.

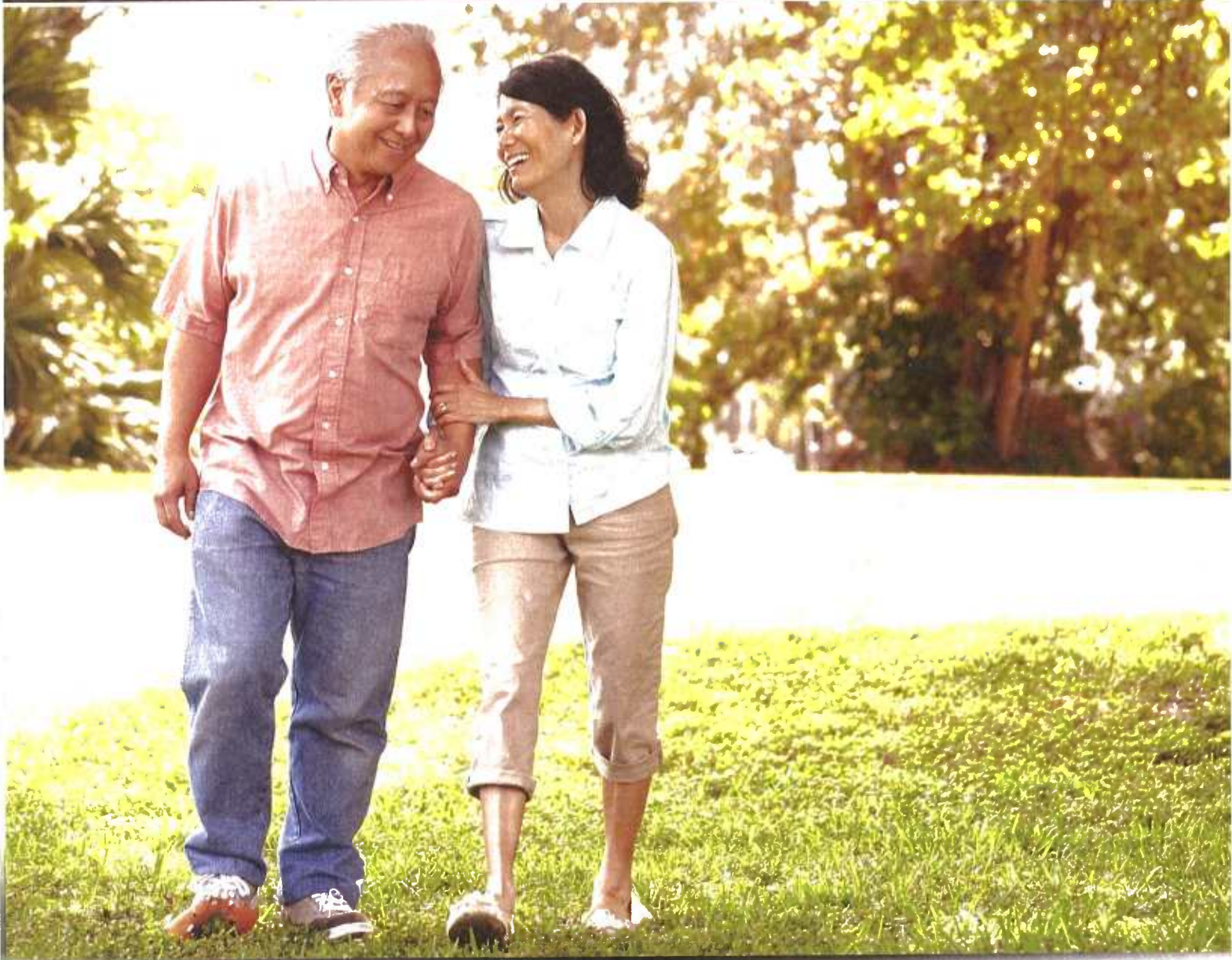
A handwritten signature in black ink that reads "David S. Schless". The signature is written in a cursive, flowing style.

David S. Schless

President

American Seniors Housing Association

EXECUTIVE SUMMARY



THE SENIORS HOUSING INDUSTRY continues to operate under increasing scrutiny regarding its fair housing practices. Since the 4th Edition of this Handbook was published, the U.S. Department of Justice (DOJ), the U.S. Department of Housing and Urban Development (HUD), and other fair housing enforcement agencies and advocacy groups have stepped up the level of challenges directly targeting seniors housing properties for allegations of disability discrimination.

Over the past year, the DOJ's focus has been to challenge continuing care retirement community (CCRC) dining room policies that would exclude private caregivers and assisted living residents from independent living dining rooms. Also, HUD has more strictly circumscribed the kinds of questions about a resident's health needs that can be asked by independent living providers. On the other hand, HUD has ruled that CCRCs may legitimately ask prospective residents questions about their health status, notwithstanding the Fair Housing Act's broad prohibitions against disability-related questions as a condition of providing housing. 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 legal counsel in such a process, as the issues can be subtle and complex.

Every organization should also 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.

Fair housing is a contentious and rapidly 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 living¹ assisted living and CCRCs. 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.

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.1).

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 ANTI-DISCRIMINATION STATUTES



I. 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. 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.⁷

³ 24 USC 2000d

⁴ 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.

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 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.

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.⁸

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 coverage⁹ 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.¹⁰ 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.¹¹
- (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 to continuing care retirement communities (CCRCs) even though they include health care and other services along with the housing component. *See Section VII.C.2.*

⁸ The HUD Occupancy Handbook 4350.3 (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.

⁹ 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).

¹⁰ But see ADA Amendments Act of 2008, discussed in Section II, below.

¹¹ See cases cited in Note 39 below.

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.¹²

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.¹³

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 (applicable to government subsidized dwellings) and still good law, new multi-family housing projects (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.

¹² 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).

¹³ This Guide does not address in detail the architectural or construction standards required under the Fair Housing Act or the Americans with Disabilities Act.

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 CFR 100.205(c) *emphasis added*)."

There is no regulation with specific measurements or rules regarding access to sinks or appliances.

The requirements for disabled access through "adaptable design" features in kitchens is 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.

(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 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.¹⁴

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." 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 \$16,000 for a first offense, up to \$42,500 for a second offense within a five-year period, and up to \$70,000 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

¹⁴ 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).

or the federal court forum. The Equal Access to Justice Act¹⁵ 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.

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."¹⁶

A. Covered Disabilities

In 2008, Congress passed the ADA Amendments Act¹⁷ 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.¹⁸ 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 accommodations. 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

Long-term care facilities and nursing homes are expressly covered by ADA regulatory guidelines.

¹⁵ 28 U.S.C. §2412.

¹⁶ The ADA also covers discrimination in employment, telecommunications, and public services.

¹⁷ P. L. 110-325.

¹⁸ 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.

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

The architectural standards required by the Fair Housing Act and the ADA are quite different. 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.¹⁹ The architectural standards are very complex and beyond the scope of this handbook.

Under Section 504 of the Rehabilitation Act of 1973 (applicable to government subsidized dwellings) and still good law, new multifamily housing projects (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 Fair Housing Act added several requirements for disabled persons’ access to residential housing,²⁰ reflecting a distinction between “readily accessible” and “adaptable” features of the building:

“ . . . (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.”²¹

¹⁹ 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>.

²⁰ The law applies to covered multifamily dwellings for first occupancy after March 13, 1991 with a building entrance on an accessible route.

²¹ 24 CFR 100.205(c)

Rather than adopting specific, detailed design regulations, 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. For example, the guidelines for kitchens and bathrooms require that an individual in a wheelchair can maneuver about the space, allowing a parallel approach to a sink, refrigerator or cooktop, or if a parallel approach is not possible, removable base cabinets to allow knee space for a forward approach to a sink or cooktop.

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.

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.

Allegations of violations of the ADA are investigated and prosecuted by the U.S. Department of Justice.

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).

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.D.3.* 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.

Generally, it is not a violation of the Fair Housing Act to require applicants for residence to meet income standards...

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 cases²² 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.²³

In addition, while the DOJ, 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. In its discussion of federal antidiscrimination laws the DOJ notes 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."²⁴ Some states, such as California, prohibit unreasonable discrimination by business establishments, including discrimination on the basis of sexual orientation.

However, 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.²⁵

Seniors housing operators should be very cautious, 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.

Seniors housing operators should be very cautious, when considering enforcement of occupancy conditions...

²² 33 ALR 4th 964

²³ See, e.g., 34 ALR Fed. 648.

²⁴ Department of Justice Civil Rights Division, "Protecting the rights of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Individuals, 2009

²⁵ *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, 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 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.²⁶

B. Occupancy Preferences and Limitations

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," 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. *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., GLBT, Danish, Jewish) but emphasize that all applicants are welcome.

²⁶ *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 192 L. Ed. 2d 514; 2015 U.S. Lexis 4249 (2015).

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.

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.E. 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 seniors housing communities or other multifamily housing providers, including a 1997 arbitration award against a Michigan retirement community for \$569,000.²⁷ 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.

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 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

²⁷ *Fair Housing Center of Metropolitan Detroit v. Henry Ford Village* (unreported) (1997).

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, 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. 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. 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. 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."²⁸ For example, an owner/operator 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.3.* regarding making limited financial exceptions as a reasonable accommodation.

²⁸ 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 I.B.2.*

The resident screening and occupancy decision process can be a minefield...

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 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.

Every senior living community should have a reasonable accommodation policy. Generally, HUD rules²⁹ 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 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.³⁰ Generally, property owners must absorb any additional costs associated with the accommodations (in their policies and procedures). However, if the request is for a modification (of the physical plant) the resident is responsible for associated costs.³¹

²⁹ 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.

³⁰ *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).

³¹ *Fagundes v. Charter Builders, Inc.*, 2008 U.S. Dist. LEXIS 9617 (N.D. Cal. Jan. 29, 2008) (unpublished).

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.³²

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.³³ 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.³⁴

The HUD Occupancy Handbook³⁵ 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 guidelines³⁶ 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.

³² March 5, 2008 Joint Statement of HUD & DOJ - *Reasonable Modifications under the Fair Housing Act*.

³³ *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).

³⁴ *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990).

³⁵ HUD Occupancy Handbook 4350.3, Section 2-31.

³⁶ 60 *Fed. Reg.* 2,658 at 2,600, Jan. 10, 1995.

**Use of an
“independent living”
admission criterion
can be confusing...**

The term “independent living” is ubiquitous in the senior living field to describe a type of living environment where care is not provided by management. Significantly, federal statute³⁷ 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.”³⁸

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.F, regarding application forms.*

Courts generally have assumed that residents of retirement communities where care is offered are handicapped within the meaning of the Fair Housing Amendments Act.³⁹ 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 as “independent living residents,” and that a local municipality need not approve a special planning permit as a reasonable accommodation to disabled persons.⁴⁰ 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 it may hurt 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

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 needs, the operator is exposed to potential liability and should encourage the resident and his or her family to take care of

³⁷ 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.”

³⁸ *See Oakmont Senior Communities of Michigan* order, Section VII.B.2.

³⁹ *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).

⁴⁰ *Budnick v. Town of Carefree*, 518 F. 3d 1109 (9th Cir. 2008).

any obviously unmet needs. If the resident and his or her representatives do not cooperate, it may become necessary to evict the resident.⁴¹ *See Section VII.D.1. regarding danger to oneself.*

Independent living properties must consider some sensitive issues. While not offering care, they often have certain 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. Along with the presence of private duty aides, these measures can blur the lines between levels of care⁴² and may contribute to “acuity creep” and residents’ perception that they have a “right” to “age in place” and may never need to move because of increasing disabilities that often accompany increasing age. 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.

Court and Agency Decisions

Fortunately, 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 having a policy of terminating the occupancy of disabled residents whose unmet care needs posed a danger to themselves or others.⁴³ 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.⁴⁴

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. On November 3, 2014, HUD announced a conciliation agreement with Oakmont Senior Communities of Michigan and Huntington Management regarding practices that HUD alleged violate the Fair Housing Act’s disability discrimination prohibitions. Among other things, the unlicensed independent living provider collected medical information from residents and required them to be screened before returning from a hospitalization.

Fortunately, 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.

⁴¹ 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).

⁴² See Section VII.C.2.

⁴³ *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 *La Flamme v. New Horizons, Inc.*, 514 F. Supp. 2d 250 (D. Conn. 2007).

In the 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.

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 array of 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.⁴⁵ 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.⁴⁶

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*,⁴⁷ 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.⁴⁸

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, many of which are described in *Sections VII.D and VIII.*

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

2. MULTI-LEVEL CARE SETTINGS

Some care facilities, such as CCRCs, 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.⁴⁹

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 admission 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.

⁴⁵ See *Potomac Group Home v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993), and cases cited in Note 65.

⁴⁶ See *Wagner v. Fair Acres Geriatric Center*, 859 F. Supp. 776 (E.D. Pa. 1994), *rev'd* 49 F.3d 1002 (3d Cir. 1995).

⁴⁷ 971 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).

⁴⁸ 24 C.F.R. 100.202(c); See discussion in Section VII.A.

⁴⁹ See 26 U.S.C. 57872, 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.”

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.”

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 included social services and similar programs for their residents and concluded that both the Fair Housing Act and the ADA should apply. 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.”⁵⁰

In one significant case, 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 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.⁵¹

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).⁵²

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.⁵³

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

⁵⁰ 56 Fed. Reg. 35,544, 35,551-2 (July 26, 1991).

⁵¹ 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.

⁵² *Herriot v. Channing House*, 2009 U.S. Dist. LEXIS 6617, January 29, 2009, (N.D. Cal.)

⁵³ *Herriot v. Channing House*, 2008 U.S. Dist. LEXIS 65871 (N.D. Cal. 2008).

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.⁵⁴

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 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.

3. HEALTH BENEFIT UNDERWRITING

The ADA exempts providers of medical benefit plans from prohibitions against discrimination on the basis of disability⁵⁵ 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 offer 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

⁵⁴ 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>.

⁵⁵ 42 U.S.C. §12201(1) (Emphasis added).

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.

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.

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.

In two similar Opinions,⁵⁶ 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.⁵⁷ 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 the 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.⁵⁸

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 the 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

⁵⁶ Longhorn Village and Westminster Manor “No Reasonable Cause” determinations, HUD Region VI, June 12, 2012 and April 21, 2014.

⁵⁷ citing 26 USC §7872.

⁵⁸ 56 Fed. Reg. 35,544, 35,551-2 (July 26, 1991).

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.

D. Factors Incidental to Resident Health

1. 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.⁵⁹ 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.⁶⁰ 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.⁶¹ 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.⁶² Thus, where a mentally disturbed resident had already committed a battery against and threatened a resident, and used obscene

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⁵⁹ 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. Bridgewater*, 871 N.E. 2d 1107 (Mass. App. Ct. 2007).

⁶⁰ *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).

⁶¹ *Wagner v. Fair Acres Geriatric Center*, 859 F. Supp. 776 (E.D. Pa. 1994), *rev'd* 49 F.3d 1002 (3d Cir. 1995).

⁶² See, e.g., *Arnold Murray Construction, LLC v. Hicks*, 621 N.W. 2d 171 (S.D. 2001).

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.

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.⁶³

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.⁶⁴ 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.⁶⁵

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.⁶⁶

2. ANIMALS

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.⁶⁷ In certain circumstances, animals that provide emotional support to a resident with a mental disability must also be permitted.⁶⁸

Some residents seeking accommodation for a guide or support animal have been made to demonstrate that the animal has received proper training in assisting disabled individuals.⁶⁹ 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,

⁶³ *Roe v. Housing Authority of the City of Boulder*, 909 F. Supp. 814 (D. Colo. 1995).

⁶⁴ *Chevron USA v. Echazabal*, 536 U.S. 73, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (U.S.S.C. 2002).

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

⁶⁷ See, e.g., *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995) (deaf resident).

⁶⁸ *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).

⁶⁹ 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)

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.⁷⁰ Only accommodations that are “reasonable” are required, and a property owner can require that a service animal not be a nuisance.⁷¹ 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. This is an evolving area of law and is being tested broadly relative to the types of animals requested to provide emotional support.

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.⁷²

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.⁷³

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 its handler does not take effective action to control it; (2) the animal is not housebroken (i.e., trained so that, absent illness or accident, the animal controls its waste elimination); or (3) the animal poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level by a reasonable modification to other policies, practices and procedures.”⁷⁴

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 circumscribe the kinds of animals that will qualify:

The Fair Housing Act requires accommodation of a disabled person’s “assistance animal,” (which includes service animals and emotional support animals) but HUD guidelines circumscribe the kinds of animals that will qualify.

⁷⁰ 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).

⁷¹ *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).

⁷² See 28 C.F.R. § 35.104; 28 C.F.R. § 36.104.

⁷³ *DiLorenzo v. Costco Wholesale Corp.*, 515 F. Supp. 2d 1187 (W.D. Wash. 2007).

⁷⁴ 28 C.F.R. § 35.136; 28 C.F.R. § 36.302(c).

For purposes of reasonable accommodation requests, neither the FHA nor Section 504 requires an assistance animal to be individually trained or certified.

“An assistance animal is not a pet. It is an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability. Assistance animals perform many disability-related functions, including but not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to sounds, providing protection or rescue assistance, pulling a wheelchair, fetching items, alerting persons to impending seizures, or providing emotional support to persons with disabilities who have a disability-related need for such support. For purposes of reasonable accommodation requests, neither the FHA nor Section 504 requires an assistance animal to be individually trained or certified.”⁷⁵

Therefore, the animal must “...work, provide assistance, perform tasks or services for the benefit of a person with a disability, or provide emotional support that alleviates one or more of the identified symptoms or effects of a person’s existing disability.”

To qualify an “emotional support animal,” the housing provider may ask for documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability.

The request may be denied if: (1) the specific assistance animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation, or (2) the specific assistance animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation. Breed, size, and weight limitations may not be applied to an assistance animal.

According to HUD, denial of a request must be based “individualized assessment that relies on objective evidence about the specific animal’s actual conduct — not on mere speculation or fear about the types of harm or damage an animal may cause and not on evidence about harm or damage that other animals have caused.”

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 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.

⁷⁵ HUD Notice: Service Animals and Assistance Animals for People with Disabilities in Housing and HUD Funded Programs; April 25, 2013.

Court Cases

A number of court cases have decided questions regarding: the qualifications of animals and supporting documentation,⁷⁶ what kinds of questions can be asked about disability and the need for an animal,⁷⁷ the credibility of the person making the request,⁷⁸ the conditions under which an otherwise-qualified animal may be permitted to remain on the premises,⁷⁹ and what constitutes denial of an accommodation.⁸⁰

3. FINANCIAL ACCOMMODATIONS

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.⁸¹ 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.⁸² 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.⁸³

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,

⁷⁶ 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).

⁷⁷ 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).

⁷⁸ 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).

⁷⁹ 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): .

⁸⁰ 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).

⁸¹ *U.S. v. California Mobile Home Park Management*, 29 F. 3d 1413 (9th Cir. 1994).

⁸² 107 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.

⁸³ *Boulder Meadows v. Saville*, 2 P. 3d 131 (Co. Ct. App. 2000).

even when the applicant's financial status was directly attributable to a disability.⁸⁴ 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.⁸⁵

E. 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.

F. 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 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.⁸⁶

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.

⁸⁴ 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).

⁸⁵ *Giebler v. M & B Assoc.*, 343 F.3d 1143 (9th Cir. 2002).

⁸⁶ *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.

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.C.*

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). 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.⁸⁷ Residential communities (senior apartments and independent living communities)

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.

⁸⁷ *U.S. v. Resurrection Retirement Community*, (consent order with a \$200,000 fine; N.D. Ill. 2002). U.S. Department of Justice disability complaints,

should refrain from steering applicants using ambulation aides to care facilities if they can be reasonably accommodated in the residential setting.⁸⁸ 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.⁸⁹ 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.⁹⁰

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.⁹¹ 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.⁹²

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.⁹³

settlements and consent decrees can be found at <http://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#disabil>.

⁸⁸ 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>.

⁸⁹ 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>.

⁹⁰ *U.S. v. Hillhaven*, 96 F. Supp. 259 (D. Utah 1997), where summary judgment was entered for the retirement community defendant.

⁹¹ *Grassi v. Country Manor Apts.* (2001 WL 1132715; HUD ALJ).

⁹² Joint statement of HUD and the Department of Justice (May 2004).

⁹³ *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>.

In another DOJ Consent Order,⁹⁴ 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.

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.B.* 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

MOBILITY AIDS

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."⁹⁵ 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.⁹⁶

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.⁹⁷

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.

⁹⁴ *U.S. v. Rathbone Retirement Community* (S.D. Ind. 2009) <http://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#disabil>.

⁹⁵ *Weinstein v. Cherry Oaks Retirement Community*, 917 P. 2d 336 (Colo. Ct. App. 1996).

⁹⁶ *Morgan v. Retirement Unlimited*, (No. 139189, Va. Cir. Ct. 1995).

⁹⁷ 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.

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.

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.⁹⁸

USE OF 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 resident wants to eat in the "main" dining room). In one case,⁹⁹ 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 facilities¹⁰⁰ 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 May 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.

⁹⁸ *United States v. Hillhaven*, 960 F. Supp. 259 (D. Utah 1997).

⁹⁹ *Appenfelder v. Deupree St. Luke*, 1995 U.S. Dist. LEXIS 21960 (S.D. Ohio).

¹⁰⁰ But see *U.S. v. Vancouver Housing Authority*, Note 54 above.

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 requires Harbor's Edge to create a claimant's fund of \$350,000 and pay a \$40,000 fine. In addition, Harbor's Edge must 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.

The dining room and events policy requires 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 may be made by the nurse, physician or level of care committee, which will then refer the matter to the Fair Housing Compliance Officer who will help determine whether a reasonable accommodation may be made to allow access. Health center residents may 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 treats all health center residents who have resided at Harbor's Edge for more than 100 consecutive days as of May 11, 2015 as having the same dining privileges as independent living residents who paid an entrance fee and entered into a continuing care contract. The Order does not require that future health center residents have such privileges. However, a direct admit health care resident may dine in the independent living dining room as a guest of an independent living resident.

EATING ASSISTANCE

On October 5, 2015, the U.S. Department of Justice (DOJ) published a Consent Order in the matter of *United States v. Lincolnshire Senior Care, LLC, dba Sedgebrook, and Life Care Services LLC*.

Sedgebrook is a CCRC in Illinois which 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 this settlement, the owner and manager of Sedgebrook will amend corporate policies 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 is 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 is required to adopt a new dining room and events policy, appoint a Fair Housing Compliance Officer, and submit reports to DOJ on relative to dining room and event participation issues for a period of three years.

The 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 states that Sedgebrook's management company will implement similar policies in over 100 communities it owns or manages across the country.¹⁰¹

ACCESS TO BINGO

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 is investigating this incident to determine if there has been a fair housing violation. Whether the CCRC management condoned or enforced exclusionary rules about mixing of residents from different levels of care, or whether this is merely an exercise by residents of their prerogative to socialize with whomever they want, remains to be seen. It also raises a question about

It also raises a question about whether health center residents have rights to use independent living facilities...

¹⁰¹The *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>

whether health center residents have rights to use independent living facilities even if they are not invited guests of an independent living resident. As of the time of publication, the outcome is unknown.

C. 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. 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.¹⁰² 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.¹⁰³

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.

¹⁰² *Shapiro v. Cadman Towers, Inc.*, 51 F. 3d 329 (2d Cir. 1995).

¹⁰³ *Jankowski Lee & Associates v. Cisneros*, 91 F. 3d 891 (7th Cir. 1996).

D. 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, 2013.¹⁰⁴

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 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 DOJ¹⁰⁵ 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 rules¹⁰⁶ 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

¹⁰⁴ See *ADA Requirements: Accessible Pools*; US Department of Justice, May 24, 2012; see also 28 CFR 36.304.

¹⁰⁵ 56 Fed. Reg. 35,551-2 (July 26, 1991).

¹⁰⁶ 28 CFR Part 36, effective March 15, 2011.

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 tend to be more commonly present in independent living properties. When present in a care facility, 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. It remains to be seen whether they will be mandated by the federal authorities for such properties.

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RECOMMENDATIONS



I. 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.

2. 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.

3. 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 policies 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.

4. 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, and sexual orientation is presumed to be illegal — except for 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.

5. 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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