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7-2014

### A Layperson's Guide to Fair Housing Law (2014)

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John Marshall Law School Fair Housing Legal Support Center

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THE  
**JOHN MARSHALL**  
LAW SCHOOL  
FAIR HOUSING LEGAL  
SUPPORT CENTER & CLINIC

# **A Layperson's Guide to Fair Housing Law**

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# Introduction

Housing discrimination can take many forms. Laws have been passed at the federal, state, and local levels to prohibit housing discrimination, and attorneys and many fair housing groups are working to eradicate the problem. But the solution to the fair housing problem will not come solely through the work of attorneys and fair housing agencies and organizations; it will also have to come from an educated public that is unwilling to tolerate the cost of housing discrimination.

Housing discrimination affects every individual in the United States. Realtors and brokers, bankers and mortgage lenders, insurance companies and developers, real estate buyers and sellers, and landlords and tenants all are affected by the fair housing laws and need to know their respective rights and responsibilities under the law. Neighborhood residents and municipalities are also affected by illegal housing practices that occur in their communities. Everyone needs to know the law.

This guide is meant to explain the fair housing laws in everyday language. It does so in a question and answer format. A better understanding by the public of the fair housing laws is essential if we are to eliminate housing discrimination.

This booklet is meant to answer only the most general questions. It was first published in 1994 and is revised periodically because the law continues to evolve.

Persons who have a fair housing problem should contact an attorney or one of the many agencies or organizations that exists throughout the United States to deal with housing discrimination. They can also seek advice from The John Marshall Law School Fair Housing Legal Support Center.

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July 2014

# I. Laws That Prohibit Housing Discrimination

What are the federal laws that prohibit housing discrimination?

Congress has passed several laws to prohibit discrimination in housing.

The first federal law that prohibited racial discrimination in housing was passed by Congress in 1866, right after the Civil War. This law makes it illegal to discriminate on the basis of race in the making of contracts and in the right to inherit, purchase, lease, sell, hold, and convey real and personal property, including housing. The 1866 Civil Rights Act was not widely enforced until 1968, when the United States Supreme Court interpreted the statute to apply to private real estate transactions.

Also in 1968, Congress passed a comprehensive fair housing statute, and in 1988, Congress broadened the coverage of this statute. As we will see, the 1968 Fair Housing Act, as amended in 1988, provides substantial remedies to many persons who are the victims of housing discrimination.

The 1866 and 1968 statutes, as amended, do not exhaust the field. A number of other federal statutes can be applied when discrimination results from governmental action, when federal funds are involved, or in special circumstances, such as in mortgage lending cases. The United States Constitution itself generally prohibits discrimination but only when there is governmental action.

What state and local laws prohibit housing discrimination?

Nearly every state has some type of human rights act that prohibits housing discrimination. Also, many local governments, large and small cities, villages, and counties have enacted ordinances outlawing housing discrimination. Many of these statutes and ordinances have been declared by the federal government to be “substantially equivalent” to the federal Fair Housing Act. This means that the same rights and remedies exist under the state and local law as under the federal law.

As we will see, some state and local laws provide greater protection than the federal laws. Therefore, it is important to check not only the federal law but also your state and local laws to see if your rights have been violated and if the law will provide you with a remedy.

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Where do I go if I suspect that I am a victim of housing discrimination?

You might want to contact your lawyer for advice. If you do not know a lawyer or do not have the resources to hire a lawyer, you have a number of alternatives.

At the federal level, you can contact the Department of Housing and Urban Development (HUD). HUD has a number of regional offices and each office has a fair housing enforcement division. A HUD representative can answer your questions, and if you suspect that discrimination has occurred, you have the right to file a complaint with HUD. You do not need an attorney to do this.

You can also contact your state or local human rights agency. They will also answer your questions and assist you to file a complaint.

There are a large number of private fair housing organizations that may be able to help you. For instance, in Chicago, you can contact The John Marshall Law School Fair Housing Legal Clinic. You might also seek advice on where to go by calling your local bar association or civil rights or legal services organizations, such as the NAACP, MALDEF, the Urban League, The Lawyers Committee for Civil Rights Under Law, or Legal Aid.

The services of many of these organizations are free, so do not hesitate to contact them for assistance.

## II. Types of Discrimination Prohibited Under the Law

Do federal laws guarantee housing?

No provision in the United States Constitution, in any federal statute, or in any federal subsidized housing program ensures that all persons will have access to decent, safe, and sanitary housing as a matter of right.

The fair housing laws do not directly address the problems of the homeless or those who cannot afford decent housing. They prohibit certain types of discrimination that limit the choices of persons in the housing market.

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What types of discrimination are illegal under the federal fair housing laws?

The 1866 Civil Rights Act prohibits discrimination based on race or color. The 1968 Fair Housing Act prohibits discrimination on the basis of race and color and also because of religion, sex, and national origin. This law was further expanded in 1988 to prohibit discrimination against families with children and against persons with disabilities, both physical and mental.

Federal law does not generally prohibit discrimination based solely on marital status, sexual orientation, age, wealth, source of income, or similar classifications. However, state or local laws may prohibit these broader classes of discrimination, and they should be consulted to see if they provide relief not offered by federal law.

In some jurisdictions, "source of income" provisions may make it illegal for landlords to discriminate against recipients of Section 8 vouchers. However, this type of discrimination is not illegal under federal law, and thus whether voucher holders are protected against discrimination will depend upon whether a local jurisdiction protects "source of income" and how it defines that term.

Similarly, when state and local laws prohibit discrimination on the basis of "marital status," that definition may vary from jurisdiction to jurisdiction. For instance, in some jurisdictions the term "marital status" applies only when the housing provider distinguishes between persons who are single and those who are married. In other jurisdictions, "marital status" may apply to unmarried cohabiting couples.

What kind of discrimination on the basis of race, color, or national origin is prohibited under the fair housing laws?

The federal law and most state and local laws broadly prohibit discrimination based solely on race, color, or national origin. Normally, the complaining party need show only that race, color, or national origin was a motivating factor in the denial of the housing. The courts have devised a number of standards that can be used to show that such discrimination was present.

A person can be a victim of discrimination based on race, color, or national origin even if the person does not belong to a minority group that has traditionally suffered discrimination as a class. For instance, the Supreme Court has held that white persons may be the victims of racial discrimination and can sue when their civil rights are violated if they are injured.

Discrimination based on language is not specifically prohibited, but language may be a proxy for race or national origin discrimination. Non-citizens are protected under the law against race and national origin discrimination, but discrimination against all immigrants equally is not in itself a protected basis under the federal law.

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What is meant by sex discrimination?

Any type of discrimination based on a person's gender is prohibited. However, as defined by the courts, gender discrimination does not include discrimination based on sexual orientation. Gays and lesbians may be protected from housing discrimination in federally subsidized housing or if some other protected basis is also present. Some state laws and local ordinances do expressly prohibit discrimination based on sexual orientation.

Sexual harassment is a prohibited form of gender discrimination. If a landlord demands sexual favors from a tenant or makes deliberate or repeated unsolicited verbal comments, gestures, or physical contact that makes for a hostile environment, the fair housing laws can be invoked. Courts have provided substantial remedies to victims of sexual harassment in housing cases.

Some courts have held that the refusal to rent to victims of domestic abuse is illegal sex discrimination under the Fair Housing Act. Some state or local laws may specifically prohibit discrimination against victims of domestic abuse or against persons under protective orders.



May religious organizations discriminate on the basis of religion?

Discrimination on the basis of religion is generally prohibited under the Fair Housing Act. On occasion, religious discrimination may also violate one of the other categories of the Fair Housing Act. For instance, discrimination against Jews or Muslims may also constitute racial discrimination under the 1866 Civil Rights Act according to the Supreme Court.

The Fair Housing Act allows a religious organization to limit the sale, rental, or occupancy of a dwelling to persons of the same religion or to give preference to persons of the same religion, so long as membership in the organization is not limited because of race, color, or national origin. This exemption is narrowly construed. Furthermore, if the religious group is acting for a commercial purpose, it will not be exempt from the Fair Housing Act and can be found liable of discrimination.

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May I be excluded from a dwelling because I have minor children residing with me?

Amendments to the Fair Housing Act in 1988 prohibit familial status discrimination. Families are defined as one or more individuals (under the age of 18 years) who live with a parent or other adult who has custody of them or has been designated by the parent to have custody of them. Pregnant women and foster families are also included in this definition.

Housing specially designated for "older persons" may exclude families with children. However, to qualify as housing for "older persons," the housing must be solely occupied by persons who are at least 62 years of age or 80 percent of the occupied units must contain at least one person who is 55 years old or older and the facility otherwise meets all HUD requirements. Housing for "older persons" may not exclude any of the other classes protected by the fair housing laws.

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May a landlord restrict families with children to designated areas?

No. A landlord may not restrict children to designated buildings or to first floor units because of concerns that the children may make noise or fall from second story units. Nor may landlords generally prohibit children from using recreational areas or other services. Just as it is illegal to segregate persons because of their race, it is illegal to segregate them because they have children.

May a landlord impose occupancy standards that operate to exclude children?

A landlord may not impose occupancy standards solely to exclude children. However, the Fair Housing Act does state that local, state, or federal regulations can set a reasonable limitation on the maximum number of persons permitted to occupy a unit, so long as the restrictions do not specifically discriminate against families with children or other groups protected by the law. The Act does not state anything about restrictions imposed by private landlords, but HUD regulations provide that such restrictions are legal so long as they are reasonable.

The key word is “reasonable.” What is reasonable depends upon the circumstances. Regulations that restrict housing to one person to a bedroom are clearly suspect. A regulation that restricts occupancy to two persons to a bedroom will probably be reasonable under HUD guidelines, but special circumstances may make it unreasonable. The size or layout of the unit must be taken into consideration in each case.

Nothing in the Act requires a landlord to provide special facilities for children.

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May a landlord refuse to rent to a family because the children cause noise or damage to the property?

A landlord may not stereotype families and may not assume that all children make noise or cause damage to property. However, if a family has a history of disturbances or damage caused by children, this may constitute a neutral ground to exclude the family from a dwelling. Such exclusions should be carefully examined to be certain that the explanation is not a mere pretext to discriminate against children.

Are landlords required to specially accommodate persons with disabilities?

Within certain limits, the answer is “yes.” A landlord or seller must make reasonable accommodations so that a person with disabilities has equal opportunity to use and enjoy a dwelling. A reasonable accommodation is one that does not impose undue financial or administrative burdens on the owner or seller. Obvious examples would be where a blind person needs a support animal or where a person in a wheelchair needs a first floor apartment and where one is available. Apartment complexes may also be required to move a person with disabilities to the top of a waiting list for a convenient parking space.

It is important to recognize that “senior housing” is not exempt under the disability provisions of the Fair Housing Act. Therefore, a complex that will lease only to “active” or “mobile” seniors would violate the Act. Complexes that require seniors to move once they become disabled have also been found to violate the Act.

Even if an accommodation would be costly or burdensome, a landlord or seller cannot refuse to let the disabled person make a reasonable modification of the premises at that person's own expense. The person with disabilities should first seek the permission of the landlord and may be required to give the landlord assurances that the work will be done suitably. The landlord may also require the tenant to restore the premises to their original condition once the lease ends if it is reasonable to do so.

The Fair Housing Act also requires that certain multi-family dwellings of four or more units designed or constructed for first occupancy after March 31, 1991 meet defined design and construction requirements. These requirements provide for minimal accessibility, but if the requirements are not met, it may be costly for the designer or contractor to retrofit the units. Dwellings that are built with public funds may have even greater accessibility requirements.

Who is a person with a disability under the Act?

The Fair Housing Act broadly defines a “handicap” as a physical or mental impairment that substantially limits a person’s major life activities. A person may also have a “handicap” as defined by the Act if the person has a record of having a physical or mental impairment or if the person is someone who is regarded as having an impairment. For instance, if a gay man is refused an apartment because the landlord assumes he has AIDS, when in fact he does not, this is discrimination based on “handicap” under the federal law. The Supreme Court has held in the employment context that a person is not “handicapped” if the impairment can be corrected by medication or corrective devices or does not substantially limit a major life activity.

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Is drug addiction considered to be a “handicap” under the Fair Housing Act?

The Fair Housing Act specifically excludes persons who are currently drug users or those who are in rehabilitation programs, if these persons are currently using drugs.

Alcoholics are considered to be “handicapped” under the Act. However, a landlord can properly exclude an alcoholic if that person violates neutral behavioral standards applicable to everyone, such as a prohibition against noise or disruptive behavior.

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May a landlord exclude a person with a communicable disease?

The Fair Housing Act explicitly allows a landlord to exclude a person whose tenancy would constitute a direct threat to the health or safety of others or would result in physical damages to the property of others. Landlords, however, may not stereotype individuals. Thus, a person who poses a significant risk of communicating an infectious disease that a reasonable accommodation would not eliminate can be excluded from a dwelling.

However, if the disease is not truly communicable, such as non-infectious tuberculosis, or if a reasonable accommodation would reduce the risk, the landlord cannot exclude the disabled person. The Act clearly protects persons with HIV, as well as those who actually have AIDS. Similarly, although sexual preference is not protected by the Act, a landlord could be found guilty of violating the Act for refusing to rent to a gay man because of the fear that he might have AIDS.

May a landlord refuse to rent to a person who has a criminal record?

Conviction of a crime is not a protected status as such under the fair housing laws. However, a rule or regulation refusing to rent to persons with criminal records may have a disparate impact on certain racial or other minorities and may consequently be illegal. Recently, many communities have enacted crime-free ordinances or regulations that attempt to exclude persons convicted of certain crimes. These regulations are likewise vulnerable if they are enacted as a pretext to discriminate against a protected class or have a discriminatory impact on groups protected by the fair housing laws.

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May a housing provider refuse to rent or sell to non-citizens or to persons who do not speak English?

The federal Fair Housing Act does not prohibit discrimination against aliens or because of language. However, often discrimination against aliens and non-English speakers is really discrimination because of the person's national origin. For instance, a landlord may specifically target Mexican-American aliens or Spanish speakers. In these instances, the discrimination would violate the national origin provisions of the fair housing laws. Discrimination may also occur if the landlord is a non-English speaker and therefore prefers to rent to persons with whom he or she can communicate.

### III. Activities Prohibited by Fair Housing Laws

If I am denied a dwelling, how can I find out whether the decision was the result of illegal discrimination?

In some instances, illegal discrimination may be apparent. The landlord may say, "We don't rent to people like you," or "Sorry, we don't rent to people with children," or "Sorry, we don't allow pets, including your seeing-eye dog." These cases are not unusual. One would think that because the anti-discrimination laws have been on the books for nearly 40 years, overt discrimination no longer occurs, but anyone who works in fair housing can verify that "people say the darndest things."

Even if there is no express statement, you can sometimes tell by a person's gestures or demeanor that discrimination is taking place.

Often, however, discrimination is hard to detect. A unit will have been advertised for sale or rent and you make an appointment to see it. When you arrive, you are told that the unit was just sold or rented that morning. You sense that this may not be the case.

The courts have established various formulas for determining whether disparate treatment has occurred. If a complainant can show:

1. that he or she belongs to a protected group, i.e., he is African-American, or she is a person with a disability, etc.;
2. that he or she applied for and was qualified to rent or buy the property;
3. that he or she was rejected; and
4. that the dwelling remained available thereafter;

the burden will shift to the landlord to offer a convincing explanation for the disparate treatment. If the landlord does not do so or if the landlord's explanation is a mere pretext for discrimination, the court may find that the Act has been violated.

What is testing and how is testing used to establish discrimination?

Assume that housing is advertised, that you belong to a protected class, that you go to see the housing, and that you are told that it is not available or you are told that your income is too low to afford it. How do you know if the landlord or seller is telling the truth?

If you suspect that you are being given a brush-off because of your race or status, you should immediately seek help by going to a local fair housing agency or organization. In an appropriate case, they will arrange for a test.

A test means that they will pair you with a paid tester. For instance, if you are a black male, you will be paired with a white male who will represent that he has a similar income qualification as yours. This tester will inquire about the unit to see if he is treated the same as you. If the white tester is told that the unit is available immediately after you have been told that it is unavailable this will constitute evidence of discrimination. In some cases, multiple tests will be conducted to determine if discrimination has occurred.

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Is the testimony of a paid tester admissible in a court or hearing?

Yes, the Supreme Court has recognized that testing is often the only way to uncover discrimination. Therefore, it is legal for paid testers to go out under false identities and inquire about the availability of housing. Indeed, the courts have held that if testers are lied to by the landlord, they are also eligible to sue on their own behalf.

Can discrimination be proven other than by showing disparate treatment?

Yes, there is another way that discrimination can be proved apart from showing disparate treatment. In some cases discrimination can be established by showing a disparate impact.

For instance, a rule that only one person can occupy a one-bedroom apartment is neutral on its face, but the effect of the rule may be to exclude children from a dwelling. Similarly, a zoning ordinance restricting occupancy in a unit to persons related by blood or marriage may operate to exclude a group home for the persons with disabilities.

Proof of a discriminatory impact does not make the rule or regulation automatically illegal. The landlord or municipality may still try to argue that the rule is justified by sound business or governmental concerns independent of the discrimination. The policy or practice will be held to be illegal; however, if the landlord's or municipality's legitimate purpose can be accomplished through measures that have a less discriminatory impact.

Proof of a disparate impact is done through statistics. In many cases, it may be difficult to convince a judge that the policy is illegal if the housing provider can show a good reason for the policy. The disparate impact test has been approved by every federal court of appeals, but it has not been tested in the United States Supreme Court. HUD has adopted a regulation that supports the disparate impact theory of proof.



What is “steering” and does steering violate the fair housing laws?

Steering exists when a real estate agent or broker or other housing provider channels persons of one race to one neighborhood and persons of another race to another neighborhood. It may also occur on a smaller scale when certain units or areas within a specific complex are off-limits to racial minorities. This practice denies applicants a full choice in housing and often has the result of creating or maintaining segregated neighborhoods. It is illegal under the fair housing laws.

Steering can be detected in a number of ways. If applicants respond to an advertisement for a specific property and are told that they might prefer a house in a different neighborhood, this might be a tip that steering is going on. Comments like “I don't think you would be comfortable in that neighborhood,” or “You might prefer the schools in this neighborhood,” may indicate steering.

However, the courts have distinguished illegal racial steering from cases where a realtor or broker is merely responding to a customer's own preferences. The line may not always be clear. Steering is generally established through a comprehensive testing program to determine if white testers are consistently steered to white neighborhoods and black testers are steered to black or so-called changing neighborhoods.

Community residents and municipalities, as well as housing applicants, suffer damage as a result of illegal steering, and the courts have recognized the right of all of these parties to complain against and recover damages from persons or companies that engage in illegal steering practices.

What is “blockbusting” and does it violate the fair housing laws?

Blockbusting or panic selling is an unlawful act under the fair housing laws. It was a particularly prevalent practice in the 1950s and 1960s, but it still continues today, although perhaps somewhat more subtly.

Blockbusting exists when realtors or developers induce persons to sell their homes or leave a neighborhood because of the prospective entry of persons of another race into the neighborhood. This results in panic selling, whereby white homeowners feel compelled to leave a neighborhood and are induced to sell at reduced prices. The units are then resold to black buyers at a profit.

Many municipalities have responded to blockbusting fears by prohibiting the display of “For Sale” signs in neighborhoods, which may have the effect of panicking residents if there are too many of them. Municipalities must be careful in drafting these laws because advertising is a form of speech protected by the First Amendment.

Can communities or landlords impose quotas so as to preserve a racially balanced neighborhood?

“Quota” is a bad word, and if a landlord or municipality adopts a “quota” to maintain a racial balance, the regulation will surely be struck down.

If landlords or other housing providers have been found guilty of discrimination, they may be required to affirmatively recruit minorities and, as a temporary measure, to establish a “goal” to recruit minority occupants so as to achieve a proper racial or minority balance in the building or community.

When a landlord or municipality has never been found guilty of discrimination, efforts to strike a proper racial balance may be less clear. If the motivation is simply to exclude minorities the practice is clearly unlawful.

However, housing providers or municipalities may argue that they are trying to create an integrated environment. They may cite what is often called a “tipping point.” Social scientists claim that when a large and sudden influx of minorities move into a previously all-white neighborhood, whites will flee and the property values will fall and the neighborhood will change. This is alleged to occur when the minority population falls anywhere within a range of 25 to 60 percent.

While the law is clear that any kind of permanent quota is illegal, courts have sanctioned less drastic measures to promote a good racial balance. These efforts may include special advertising to interest white buyers in the community and other informational and educational projects aimed at reassuring homeowners. In some communities and states, special insurance programs have been advocated to protect homeowners from a sudden drop in home values due to the changing racial make-up of the neighborhood.

What is meant by “redlining” and is it illegal?

Redlining is a practice where brokers, mortgage lenders, or insurance companies in effect write off an entire neighborhood and refuse to do business there. There has been a long history of redlining in African-American neighborhoods. Redlining is illegal under the Fair Housing Act.

Redlining may be difficult to prove. Mortgage lenders or insurance companies will generally argue that the risk of loss in certain neighborhoods is simply too high to justify the cost of doing business there. It is not illegal for a company to charge higher rates because of higher risks, and higher risks may well be present in some minority communities. The solution may depend upon how the company defines neighborhood boundaries and whether these boundaries are intentionally and narrowly drawn to include only minority communities in the high-risk areas.

Redlining may occur when different products are offered to communities of color or when certain communities are targeted for predatory or inferior loans or if loan modifications or refinancing is not equally available to all communities. Redlining may also be evidenced by the type and extent of advertising in particular neighborhoods or to particular communities.

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Is it illegal for an insurance company to deny me homeowner's or rental insurance or charge me a higher premium because my home is in a minority neighborhood or because of other discriminatory reasons?

Yes, while insurance has been traditionally regulated by the states, the courts have now held that discrimination by insurance companies or agents because the property is in a minority neighborhood or because of the protected status of the homeowner or renter is prohibited under the fair housing laws. Certain policies of insurers, such as the refusal to sell insurance in older neighborhoods, may have a disparate impact on groups protected by the fair housing laws and be illegal.

There has been a lot of publicity about mortgage lending discrimination. If I am turned down for a loan how do I know whether it was because of illegal discrimination?

Recent studies have focused a lot of interest on mortgage lending discrimination. These studies indicate that mortgage lending discrimination is a major problem throughout the country. As a result, state and federal government agencies are paying particular attention to mortgage lending discrimination.

If you are denied a loan solely because of your neighborhood, this may be evidence of illegal "redlining." More often, you will be told you are denied a loan because of your low income or because you have poor credit. In and of themselves, these may be good reasons for a bank or lending institution to refuse to lend you money, but a lot of discretion is involved in determining who has bad credit or who makes too little money.

You may have missed a credit card payment or you may have a spotty employment history, but how is that history interpreted by the lending institution? A late payment may disqualify applicants, but all too often white applicants may be given an opportunity to explain a late payment when African-American applicants are not. Today many lenders use "credit scoring" to determine good credit. Credit scoring is done by outside consultants based on supposedly "neutral" criteria. Generally the factors that are taken into consideration are not revealed to the public. Credit scoring may or may not be illegal depending upon the factors used in the scoring and the way the score is used.

Discrimination in mortgage lending is rarely detected solely by looking at one person's mortgage application. Mortgage lending discrimination is best shown by establishing a pattern and practice of an institution's denying loans to minority applicants whose applications are indistinguishable from majority applicants.

This process of uncovering mortgage lending discrimination is time-consuming and costly. However, if your credit is on the borderline and suspect that you were turned down by a particular institution because of your protected status under the fair housing laws you should talk to someone at one of the public or private fair housing agencies. They may have a history on the particular lender or decide that an investigation or test is warranted.

What is predatory lending and does it violate the fair housing laws?

There is no precise definition of predatory lending. A predatory loan may be one that is too expensive for the particular borrower. In many cases, it will be a loan that the borrower could not reasonably be expected to pay back. It may be characterized by high interest rates or service charges, a prepayment penalty, a balloon payment, or other unconscionable terms. Often a predatory loan will occur when a person who is otherwise qualified for a prime loan is steered to the sub-prime market.

Predatory loans in and of themselves do not violate the fair housing laws. However, predatory lenders often prey upon the most vulnerable segments of our society. If the borrower has been singled out because of his or her protected class by the predatory lender, there can be a violation of the fair housing laws, as well as a violation of other federal and state laws that prohibit predatory lending practices.

The fair housing laws provide better and more comprehensive remedies than many truth-in-lending and other consumer protection laws. Therefore, it is often beneficial for a borrower who is the victim of a predatory home lending practice to inquire if there may also be illegal discrimination in the transaction.

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Is it illegal to place a discriminatory advertisement for housing?

Any printed or published notice, statement, or advertisement that states an illegal preference under the fair housing laws is itself illegal. This prohibition applies even if the particular housing is itself exempt under the Fair Housing Act.

This provision covers all advertising and not just the traditional newspaper advertisement. It also applies to spoken statements and visual representations made to buyers or renters. For instance, if an advertisement contains only white models or if the advertisement appears to discourage persons with disabilities from living in the particular environment, the advertisement may be in violation of the law.

Anyone who publishes an advertisement is responsible for its content. Hence, newspapers are strictly liable for the content of advertisements printed in their papers, as are providers of community bulletin boards. Persons who post discriminatory advertisements on the internet are liable for what they post; however, courts have held that website providers who do not solicit specific information from the persons posting internet advertisements may enjoy immunity under the federal Internet Decency Act.

Are there other practices that are prohibited by the fair housing laws?

In addition to the illegal practices already described, any other action that makes a dwelling unavailable or that discriminates in the terms, conditions, or privileges of sale or rental, or in the provision of services or facilities on the basis of any prohibited classification is illegal. Similarly, harassing or retaliating against a person because of his or her protected status is a violation of the fair housing laws. Landlords who take no steps to protect residents from harassment or retaliation when they know about it may also be liable.

## IV. Types of Housing Covered by Fair Housing Laws

Do the fair housing laws cover commercial as well as residential properties?

The Fair Housing Act of 1968, as amended, covers “dwellings,” which are structures designed or occupied as residences or land offered for sale for a residence. A “dwelling” is broadly defined and can include a homeless shelter or a summer home.

The Civil Rights Act of 1866 is broader and covers all real or personal property, whether intended for residential or commercial use. However, the Civil Rights Act of 1866 prohibits only racial discrimination.

Is all residential property covered by the Civil Rights Act of 1968, as amended?

Both public and private housing is covered by the Fair Housing Act; however, there are some limited exceptions. Religious organizations and private clubs may restrict non-commercial housing to their members so long as they don't discriminate on the basis of race.

Housing that is legitimately designed for older persons can exclude families with children. However, providers of "senior housing" may not discriminate against persons based on any of the other protected classes. Nursing homes and assisted living centers where seniors reside for extended periods of time are "dwellings" under the Fair Housing Act and may not discriminate.

Recent testing indicates that some senior facilities, like many other housing communities in the United States, do engage in racial or national origin discrimination. Also, successful cases have been brought against senior facilities that refuse to make accommodations for seniors with certain disabilities.

The Mrs. Murphy's boarding house exemption provides that certain sections of the Fair Housing Act are not applicable to owner-occupied dwellings with no more than four units. Also, the Act does not apply to the sale or rental of single-family houses by the owner of three or fewer single-family homes if the owner does not employ a real estate agent or broker, does not advertise, and has not sold other real estate in the past year. These exemptions do not apply to discrimination in financing, insurance, or advertising.

The 1866 Civil Rights Act and some state and local laws and ordinances do not have these exceptions and may cover dwellings that are exempted under the federal statute.



Who can be held liable for discrimination under the fair housing laws?

Anyone who engages in an act of discrimination prohibited by the fair housing laws can be held liable. This includes owners, building managers, salespersons, real estate brokers or agents, insurance persons, and lending personnel—whenever participated in the discriminatory conduct.

Also, an employer or partner of a person who discriminates may be held liable. This includes real estate management companies, trust companies, development companies, banks, and supervisory personnel. These companies and supervisors do not need to have personally participated in or known of the discrimination so long as the persons who did the discriminating were in their employment and under their direction.

## V. Remedies Available Under Fair Housing Laws

If a housing provider will not rent or sell to me and I want the unit, is there something I can do to prevent it from being given to someone else?

If you have been discriminated against and want the unit but fear that someone else may come along and rent it or buy it, you should immediately see an attorney or talk to someone at a public or private fair housing agency or organization. A private attorney can immediately file a lawsuit if there is good evidence of discrimination and ask the court for a temporary restraining order (TRO) or a preliminary injunction.

A TRO is a technical legal name given to an order that a judge issues against a housing provider to prevent the sale or rental of the unit until a hearing can be held to determine the merits of your discrimination claim. You will have to give the judge good cause to believe that discrimination has occurred.

A preliminary injunction is issued after a hearing but before the actual trial of the controversy.

If you file your complaint with HUD, that agency may request an attorney from the United States Department of Justice to file a civil action and seek a TRO or injunction pending the outcome of a HUD investigation. Similar relief can be secured through a state or local agency that is "substantially equivalent" to HUD.

No landlord or seller wants to be placed under a TRO or injunction even for a short time and hence many claims are settled at this stage.

In addition to the preliminary order, what other relief can I get if I file a winning claim under the fair housing laws?

If you were not able to successfully secure the unit you first wanted, you can seek an order requiring comparable housing when it becomes available, if you want it.

When housing providers have been guilty of other acts of discrimination, they can be required to take affirmative steps to ensure that discrimination will not occur in the future. This may involve taking a training course in the fair housing laws, correcting any discriminatory procedures, or implementing an affirmative action plan to remedy past injustices.

You may also be able to collect monetary damages. You can receive compensation for any out-of-pocket expenses or inconveniences you incurred. You may also be awarded an amount to compensate you for any pain, humiliation, or other suffering resulting from the discrimination if there is evidence that such injuries have occurred.

If the housing provider is found guilty of reckless or intentional conduct you may be able to collect punitive damages, which are damages awarded to punish defendants for their bad conduct. Punitive damages may or may not be available to you depending upon whether you chose to file your complaint before an agency or go to court. In some instances, a penalty can be imposed against a defendant that must be paid to the government.

## Who can file a complaint for housing discrimination?

Anyone who suffers an injury by a discriminatory housing practice can bring a complaint under the fair housing laws. An injury can be economic—you had to pay higher rent or incurred expenses directly resulting from the discrimination—but it does not have to be.

If you were denied the right to live where you wanted to live or you were forced to live in a neighborhood that excluded minorities you can be a complainant. For instance, the Supreme Court held that white persons could sue if the quality of their lives were diminished because African-Americans could not live in their apartment building or neighborhood.

In certain cases, testers that have been given false or misleading information can be complainants. Property owners who are precluded from selling or renting property to minority persons can sue. Neighborhood residents and villages that have been injured by the “steering” policies of a realtor can sue. Fair housing organizations that are forced to expend time and efforts to assist equal access to fair housing may also be able to file complaints.

The policy of the fair housing laws is to allow groups and individuals broad standing to enforce the law by filing complaints before HUD or state agencies or by being plaintiffs in a lawsuit in state or federal court.

What are the advantages of my filing a private lawsuit in state or federal court?

Private persons can enforce the fair housing laws by filing a lawsuit in either the state or the federal courts. A private lawsuit may be filed even while an investigation is proceeding at HUD or at a state or local human rights agency. Private persons can represent themselves in court, but court procedures can be complicated and it is better to be represented by an attorney in court. In appropriate cases, a court may appoint an attorney to represent a plaintiff who has no funds.

A lawsuit is instituted by filing a complaint and paying a filing fee to the court. If the plaintiff is poor, it may be possible to get a waiver of the filing fee from the court. A copy of the complaint must be served upon the defendants. Court rules will explain how this is done.

Both sides are entitled to do discovery. That means the other side can get any documents you have, ask you written questions, and take your deposition, which means you can be asked questions under oath. You may be required to disclose all your witnesses and they may be questioned. Of course, you can do the same to the other side. The purpose of discovery is so that both sides know what evidence the other side has in order to prevent surprises during the trial.

A lawsuit may sometimes be disposed of on written motions, but if there is a dispute in the facts the case may have to go to trial. If damages are in issue, either side may request a trial by jury. Many cases are settled prior to trial.

If a case is successful, the court may order that the discrimination cease and that the plaintiff be allowed to rent or buy the unit. Prevailing plaintiffs may also be awarded compensatory and punitive damages to punish the defendants and a sum to cover the plaintiff's costs and attorney's fees.

Under the federal Fair Housing Act, an injured party has two years after the discriminatory practice to file a civil suit in court.

The advantage of filing a civil suit is that you are represented by your own lawyer; you can ask for a jury trial, and you do not have to wait for a government lawyer or agency to act in your behalf. The major disadvantage of a lawsuit is that lawsuits can be time consuming and expensive.

What is my alternative to a lawsuit?

You can file an administrative complaint under the Fair Housing Act with HUD or with a state or local fair housing agency.

If you file a complaint with HUD, HUD may refer it to a “substantially equivalent” state or local agency. You have one year after the act of discrimination has occurred to file a complaint with HUD. Also, filing with HUD will stay the two-year period you have to file an action in state or federal court. A complaint can be filed with HUD even though a private law suit is pending in court.

Once a complaint is filed, HUD or the state agency will try to conciliate the complaint. If an agreement can be reached between the parties, this will end the matter. If an agreement cannot be reached, a state or federal investigator will investigate the complaint and write a report. The Fair Housing Act states that investigations should be completed within 100 days, but investigations often take longer.

If HUD or an equivalent state agency determines that there is “probable cause” to believe that discrimination occurred, it will issue a charge. If it believes there is no “probable cause,” the complaint will be dismissed. If a complaint is dismissed, the complaining party can still file a private suit in state or federal court.

What happens if an administrative charge is issued?

If a charge is issued by HUD or a substantially equivalent state or local agency, the complaining party has 20 days to decide whether to have a government attorney file a suit in court.

If the party elects to go to court, the government attorney will handle the lawsuit; although the complaining party may request that a private attorney be allowed to participate in the trial also. The government attorney can ask the court to issue an injunction to stop the discrimination and it can seek compensatory and punitive damages for the complaining party. The government attorney can also seek civil penalties against the defendants that will be paid to the government. If you are represented by a private attorney, you may also be able to recover your attorney's fees.

The other alternative is to have a hearing within HUD or the state agency. The hearing will be presided over by an administrative law judge (ALJ), a person hired by the agency specifically to hear discrimination cases. A lawyer employed by HUD or the state agency will handle the case. You can ask a private lawyer to represent you if you desire.

The law imposes strict time limits on when the hearing is to be held. A complaining party in a HUD proceeding may be awarded compensatory damages, but not punitive damages. The ALJ can also impose a civil penalty on the defendant that must be paid to the government. If a private attorney represents you, you can also recover your attorney's fees.

The advantage of a trial before an ALJ is that the procedure is fast. The disadvantage is that a complaining party cannot collect punitive damages before a HUD ALJ, which could be awarded if the action had been tried in court.

Some state agencies may provide greater relief, including punitive damages.

Which procedure is best?

There is no “best” procedure. Each procedure has certain advantages and disadvantages. Complaining parties should discuss their options with an attorney or counselor to determine the best procedure for the individual circumstances.

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What will it cost to pursue a fair housing claim?

If you pursue the administrative route of complaining to HUD or a state agency, there is no charge for filing a complaint. You do not need to hire an attorney to file a complaint with an agency; however, it may be advantageous, although not required, to have your own lawyer during the conciliation process.

After an investigation is held and if “probable cause” is found, you can be represented free of charge in the HUD proceedings by a government attorney. You can also be represented by a private attorney and if your case is successful the defendant may be ordered to pay your lawyer’s attorney fees.

If you file suit in state or federal court, there is a cost factor that must be considered. Generally you must pay a filing fee to file a complaint in court. There may be a cost involved in trying to serve the complaint on the defendant. Discovery in a civil suit can be very expensive. However, if you cannot afford the filing fee, you can petition the court to waive it. Also, many communities have fair housing groups that will litigate your case for you and help absorb some of the cost.

Attorneys can be expensive, but if the plaintiff is successful, the defendant may be ordered to pay the plaintiff’s attorneys fees. If the plaintiff loses, the court will not require the plaintiff to pay the defendant’s attorney fees unless the suit was frivolous or filed in bad faith. The reason for the different treatment between plaintiffs and defendants is that Congress wanted to encourage plaintiffs to take action when they legitimately feel that they have suffered discrimination.

If a plaintiff loses, the plaintiff’s attorney will not get attorney’s fees from the defendant. Many attorneys will take the risk and take the case on the contingency that if the plaintiff loses, the attorney will not be paid. But this should be the subject of a written agreement between the plaintiff and the attorney. Some private fair housing groups have staff attorneys or outside attorneys that they can refer aggrieved parties to for representation.



Why should I bother to pursue a fair housing claim?

This is a question that must be individually answered in every case. Pursuing a claim is not without cost. It can be time consuming and emotionally draining.

On the other hand, you must determine how badly you have been injured and how much you want the housing. You must also consider the great social cost that discrimination imposes. If housing providers are allowed to discriminate without being caught, then the societal problem will only become greater.

These are not easy factors to balance. Frequently persons who experience discrimination suffer greater damage than they first realize. For this reason, it is generally wise to discuss the situation with a number of persons experienced in fair housing matters, so that you can make the right decision for you.

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What if I am harassed or retaliated against because I have filed a fair housing complaint?

The law makes it a separate unfair housing practice to intimidate or retaliate against any person who has filed a fair housing complaint. Even if a complainant filed a fair housing complaint that was later dismissed on the merits, that person has a new claim if the housing provider takes any action against the person for having filed such a complaint. The full array of remedies is available to discourage such conduct.

# Glossary of Terms

**Administrative Law Judge (ALJ):** The officer employed by HUD or a state fair housing agency who presides over an administrative hearing and decides whether an act of discrimination has taken place and, if so, the remedy that should be imposed.

**Blockbusting:** Blockbusting, or panic peddling, occurs when real estate agents frighten people to move out of a neighborhood because of fear of a rapid influx of minority persons.

**Broker:** A person who acts as an intermediary between a buyer and seller of real estate to negotiate a contract for the purchase or sale of property.

**Civil Penalty:** A monetary penalty that can be imposed upon a defendant found guilty of willful, malicious, or reckless discriminatory acts. The penalty is paid to the government, not to the plaintiff.

**The Civil Rights Act of 1866:** This statute passed after the Civil War gives all persons the same right as white citizens to make and enforce contracts, and all citizens the same rights as white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property.

**Compensatory Damages:** The damages a victim of housing discrimination can recover to compensate for injuries actually sustained. Compensatory damages can include out-of-pocket expenses, compensation for loss of rights, and compensation for humiliation and emotional distress.

**Conciliation:** Conciliation refers to the efforts of HUD or a state agency to attempt the resolution of a fair housing complaint without a hearing by securing a settlement between the parties.

**Defendant:** The person or persons who are sued in a private fair housing lawsuit. Anyone who participated in or was responsible for the discrimination can be named as a defendant.

**The Department of Housing and Urban Development (HUD):** The federal agency charged with enforcing the fair housing laws.

**Disparate Impact:** A rule or regulation that may be neutral on its face but nonetheless have a discriminatory impact on a protected class.

**Disparate Treatment:** Disparate treatment occurs when a housing provider treats a member of a protected class differently from other persons.

**Dwelling:** The Fair Housing Act prohibits discrimination in "dwellings." A dwelling is a building or structure or part thereof that is intended for occupancy as a residence, or vacant land which is offered for sale or lease for the construction of a dwelling.

**The Fair Housing Act of 1968:** This Act prohibits discrimination in residential housing on the basis of race, color, religion, sex, and national origin.

**The Fair Housing Amendments Act of 1988:** This Act expanded the Fair Housing Act of 1968 to prohibit discrimination on the basis of familial status and handicap and to broaden the remedies available to aggrieved persons.

**Familial Status Discrimination:** The Fair Housing Act defines “familial status” to mean one or more individuals (who have not attained the age of 18 years) being domiciled with a parent or person having legal custody, or the designee of the parent or the person having custody with the written permission of the parent or other person. It also applies to pregnant women or someone in the process of securing legal custody of a minor.

**Harassment:** Harassment can violate the fair housing laws if it is done because of a protected class. Harassment is generally of two types: quid pro quo, i.e., an offer to rent in return for sexual favors, or a hostile environment, i.e., the harassment is sufficiently severe or pervasive to create a hostile or abusive living environment for the tenant.

**Handicap Discrimination:** Discrimination against an individual with a handicap (or more commonly, a person with a disability), including someone with a physical or mental impairment that substantially limits one or more of that person's major life activities, or someone who has a record of having such an impairment, or who is regarded as having such an impairment. It does not include persons who currently illegally use or are addicted to drugs.

**Housing for Older Persons:** Under the Fair Housing Act, housing for older persons can exclude families with children. If all of the units are occupied by persons 62 or older or if 80 percent of the units are occupied by at least one person over 55 years of age, a housing complex may qualify as senior housing.

**Injunction:** An order by a court requiring a defendant to do something or to stop from doing something. An injunction can normally be imposed only after there is a hearing.

**Marital Status Discrimination:** Some state and local laws prohibit discrimination based on marital status. Some of these laws may apply only if single individuals are treated differently from married couples. However, the prohibition may be broader in some jurisdictions, and marital status can include unmarried cohabiting couples.

**Occupancy Standards:** Municipalities and landlords frequently regulate the number of persons that can occupy a unit. Such regulations must be reasonable to pass scrutiny under the Fair Housing Act.

**Plaintiff:** The person or persons who file a private fair housing lawsuit. Any person who is injured by a discriminatory act can be a plaintiff.

**Predatory Home Lending:** Predatory home lending may violate the Fair Housing Act if it is done on the basis of a protected class. There is no single definition of a predatory loan. It is generally a loan that a borrower would not be expected to be able to pay off. It may contain high interest rates, high fees, prepayment penalties, balloon payments, or other unconscionable terms. A loan may also be predatory if the borrower would have qualified for a prime loan but was instead steered to a sub-prime loan.

**Protected Class:** Persons protected from discrimination under the fair housing laws.

**Punitive Damages:** Damages awarded to a plaintiff to punish a defendant for willful, malicious, or reckless discriminatory acts.

**Quota:** A quota is where a specific number of units are set aside for minority applicants. Often minorities are not allowed to exceed the quota. Quotas are generally illegal under the fair housing laws. Quotas are distinguished from goals, which are generally legal and set out targets to be achieved.

**Racial Discrimination:** Under the 1866 Civil Rights Act, the term “race” may include certain types of ethnic discrimination if that type of discrimination was thought of as “racial” in the 19th century.

**Realtor:** A real estate agent, broker, or appraiser who is a member of the National Association of Realtors.

**Reasonable Accommodation:** Under the Fair Housing Act, a housing provider must reasonably accommodate persons with disabilities. A reasonable accommodation is something that the landlord may provide to make housing more accessible to the persons with disabilities and that will not involve an unreasonable cost or administrative burden.

**Reasonable Modification:** Under the Fair Housing Act, a tenant must be allowed to make modifications in a unit if necessary because of the tenant's disability. The tenant must pay for the modification and, in some cases, return the property to its original condition when the tenant vacates.

**Redlining:** Redlining occurs when lenders or insurance companies refuse to do business in a particular neighborhood.

**Source of Income:** Some state and local laws prohibit discrimination based on source of income, which can include things like child support or welfare or social security payments. In some jurisdictions, “source of income” has also been held to include Section 8 or housing choice vouchers.

**Standing:** A person normally has “standing” to bring a fair housing complaint if the person alleges that he or she suffered injury as a result of a discriminatory housing practice.

**Steering:** Steering occurs when members of a protected group are shown housing only in certain areas or neighborhoods.

**“Substantially Equivalent”:** A state or local agency may be certified as “substantially equivalent” by HUD if the substantive rights, procedures, remedies, and availability for judicial review under the state act are substantially equivalent to those under the federal Fair Housing Act.

**Temporary Restraining Order (TRO):** An emergency order that lasts for only 10 days that prevents a defendant from doing something. It can be entered without the court first holding a formal hearing. In a fair housing case a TRO may prevent a landlord from renting a unit until a hearing can be held to determine if discrimination occurred.

**Testing:** This is a procedure approved by the courts whereby non-applicants pose as applicants to see if members of different classes are treated differently.

**Zoning Laws:** Municipalities frequently pass zoning laws to regulate density or the types of buildings or activities that can take place in a neighborhood.

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## The John Marshall Law School Fair Housing Legal Support Center & Clinic

The John Marshall Law School Fair Housing Legal Support Center was established in 1992. The Center educates and trains the public on fair housing law and provides legal assistance to those private and public organizations and persons seeking to eliminate discriminatory housing practices.

The Clinic is devoted exclusively to fair housing training and enforcement. Its unique nature allows it to assist persons in receiving and retaining the housing of their choice, thereby building and strengthening neighborhoods and communities.

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