

THINKING AHEAD...

TO DELIVER
peace of mind

THE FAIR HOUSING ACT & COVID-19

The Fair Housing Act (FHA)¹ is the primary federal law prohibiting discrimination in the private housing market, including the rental of residential housing. The FHA applies to buildings designed for occupancy as a residence by one or more unrelated people² and prohibits—among other things—discrimination based on disability.³ Discrimination under the FHA includes refusing to rent a unit to any person because of disability or evicting tenants because of their disability.⁴ Landlords also have to make reasonable accommodations to rules, policies, practices, and services for people with disabilities.⁵

People who currently have COVID-19, have a history with the virus, or who are perceived as having the virus may be protected from discrimination by the FHA, as well as state or local laws. Additionally, the FHA protects people from national origin discrimination, including discrimination against people from certain countries or areas of the world associated with COVID-19.⁶ Inter/national organizations and local house corporations should be aware of their obligations under these laws when making decisions about how to best manage the chapter facility.

WHAT QUALIFIES AS A DISABILITY UNDER THE FHA?

The FHA defines a disability as:

1. A physical or mental impairment⁷ that substantially limits one or more of the person's major life activities;
2. Having a record or history of such an impairment; or
3. Being regarded as having such an impairment.⁸

IS COVID-19 A DISABILITY UNDER THE FHA?

This is an open legal question that has not yet been resolved.⁹ The term "physical or mental impairment" includes people suffering from communicable diseases.¹⁰ Therefore, COVID-19 may be a qualifying impairment under the FHA.

Whether a person has a disability under the FHA requires a case-by-case analysis of how their impairment affects their activities.¹¹ People who contract COVID-19 may experience impairments limiting their major life activities, such as the inability to walk long distances, go to the grocery store, or care for themselves.¹² If a person with COVID-19 experiences these types of limitations, they may qualify as having a disability under the FHA.¹³

People who contract COVID-19 and recover may be protected from discrimination under the second part of the FHA's disability definition: having a "record of" a qualifying impairment. Treating residents who

contract COVID-19 and recover differently than other residents may expose a house corporation to liability.

Finally, people who are perceived as having COVID-19—even if they do not—may be protected from discrimination under the third part of the FHA’s disability definition: being “regarded as” having a qualifying impairment. Anti-discrimination laws protect people with disabilities and people others—rightly or wrongly—assume have disabilities from discrimination based on stereotypes, prejudice, and unfounded fears.¹⁴ Consequently, if a house corporation, for example, prohibits students who live in a particular city or state from moving into the chapter house based on the reported prevalence of COVID-19 in that area, the house corporation has likely engaged in unlawful discrimination. The affected students do not have to prove they had COVID-19 to qualify for disability discrimination protection in this circumstance. Instead, the students simply have to show that the house corporation regarded them as having a disability—COVID-19—and refused to rent to them.

CAN I ASK RESIDENTS IF THEY’VE TESTED POSITIVE FOR COVID-19?

Probably not. The FHA prohibits landlords from making inquiries to determine if applicants or tenants have a disability or how severe their disability is.¹⁵ Consequently, asking for information about the nature of a student’s communicable disease, or evidence about COVID-19 exposure or test results, likely violates the FHA. House corporations should also not require current or future residents to disclose whether they have medical conditions that make them more vulnerable to contracting COVID-19.

WHAT IS A “REASONABLE ACCOMMODATION”?

The FHA prohibits a landlord from refusing “to make reasonable accommodations in rules, policies, practices, or services” when the accommodations would be necessary to give a person with a disability an “equal opportunity to use and enjoy” the facility.¹⁶ Reasonable accommodations usually involve changing a generally applicable rule or policy to make its burden less onerous for the person with a disability.¹⁷ Determining whether a requested accommodation is reasonable requires a case-by-case analysis, including considerations of feasibility and practicality.¹⁸

The often-used example is a tenant with visual impairment who lives in a building with a no pets policy but requests to be able to live with his seeing eye dog.¹⁹ In that circumstance, the request is a reasonable policy modification the landlord must accommodate under the FHA.²⁰

During the COVID-19 pandemic, the house corporation may, for example, receive requests from students with a qualifying disability—possibly a disease or illness that would put them at higher risk for contracting COVID-19—for single rooms. If the house corporation has a policy that only allows chapter officers to live in single rooms, the requested accommodation would be a change to a generally applicable policy. The house corporation would then need to engage in a fact-specific analysis, with advice from legal counsel, to determine if the request is reasonable.

CAN I REQUIRE PEOPLE WHO TEST POSITIVE FOR COVID-19 TO MOVE OUT WITHOUT VIOLATING THE FHA?

It depends. The FHA contains an exception for landlords when a person’s “tenancy would constitute a direct threat to the health or safety of other[s]...”²¹ Application of the direct threat exception requires a case-by-case analysis based on factors such as current medical knowledge or the best available objective evidence; the nature, duration, and severity of the risk; the probability of potential injury; and the extent to which the landlord could reasonably modify policies, practices, or procedures to mitigate the risk.²²

House corporations should not rely on the FHA's direct threat exception to justify requiring all students who test positive for COVID-19 to move out of the chapter house. Instead, the house corporation should make an individualized evaluation of the affected student informed by the reasonable medical judgments of the Centers for Disease Control or state or local health authorities.²³ If the threat can be reduced or eliminated through a reasonable accommodation, the house corporation should offer an accommodation.²⁴ Ultimately, the decision to invoke the direct threat exception must be based on objective factual evidence rather than stereotypes or assumptions.²⁵ House corporations should also review the terms of their housing agreement to ensure the requirement would not constitute a breach.

WHAT CAN I DO?

House corporations may encourage students to adopt practices to prevent the spread of COVID-19 like washing hands regularly, wearing cloth face coverings, and practicing social distancing, without violating the FHA. House corporations may also ask students to self-report COVID-19 exposure or an underlying medical condition—but not about treatment—as long as the house corporation does not then engage in discriminatory behavior.²⁶

¹ 42 U.S.C. §§ 3601-31 (2018).

² *See id.* at § 3602(b-c).

³ *See id.* at §§ 3604-07.

⁴ *Id.* at § 3604(a); 24 C.F.R. § 100.60(b) (2020).

⁵ *See* 42 U.S.C. § 3604(f)(3)(B) (2018).

⁶ *See id.* at § 3604(a-e).

⁷ Physical or mental impairments include diseases and conditions like cancer, heart disease, diabetes, and HIV infection. 24 C.F.R. § 100.201(2020).

⁸ 42 U.S.C. § 3602(h) (2020); 24 C.F.R. § 100.201 (2020).

⁹ *Cf.* Jay Glunt & Marguerite Goglia, "Ask the EEOC" *Whether COVID-19 Is a Disability: Its Answer May Surprise You*, EMP. L. WATCH (Mar. 29, 2020), <https://www.employmentlawwatch.com/2020/03/articles/employment-us/covid-19-novel-coronavirus/ask-the-eeoc-whether-covid-19-is-a-disability-its-answer-may-surprise-you/> (describing the Equal Employment Opportunity Commission's response to whether COVID-19 is a disability under the Americans with Disabilities Act).

¹⁰ NAT'L FAIR HOUSING ALLIANCE, COVID-19, ILLEGAL HOUSING DISCRIMINATION, AND PROTECTIONS FOR PEOPLE WITH DISABILITIES AND THOSE WHO CARE FOR THEM UNDER THE FAIR HOUSING ACT 2 (2020), https://nationalfairhousing.org/wp-content/uploads/2020/04/COVID-19-Disability-Research_April-9-2020.pdf.

¹¹ *Id.* at 1; *supra* note 7.

¹² *Id.*

¹³ *Id.*

¹⁴ NAT'L FAIR HOUSING ALLIANCE, *supra* note 10, at 1.

¹⁵ 24 C.F.R. § 100.202 (2020).

¹⁶ 42 U.S.C. § 3604(f)(3)(B) (2018) (emphasis added).

¹⁷ *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1502 (10th Cir. 1995) (quoting *Oxford House, Inc. v. Twp. of Cherry Hill*, 799 F. Supp. 450, 462 (D.N.J. 1992)).

¹⁸ *See* 24 C.F.R. § 100.204(b) (2020).

¹⁹ *See id.*

²⁰ *Id.*

²¹ 42 U.S.C. § 3604(f)(9) (2018).

²² *Cf.* 24 C.F.R. § 9.131 (2020).

²³ NAT'L FAIR HOUSING ALLIANCE, *supra* note 10, at 3-4.

²⁴ *Id.* at 3.

²⁵ *Id.* at 4.

²⁶ *See* NAT'L FAIR HOUSING ALLIANCE, *supra* note 10, at 2.