



Discrimination against persons with limited English proficiency

QUESTION: I am a professional property manager in a market where there are a lot of prospective tenants whose command of the English language is very limited. I don't have anything against renting properties to persons whose first language is something other than English if they are otherwise qualified, but I must say I do have some concerns about the increased potential for misunderstandings with such a person due to the language barrier. My question is, may I add to the criteria I use to qualify all prospects a requirement that the prospect must demonstrate a rudimentary ability to speak and/or read the English language?

ANSWER: This subject was addressed in a document issued by the HUD Office of General Counsel in September 2016 titled ["Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency"](#) ("HUD Guidance"). The HUD Guidance discusses how the Fair Housing Act ("FHA") applies to a housing provider's consideration of a person's limited ability to read, write, speak or understand English.

QUESTION: Inability to speak English isn't a protected class under the FHA is it?

ANSWER: Correct. Persons with limited English proficiency ("LEP") are not a protected class under the FHA. However, according to the HUD Guidance, the FHA prohibits housing providers from using LEP in a way that causes an unjustified discriminatory effect.

QUESTION: What do you mean by that?

ANSWER: According to the HUD Guidance, "[n]early all LEP persons are LEP because either they or their family members are from non-English speaking countries... Thus, housing decisions that are based on LEP generally relate to race or national origin... Courts have found a nexus between language requirements and national origin discrimination."

QUESTION: I would never discriminate against someone on account of their race, national origin or any other class protected under the FHA!

ANSWER: We understand. However, even if a housing provider has no intent to discriminate, the provider can violate the FHA if the provider's policy or practice has a so-called "unjustified discriminatory effect" on a protected class. Under this standard, a facially-neutral policy or practice that has a discriminatory effect on someone due to their race, national origin or other protected characteristic violates the FHA if it is not supported by a legally-sufficient justification. Discriminatory effects liability is determined using a three-step process.

QUESTION: How does that process work?

ANSWER: In the first step, the complaining party must prove that the housing provider's policy or practice concerning LEP people results in a disparate impact on a group of persons because of the group's national origin, race or other protected characteristic. This step may be satisfied though the use of census data proving that an LEP-related policy has a disparate impact based on race, national origin or other protected characteristic.

QUESTION: What does "disparate impact" mean?

ANSWER: In the context of the FHA, it means a housing-related practice that adversely affects one group of people of a protected characteristic more than another even though the practice is applied in the same way to both groups.

QUESTION: What's the second step?

ANSWER: If the complaining party proves that the policy concerning LEP people has a "disparate impact," in the second step of a discriminatory-effects analysis, the burden shifts to the housing provider to prove that the challenged policy is necessary to achieve a substantial, legitimate, non-discriminatory interest of the provider. According to the HUD Guidance, "English proficiency is [not] likely necessary in the landlord-tenant context where communications are not particularly complex or frequent or where, for example, a landlord employs a management company with multilingual staff or otherwise can access language assistance."

QUESTION: I need to communicate pretty regularly with my tenants about a wide range of things in order to carry out my legal and contractual duties to my landlord client and the tenants, and I don't have anybody on my small staff who is multilingual. I think I could demonstrate to a judge that a policy requiring English language proficiency is necessary to achieve my legitimate interest in being able to communicate effectively with my tenants.

ANSWER: That's where the third step of the analysis comes in. If the housing provider successfully proves that its language-related policy is necessary to achieve a legitimate interest, the burden shifts back to the complainant to prove that the housing provider's legitimate interest could be served by another practice that has a less discriminatory effect.

QUESTION: What would be an example of that?

ANSWER: The HUD Guidance suggests that allowing a tenant a reasonable amount of time to take a document, such as a lease, to be translated, could be a less discriminatory alternative. Other examples given are obtaining written or oral translation services, drawing upon the language skills of staff members, and agreeing to communicate through a family member or other person who a prospective tenant brings along.

QUESTION: So what I hear you saying is that on the one hand, it would not be a good idea for me to have a policy prohibiting rentals to persons who cannot demonstrate a rudimentary ability to speak and/or read the English language. However, on the other hand, if I offer such persons reasonable alternatives to speaking and/or reading English, such as the opportunity to have the lease translated into their native tongue and/or the opportunity to identify a representative who can translate for them, I could potentially refuse to rent to them if they were unwilling or unable to pursue those alternatives. Am I hearing you correctly?

ANSWER: Yes.

NC REALTORS® provides articles on legal topics as a member service. They are general statements of applicable legal and ethical principles for member education only. They do not constitute legal advice. If you or a client requires legal advice, the services of a private attorney should be sought. Always consult your broker-in-charge when faced with a question relating to the practice of real estate brokerage.

© Copyright 2018. NC REALTORS®. All rights reserved. No reproduction of any part may be made without the prior written consent of the copyright holder. Any unauthorized reproduction, use, disclosure or distribution is strictly prohibited.