

***VIRGINIA FAIR
HOUSING
HANDBOOK
FOR
LANDLORDS &
PROPERTY MANAGERS***



VIRGINIA LANDLORD PUBLISHING LLC

By

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Falls Church, Virginia

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From a declaration of principles jointly adopted by a committee of the American Bar Association and a committee of the Publishers Association



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About the Author

Robert J. Duffett, Esquire is a partner in an active trial practice with the Falls Church law firm of Baskin, Jackson & Duffett, P.C. He appears regularly in the state courts of all Northern Virginia jurisdictions and has successfully argued before the Virginia Supreme Court. He focuses his practice on landlord-tenant and fair housing laws as well as the drafting and review of commercial and residential leases. By focusing on one specialty of the law, Mr. Duffett is able to understand the needs of his clients and deliver professional services that are specifically tailored to their needs.

Mr. Duffett represents numerous landlords and property management firms in Virginia and is a landlord himself. He is also a frequent speaker on landlord-tenant law. Some of the organizations he has addressed include the Virginia Sheriff's Civil Enforcement Association, the Northern Virginia Association of Realtors, and the United States Department of State. He is a featured speaker at continuing-education seminars relating to commercial and residential leasing and fair-housing compliance. With Mr. Duffett, clients get the benefit of an attorney who has a presence in the industry and is able to adapt and respond to the issues of both large and small landlords.

Mr. Duffett received his B.S. in business with a concentration in finance from Indiana University and his J.D. from the T.C. Williams School of Law at the University of Richmond, Virginia. He is a member of the Virginia State Bar. Mr. Duffett served as a commissioner on the City of Falls Church Housing Commission from 1999 through 2004. He was elected and served as an owner board member of the Northern Virginia Apartment Association and currently serves as the chairman of the Northern Virginia Apartment Association's Legislative Committee.

Every January, Mr. Duffett presents the popular Virginia Landlord® Year-in-Review Dinner, which provides an opportunity for landlords and property managers to socialize, exchange tips, and keep abreast of the legal landscape affecting Virginia's landlords by attending a casual evening seminar. The dinner also provides landlords and property managers with a straightforward summary of:

1. All Virginia Supreme Court decisions affecting landlords from the previous year.
2. Relevant Virginia Circuit Court decisions affecting landlords from around the state from the previous year.
3. Key legislation enacted by the General Assembly in the previous year affecting landlords and a summary of relevant pending legislation.

Participants may attend the live event in person or via a live webcast from the comfort of their home. Additional information may be obtained at virginialandlord.com.

Scope of Seminar

The scope of this book is limited to landlord-tenant relations and focuses on fair housing issues relating only to rental transactions. Fair housing laws are broad and apply to a wide variety of activities and transactions. Fair housing laws generally apply to:

- Rental transactions, including trying to rent an apartment.
- Sales transactions, including trying to buy a single family home, townhouse, condominium, mobile home, or any other type of dwelling.
- Financing transactions, including trying to obtain a loan to purchase a residential property.
- Insurance transactions, including trying to obtain homeowner's insurance which is often referred to as hazard insurance. This type of insurance is frequently required to be escrowed by lenders financing the purchase of homes.

This book is focused on fair housing issues relating only to rental transactions because many landlords and leasing agents will never be involved in the sale, financing, or insurance aspects of housing. There are many excellent sources of material available to obtain information on the activities and transactions excluded from this book. One should seek other guidance for fair housing issues not related to rental transactions. The appendix to this book includes several reference sources for obtaining additional fair housing related information.

Fair housing laws apply to many types of people, including landlords, real estate agents, architects, insurance agents, bankers, mortgage brokers, builders, property managers, and property owners. This book focuses on fair housing laws that generally apply to landlords, property owners, and leasing agents.

Definitions

For ease of reading, this handout generally substitutes the term:

- "Landlord" in place of "property owner," "property manager," and "housing provider."
- "Property manager" for "leasing agent" and "rental manager."
- "Disability" instead of "handicap."

The Virginia Residential Landlord and Tenant Act (§ 55-248.2, et seq.) may be referenced as "VRLTA."

Chapter One

Fair Housing Laws

Federal Fair Housing Law

The federal government's fair housing law was enacted as part of the Civil Rights Act of 1968.¹ The federal law relating to fair housing is often cited as the "Fair Housing Act."

Policy of the United States

It states that it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.² To avoid confusion with other state and local fair housing legislation, this seminar will reference the Fair Housing Act as the "federal Fair Housing Act."

The federal Fair Housing Act prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and handicap. Many states and local jurisdictions have enacted fair housing laws that are substantially equivalent to the federal Fair Housing Act. Many state and local fair housing laws expand upon the federal Fair Housing Act by adding additional types of protected classes such as marital status and elderliness.

Enforcement

The Department of Justice ("DOJ") and the Department of Housing and Urban Development ("HUD") are jointly responsible for enforcing the federal Fair Housing Act.³

Virginia Fair Housing Law

The Virginia Fair Housing Law, §§ 36-86 through 36-96 of the Code of Virginia, was enacted in 1972 and has been amended several times since its enactment.

Reconciling the Virginia Fair Housing Law with the Federal Fair Housing Act

The Virginia Fair Housing Law was enacted to complement the federal fair housing law.⁴ Nothing contained in the Virginia Fair Housing Law reduces the scope of the federal Fair

¹ See 42 U.S.C.A. § 3601-3610

² 42 U.S.C. § 3601

³ The Fair Housing Act is codified at 42 U.S.C. §§ 3601-3619.

⁴ 1989 Va. AGLEXIS 71; 1989 Op. Atty Gen. Va. 245.

Housing Act of 1968.⁵ If any provision of the Virginia Fair Housing Law or the application thereof to any person or circumstances is held by a court to be invalid, the invalidity shall not affect the other provisions or applications of the Virginia Fair Housing Law, which can be given effect without the invalid provisions or application, and to this end the provisions of the Virginia Fair Housing Act are severable.⁶

Policy of the Commonwealth

The Virginia General Assembly has expressly stated that it is the policy of the Commonwealth of Virginia to provide for fair housing throughout Virginia, to all its citizens, and to prohibit discriminatory practices with respect to residential housing by any person or group of persons regardless of:

- **Race**
- **Color**
- **Religion**
- **National origin**
- **Sex**
- **Elderliness**
- **Familial status**
- **Disability**

The Fair Housing Act is an exercise of the police power of the Commonwealth.

The provision of such fair housing throughout Virginia is necessary in order that the peace, health, safety, prosperity, and general welfare of all the inhabitants of the Commonwealth may be protected and insured.⁷ The Virginia Fair Housing Law is deemed an exercise of the police power of the Commonwealth of Virginia for the protection of the people of the Commonwealth.⁸

The Court in *Allen v. Seventy-Seven Acres, et al.*, recognized the broad declaratory purpose of the Virginia Fair Housing Act and the legislators' desire to use the full police power of the Commonwealth when it determined that "sexual harassment" of a tenant amounted to discrimination on the basis of sex within the meaning of the Virginia Fair Housing Law. The Court noted that:

"[I]t is necessary to look at the Virginia Fair Housing Act in some detail. First, the broad declaratory purpose of the [Virginia Fair Housing Act], setting forth the fact that

⁵ See Va. Code § 36-96.23 Nothing in this chapter [Virginia Fair Housing Law] shall abridge the federal Fair Housing Act of 1968 (42 U.S.C. § 3601 et seq.) as amended.

⁶ § 36-96.22

⁷ See Va. Code § 36-96.1(B)

⁸ See Va. Code § 36-96.1(B)

it is an exercise of a police power of the Commonwealth, provides that it is the policy of the Commonwealth:

To provide for fair housing throughout the Commonwealth to all its citizens, regardless of race, color, religion, national origin, sex, elderliness, familial status, or handicap, and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons in that the peace, health, safety, prosperity, and general welfare of all inhabitants of the Commonwealth may be protected and insured.

It is hard to envision a more emphatic expression of a desire to use the full police power of the state to outlaw sexual, racial, and other types of invidious discrimination to the maximum extent possible under the law.” [Emphasis added]⁹

In addition to the Virginia Fair Housing Law, the Virginia Human Rights Law provides, in part, that landlords not discriminate on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability.

It is essential that landlords comply not only with the federal Fair Housing Act and Virginia Fair Housing Law but also with any additional protected classes as required by the local jurisdiction where their rental property is located.

<u>Federal Fair Housing Act</u>	<u>Virginia Fair Housing Law</u>
Race	Race
Color	Color
Religion	Religion
Sex	Sex
National Origin	National Origin
Familial Status	Familial Status
Disability ¹⁰	Disability
	Elderliness

⁹ *Allen v. Seventy-Seven Acres, et al.*, 48 Va. Cir 318 (1999) (Circuit Court of Rockingham County).

¹⁰ Both the federal Fair Housing Act and Virginia Fair Housing Law use the term “handicap” instead of “disability.” Both terms have the same legal meaning. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that the definition of “disability” in the Americans with Disabilities Act is drawn almost verbatim from the definition of “handicap” contained in the Fair Housing Amendments Act of 1988).

Chapter Two

Exemptions to Virginia Fair Housing Law

The Virginia Fair Housing Law provides for several limited exemptions from the law's provisions.

Property Owner Residing in Building with no More than Four Dwelling Units

Except advertising and statements relating to any preference, limitation, or discrimination based on a protected class as outlined in subdivision A 3 of § Va. Code 36-96.3,¹¹ the Virginia Fair Housing Law does not apply to rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.¹²

Certain Individuals Owning no More than Three Single-Family Homes

Except as provided in subdivision A 3 of § 36-96.3 and subsections A, B, and C of § 36-96.6, the Virginia Fair Housing Law shall not apply to any single-family house sold or rented by an owner, provided that such private individual does not own more than three single-family houses at any one time.

Certain Real Estate Investors

In the case of the sale of any single-family house by a private individual owner not residing in the house at the time of the sale or who was not the most recent resident of the house prior to sale, the exemption granted shall apply only with respect to one such sale within any 24-month period, provided that such bona-fide private individual owner does not own any interest in - nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of - more than three such single-family houses at any one time. The sale or rental of any such single-family house shall be exempt from the application of the Virginia Fair Housing Law only if the house is sold or rented:

¹¹ Va. Code § 36-96.3(A)(3) provides that it shall be an unlawful discriminatory housing practice for any person:

To make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement, with respect to the sale or rental of a dwelling, that indicates any preference, limitation, or discrimination or an intention to make any such preference, limitation, or discrimination based on race, color, religion, national origin, sex, elderliness, familial status, or handicap. The use of words or symbols associated with a particular religion, national origin, sex, or race shall be prima facie evidence of an illegal preference under this chapter, which shall not be overcome by a general disclaimer. However, reference alone to places of worship including, but not limited to, churches, synagogues, temples, or mosques in any such notice, statement, or advertisement shall not be prima facie evidence of an illegal preference.

¹² Va. Code § 36-96.2(B)

1. without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, salesperson, or of the facilities or the services of any person in the business of selling or renting dwellings, or of any employee, independent contractor, or agent of any broker, agent, salesperson, or person;

and

2. without the publication, posting, or mailing, after notice, of any advertisement or written notice in violation of the Virginia Fair Housing Law.

However, nothing referenced above shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other professional assistance as necessary to perfect or transfer the title. This exemption shall not apply to or inure to the benefit of any licensee of the Real Estate Board or regulant of the Fair Housing Board, regardless of whether the licensee is acting in his personal or professional capacity.

Note: All advertising is subject to the Virginia Fair Housing Law.

The rental of all housing is subject to applicable fair housing laws with respect to advertising. This is true even where the landlord meets one of the above referenced exemptions. See a discussion of advertising later in this handout.

Chapter Three

Race

It is the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of race and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons.¹³ Race may not be considered by a landlord during the application process or at any other time during a tenancy.

Definition of Race

Neither the Virginia Fair Housing Law nor the federal Fair Housing Act defines the term “race.” Fair Housing and other civil rights laws generally do not specify individual racial and ethnic groups for protection. Instead, civil rights laws generically forbid discrimination on the basis of race, color, or national origin.

Examples of Racial Discrimination

Race discrimination generally encompasses:

Ancestry: Discrimination because of racial or ethnic ancestry. Discrimination against a person because of his or her ancestry can violate the fair housing prohibition against race discrimination. There is frequently an overlap between “race” and “national origin,” but they are different. For example, a landlord’s discrimination against a Japanese-American rental applicant might be targeted at his Asian ancestry and not his Japanese national origin. In such a case, the rental applicant would have a claim of discrimination against the landlord based on race but not based on national origin.

Physical Characteristics: Discrimination based on a person’s physical characteristics associated with race, such as a person’s color, hair, facial features, height, and weight.

Culture: Discrimination against a person because of cultural characteristics often associated to race or ethnicity, such as a person’s name,¹⁴ cultural dress and grooming practices, or accent or manner of speech.

Example: A landlord receives a telephone call from a person inquiring whether there are any available one-bedroom apartments. Because the landlord thinks the potential tenant has a “black accent,” she falsely tells the caller that there are not any one-bedroom apartments available. The next call is from a caller who “sounds white,” so the landlord happily tells the caller that a one-bedroom apartment is available.

Perception: Discrimination against an individual based on a belief that the individual is a

¹³ Va. Code § 36-96.1(B)

¹⁴ See *supra* note 7; cf. *El-Hakem v. BJY, Inc.*, 415 F.3d 1068, 1073 (9th Cir. 2005) (“names are often a proxy for race and ethnicity”).

member of a particular racial group, regardless of how the individual identifies himself. Discrimination against an individual based on a perception of his or her race violates fair housing laws even if that perception is wrong.

Association: Discrimination against an individual because of his/her association with someone of a particular race. For example, it is unlawful to discriminate against a white person because he or she is married to an African American or has a multiracial child,¹⁵ or because he or she maintains friendships or otherwise associates with persons of a certain race.

¹⁵ See *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999) (holding employee stated a claim under Title VII when he alleged that the company owner discriminated against him after his biracial child visited him at work: “A white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child,” because “the essence of the alleged discrimination... is the contrast in races.”).

Chapter Four

Color

It is the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of color and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons.¹⁶ Color shall not be considered by a landlord during the application process or at any other time during a tenancy.

Neither the Virginia Fair Housing Law nor the federal Fair Housing Act defines the term “color.” The commonly understood meaning of a word is used when a statute does not specifically define a word. The commonly understood meaning of “color” when used in a fair housing context is pigmentation, complexion, or skin shade or tone.

Color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person. Even though race and color have overlapping considerations, they are not synonymous.¹⁷ Color discrimination can occur between persons of different races or ethnicities, or between persons of the same race or ethnicity.¹⁸

Refer to “Race” section. More race claims are made each year than color claims. However, the same analyses apply to both race and color.

¹⁶ Va. Code § 36-96.1(B)

¹⁷ See *Walker v. Secretary of the Treasury, IRS*, 713 F. Supp. 403, 405-08 (N.D. Ga. 1989) (discrimination based on color not necessarily the same as race; cause of action available for suit by light-skinned black person against a dark-skinned black person), *aff’d* 953 F.2d 650 (11th Cir. 1992); *cf. Rodriguez v. Guttuso*, 795 F. Supp. 860, 865 (N.D. Ill. 1992) (Fair Housing claim succeeded on statutory ground of “color” discrimination where light-complexioned Latino defendant refused to rent to Latino couple because husband was a dark-complexioned Latino).

¹⁸ See *Santiago v. Stryker Corp.*, 10 F. Supp. 2d 93, 96 (D.P.R. 1998) (holding dark-complexioned Puerto Rican citizen replaced by light-complexioned Puerto Rican citizen could establish a prima facie case of “color” discrimination) (quoting, with approval, *Felix v. Marquez*, 24 EPD ¶ 31,279 (D.D.C.1980): “Color may be a rare claim because color is usually mixed with or subordinated to claims of race discrimination, but considering the mixture of races and ancestral national origins in Puerto Rico, color may be the most practical claim to present.”).

Chapter Five

Religion

It is the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of religion and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons.¹⁹ Neither the Virginia Fair Housing Law nor the federal Fair Housing Act defines the term “religion.” Discrimination on the basis of religion includes discrimination against persons who are atheists and who hold no religious beliefs. Religion and all other protected classes should not be considered by a landlord during the application process or at any other time during a tenancy.

A. Exemption - Housing Operated by Religious Organizations

The Virginia Fair Housing Law does not prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, from limiting the rental or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preferences to such persons, *unless membership in such religion is restricted on account of race or color*.²⁰

B. Advertising - Religious References

It is an unlawful discriminatory housing practice for any person to make, print, or publish any notice, statement, or advertisement with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination or an intention to make any such preference, limitation, or discrimination based on religion.²¹ It shall also be an unlawful discriminatory housing practice for any person to cause to be made, printed, or published any notice, statement, or advertisement, with respect to the rental of a dwelling, that indicates any preference, limitation, or discrimination or an intention to make any such preference, limitation, or discrimination based on religion.²²

The use of words or symbols associated with a particular religion shall be prima facie evidence of an illegal preference under the Virginia Fair Housing Law.²³ This prima facie evidence of an illegal religious preference shall not be overcome by a general disclaimer in any such notice, statement, or advertisement.²⁴ However, reference alone to places of worship including, but not

¹⁹ Va. Code § 36-96.1(B)

²⁰ Va. Code § 36-96.1(B) [Emphasis added]

²¹ See Va. Code § 36-96.3(A)(3)

²² See Va. Code § 36-96.3(A)(3)

²³ Va. Code § 36-96.3(A)(3)

limited to, churches, synagogues, temples, or mosques in any such notice, statement, or advertisement shall not be prima facie evidence of an illegal preference.

²⁴ Va. Code § 36-96.3(A)(3)

Chapter Six

National Origin

It is the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of national origin and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons.²⁵ National origin shall not be considered by a landlord during the application process or at any other time during a tenancy.

Ancestry: Discrimination against a person because of his or her ancestry violates the fair housing prohibition against national origin discrimination. There is frequently an overlap between “race” and “national origin,” but they are different. For example, a landlord’s discrimination against a Japanese-American rental applicant might be targeted at his Asian ancestry and not his Japanese national origin. In such a case, the rental applicant would have a claim of discrimination against the landlord based on race but not based on national origin.

Example: Ira is the property manager of a large apartment complex. Several of his family members were victims of the Holocaust, and he does not like Germans. He receives an inquiry from a white lady named “Gretchen Bach” about the availability of a two-bedroom apartment. Because her name sounds German, Ira falsely tells Gretchen that no two-bedroom apartments are available.

²⁵ Va. Code § 36-96.1(B)

Chapter Seven

National Origin vs. Citizenship

A. HUD Opinion Letter Relating to Citizenship

After September 11, 2001, HUD noted that some persons who are, or are perceived to be, Muslim or of Middle-Eastern or South-Asian descent reported increased discrimination and harassment in connection with their housing.²⁶ In addition, many landlords and property managers made inquiries to HUD about the legality of screening housing applicants on the basis of their citizenship status. In response to these concerns, HUD published a review of federal fair housing laws and answers to some questions regarding housing discrimination that have been raised since the terrorist attacks of September 11, 2001.²⁷

HUD noted that the Fair Housing Act does not prohibit discrimination based solely on a person's citizenship status. Therefore, asking housing applicants to provide documentation of their citizenship or immigration status during the screening process would not violate the Fair Housing Act.²⁸ In fact, HUD noted that such measures have been in place for a number of years in screening applicants for federally-assisted housing. For federally-assisted properties, HUD regulations define what kind of documents are considered acceptable evidence of citizenship or eligible immigration status and outline the process for collecting and verifying such documents.²⁹ These procedures are uniformly applied to every applicant in federally-assisted properties.

HUD stressed that landlords who are considering implementing similar measures must make sure they are carried out in a nondiscriminatory fashion.³⁰ The Secretary of HUD provided the following examples to assist landlords:

Example: *A person from the Middle East who is in the United States applies for an apartment. Because the person is from the Middle East, the landlord requires the person to provide additional information and forms of identification, and refuses to rent the apartment to him. Later, a person from Europe who is in the United States applies for an apartment at the same complex. Because the person is from Europe,*

²⁶ See *Rights and Responsibilities of Landlords and Residents in Preventing Housing Discrimination Based on Race, Religion, or National Origin in the Wake of the Events of September 11, 2001*.

²⁷ *Rights and Responsibilities of Landlords and Residents in Preventing Housing Discrimination Based on Race, Religion, or National Origin in the Wake of the Events of September 11, 2001*.

²⁸ *Rights and Responsibilities of Landlords and Residents in Preventing Housing Discrimination Based on Race, Religion, or National Origin in the Wake of the Events of September 11, 2001*.

²⁹ See HUD Regulations at 24 CFR 5.506-5.512

³⁰ *Rights and Responsibilities of Landlords and Residents in Preventing Housing Discrimination Based on Race, Religion, or National Origin in the Wake of the Events of September 11, 2001*.

the landlord does not have him complete additional paperwork, does not verify the information on the application, and rents the apartment.

Answer: This is disparate treatment on the basis of national origin.³¹

Example: *A person who is applying for an apartment mentions in the interview that he left his native country to come study in the United States. The landlord, concerned that the student's visa may expire during tenancy, asks the student for documentation to determine how long he is legally allowed to be in the United States.*³²

Answer: If the landlord requests this information, regardless of the applicant's race or specific national origin, the landlord has not violated the Fair Housing Act.

B. VRLTA - Identification and Social Security Number or Taxpayer ID Number

The VRLTA provides that a landlord may photocopy each applicant's driver's license or other similar photo identification, containing either the applicant's social security number or control number issued by the Department of Motor Vehicles pursuant to § 46.2-342.³³ The landlord may require that each applicant provide a social security number issued by the U.S. Social Security Administration or an individual taxpayer identification number issued by the U.S. Internal Revenue Service, for the purpose of determining whether each applicant is eligible to become a tenant in the landlord's dwelling unit.³⁴

³¹ *Rights and Responsibilities of Landlords and Residents in Preventing Housing Discrimination Based on Race, Religion, or National Origin in the Wake of the Events of September 11, 2001.*

³² *Rights and Responsibilities of Landlords and Residents in Preventing Housing Discrimination Based on Race, Religion, or National Origin in the Wake of the Events of September 11, 2001.*

³³ See § Va. Code 55-248.4, definition of "rental application."

³⁴ See § Va. Code 55-248.4, definition of "rental application."

Chapter Eight

Sex

It is the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of sex and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons.³⁵ Sex shall not be considered by a landlord during the application process or at any other time during a tenancy. The Virginia Fair Housing Act does not define the term “sex”; however, sexual harassment of a tenant has been held to amount to discrimination on the basis of sex for the purposes of the Virginia Fair Housing Law.³⁶

Selected Virginia Cases Relating to Sexual Discrimination

Allen v. Seventy-Seven Acres, et al.

In the 1999 circuit court case of *Allen v. Seventy-Seven Acres, et al.*, a female tenant filed a lawsuit alleging, in part, a violation of the Virginia Fair Housing Law. She alleged that she and her late husband rented an apartment from the defendants and that, shortly after her husband's death, the managing partner of the landlord's partnership began making sexual advances upon her. She alleged that she began to refuse the defendant's sexual advances and that the defendant had threatened to evict her from the property if she did not submit to his further sexual requests. The defendants had a summons for unlawful detainer issued against the tenant seeking to have her evicted.

The landlord and its managing partner argued that the alleged “sexual harassment” did not amount to discrimination on the basis of sex within the meaning of the Virginia Fair Housing Law and that the tenant's case should be dismissed without going to trial. In 1999, both parties agreed that this issue was a matter of first impression in Virginia. The Court noted that Va. Code § 36-96.3A(2) prohibits any discrimination based on sex relating to the “terms, conditions, or privileges of... rental of a dwelling or in the provision of services or facilities in the connection therewith.” The Court also noted that it would appear that 36-96.3A(2) is drafted broadly enough to encompass within the term “sexual discrimination,” as set forth in this statute, demands which the landlord puts upon certain tenants for sexual favors based upon the fact that they are females of a certain age or appearance. In short, it is hard to think of a more patently discriminatory practice than what had been alleged in this case. Therefore, the Court in *Allen v. Seventy-Seven Acres, et al.* held that the allegations of sexual harassment or the quid-pro-quo renting or altering the terms and conditions of rental agreements for sexual reasons, if proven, would be a form of sexual discrimination prohibited by the statute.³⁷

³⁵ Va. Code § 36-96.1(B)

³⁶ *Allen v. Seventy-Seven Acres, et al.*, 48 Va. Cir 318 (1999) (Circuit Court of Rockingham County) (i.e., landlord demanding sexual favors of female tenants as a quid pro quo for female tenants being permitted to continue to reside in rented premises).

³⁷ *Allen v. Seventy-Seven Acres, et al.*, 48 Va. Cir 318 (1999) (Circuit Court of Rockingham County).

Rike v. Harris

In *Rike v. Harris*, a female tenant filed suit against her landlord alleging sexual discrimination in violation of the federal Fair Housing Act, 42 U.S.C.A. §§ 3601-3631, due to his conduct as her landlord. The tenant testified that her landlord approached her at a time when she was upset due to an argument with her roommate. He put his arm around her and placed his hand on the side of her in an inappropriate manner. He explained that he was aware that she recently lost her job then implied that he would forgo her rental payments if she would engage in a sexual relationship with him. He told her that he had convinced another tenant to exchange sex for rent. The tenant was so disturbed by the landlord's conduct and afraid for her safety that she left her apartment following the incident and returned only to pack her belongings and vacate the premises.³⁸

The case was tried before a jury that found in favor of the tenant and awarded her compensatory damages of \$1,870 and punitive damages in the amount of \$5,000. The jury decided that the tenant was entitled to compensation for all of her actual damages, which included the amount of her unreturned security deposit and storage costs. In addition, the jury awarded her \$1,000 for emotional suffering and inconvenience and \$5,000 in punitive damages. The tenant had sought \$50,000 in punitive damages. The Court also awarded the tenant recovery of her \$7,755 in attorney's fees incurred to bring the action.³⁹

The May 4, 2009 issue of *Virginia Lawyer's Weekly* reported that an Albemarle County Circuit Court judge entered judgment on a jury's award of \$190,000 in damages in favor of a female tenant against the co-owner of a residential property, who also managed the property, for sexually harassing the tenant. The landlord denied the tenant's allegation that he coerced her into performing oral sex on him because she was behind in her rent. However, the jury reportedly awarded \$15,000 in compensatory damages and \$175,000 in punitive damages on the tenant's behalf in September 2008. The suit was filed by the Virginia Real Estate Board and the Virginia Fair Housing Board.⁴⁰

"In order to determine the form of sexual harassment alleged in this case (i.e., landlord demanding sexual favors of female tenants as a quid pro quo for female tenants being permitted to continue to reside in rented premises), it is necessary to look at the Virginia Fair Housing Act in some detail. First, the broad declaratory purpose of the Act, setting forth the fact that it is an exercise of a police power of the Commonwealth, provides that it is the policy of the Commonwealth:

To provide for fair housing throughout the Commonwealth to all its citizens, regardless of race, color, religion, national origin, sex, elderliness, familial status, or handicap, and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons in that the peace, health, safety, prosperity, and general welfare of all inhabitants of the Commonwealth may be protected and insured.

It is hard to envision a more emphatic expression of a desire to use the full police power of the state to outlaw sexual, racial, and other types of invidious discrimination to the maximum extent possible under the law..."

³⁸ *Rike v. Harris*, 2002 U.S. Dist. LEXIS 13754 (2002).

³⁹ *Rike v. Harris*, 2002 U.S. Dist. LEXIS 13754 (2002).

Exceptions to Sex

A. Private Clubs

Nothing in the Virginia Fair Housing Law shall apply to a private membership club, not in fact open to the public, which, as an incident to its primary purpose or purposes, provides lodging which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.⁴¹

B. Religious Groups

Nothing in the Virginia Fair Housing Law prohibits a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, from limiting the rental or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preferences to such persons, *unless membership in such religion is restricted, in part, on account of sex.*⁴²

C. Educational Institutions, Hospitals, and Jails

Where matters of personal privacy are involved, nothing in the Virginia Fair Housing Law shall be construed to prohibit any private, state-owned, or state-supported educational institution, hospital, nursing home, religious or correctional institution from requiring that persons of both sexes not occupy any single-family residence or room or unit of dwellings or other buildings, or restrooms in such room or unit in dwellings or other buildings, which it owns or operates.⁴³

⁴⁰ *Virginia Lawyers' Weekly*, May 4, 2009 Issue

⁴¹ Va. Code § 36-96.1(B)

⁴² Va. Code § 36-96.2(C) [Emphasis added]

⁴³ Va. Code § 36-96.2(C)

Chapter Nine

Elderliness

It is the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of elderliness and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons.⁴⁴ Elderliness should not be considered by a landlord during the application process or at any other time during a tenancy unless the landlord is providing housing in a building or community that meets the specific requirements of housing for older persons.

The Virginia Fair Housing Law defines “elderliness” to mean an individual who has attained his fifty-fifth birthday.⁴⁵ It should be noted that certain elderly tenants may be provided additional rights when an apartment building is converted into a condominium or cooperative. In both types of conversion situations, the term “elderly” means a person not less than sixty-two years of age.⁴⁶

The VRLTA provides that a tenant may designate a third party to receive duplicate copies of a summons for unlawful detainer [eviction suit] and of written notices from the landlord relating to the tenancy.⁴⁷ Where such a third party has been designated by the tenant, the landlord shall mail the duplicate copy of any summons or notice to the designated third party at the same time the summons or notice is mailed to or served upon the tenant. The failure of the landlord to give notice to a third party designated by the tenant shall not affect the validity of any judgment entered against the tenant.⁴⁸

⁴⁴ Va. Code § 36-96.1(B)

⁴⁵ Va. Code § 36-96.1:1

⁴⁶ “Elderly” [Va. Code § 55-79.94 Condominium Conversion definition only] means a person not less than sixty-two years of age.

“Elderly” [Va. Code § 55-487 Cooperative Conversion definition only] means not less than sixty-two years of age.

⁴⁷ § 55-248.9:1(B).

⁴⁸ § 55-248.9:1(B).

Chapter Ten

Familial Status

It is the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of familial status and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons.⁴⁹ Familial status and all other protected classes should not be considered by a landlord during the application process or at any other time during a tenancy.

The Virginia Fair Housing Law defines the term “familial status” to mean one or more individuals who have not attained the age of 18 years being domiciled with (i) a parent or other person having legal custody of such individual or individuals or (ii) the designee of such parent or other person having custody with the written permission of such parent or other person. The term "familial status" also includes any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.⁵⁰ The Virginia Fair Housing Law defines the term "in the process of securing legal custody" to mean having filed an appropriate petition to obtain legal custody of such minor in a court of competent jurisdiction.⁵¹

Exception - Housing for Older Persons

Nothing in the Virginia Fair Housing Law regarding unlawful discrimination because of familial status shall apply to housing for older persons.⁵² For the purposes of the exception to familial status discrimination applicable to housing for older persons, the term “housing for older persons” means housing:

- (i) provided under any state or federal program that is specifically designed and operated to assist elderly persons, as defined in the state or federal program;⁵³

or

- (ii) intended for, and solely occupied by, persons sixty-two years of age or older;⁵⁴

⁴⁹ Va. Code § 36-96.1(B)

⁵⁰ Va. Code § 36-96.1:1

⁵¹ Va. Code § 36-96.1:1

⁵² Va. Code § 36-96.7(A)

⁵³ Va. Code § 36-96.7(A)(i)

⁵⁴ Va. Code § 36-96.7(A)(ii) Va. Code Section § 36-96.7(B) provides that housing shall not fail to meet the requirements for housing for older persons by reason of:

or

- (iii) intended for, and solely occupied by, at least one person fifty-five years of age or older per unit.⁵⁵

The following criteria shall be met in determining whether housing qualifies as housing for older persons intended for, and solely occupied by, at least one person fifty-five years of age or older per unit referenced in clause (iii) above:

1. At least eighty percent of the occupied units are occupied by at least one person fifty-five years of age or older per unit;⁵⁶

and

2. The publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons fifty-five years of age or older.⁵⁷

1. Persons residing in such housing as of September 13, 1988, who do not meet the age requirements of clauses (ii) and (iii) of subsection A of Va. Code § 36-96.7, provided that new occupants of such housing meet the age requirements of those clauses; or

2. Unoccupied units, provided that such units are reserved for occupancy by persons who meet the provisions of clauses (ii) and (iii) of subsection A of Va. Code § 36-96.7.

⁵⁵ Va. Code § 36-96.7(A)(iii) Va. Code Section § 36-96.7(B) provides that housing shall not fail to meet the requirements for housing for older persons by reason of:

1. Persons residing in such housing as of September 13, 1988, who do not meet the age requirements of clauses (ii) and (iii) of subsection A of Va. Code § 36-96.7, provided that new occupants of such housing meet the age requirements of those clauses; or

2. Unoccupied units, provided that such units are reserved for occupancy by persons who meet the provisions of clauses (ii) and (iii) of subsection A of Va. Code § 36-96.7.

⁵⁶ Va. Code § 36-96.7(A)(1)

⁵⁷ Va. Code § 36-96.7(A)(2)

Chapter Eleven

Handicap/Disability

It is the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of disability/handicap and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons.⁵⁸ Disability and all other protected classes should not be considered by a landlord during the application process or at any other time during a tenancy.

Handicap/Disabled - Fair Housing Definition

Both the Virginia Fair Housing Law and the federal Fair Housing Act define “handicap” to mean, with respect to a person, (i) a physical or mental impairment that substantially limits one or more of such person's major life activities; (ii) a record of having such an impairment; or (iii) being regarded as having such an impairment.⁵⁹

In 2004 and 2008, HUD and the U.S. Department of Justice issued a joint statement clarifying some fair housing issues relating to disability. The statement included the following examples of physical or mental impairments as well as their meaning of “substantially limits” and “major life activity.”

Examples of Physical or Mental Impairment

Both HUD and the U.S. Department of Justice have noted that the term “physical or mental impairment” includes, but is not limited to, such diseases and conditions as:

- orthopedic
- visual
- speech and hearing impairments
- cerebral palsy
- autism
- epilepsy
- muscular dystrophy
- multiple sclerosis
- cancer
- heart disease
- diabetes
- human immunodeficiency virus infection
- mental retardation
- emotional illness

⁵⁸ Va. Code § 36-96.1(B)

⁵⁹ Va. Code § 36-96.1:1 and 42 U.S.C. § 3602.

- drug addiction (other than addiction caused by current, illegal use of a controlled substance)
- alcoholism.⁶⁰

“Substantially Limits” - Defined

Both HUD and the U.S. Department of Justice have noted that the term “substantially limits” suggests that the limitation is “significant” or “to a large degree.”⁶¹

“Major Life Activity” - Defined

Both HUD and the U.S. Department of Justice have noted that the term “major life activity” means those activities that are of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, caring for one’s self, learning, and speaking. This list of major life activities is not exhaustive.⁶²

It should be noted that certain disabled Virginia tenants may be provided additional rights when an apartment building is converted into a condominium or cooperative. In both types of conversion situations, the term “disabled” has a different definition from the term “handicap” used in the Virginia Fair Housing Law and federal Fair Housing Act.⁶³ The fair housing definition of disability/handicap shall apply to this book.

The VRLTA provides that a tenant may designate a third party to receive duplicate copies of a summons for unlawful detainer [eviction suit] and of written notices from the landlord relating to the tenancy.⁶⁴ Where such a third party has been designated by the tenant, the landlord shall mail the duplicate copy of any summons or notice to the designated third party at the same time the summons or notice is mailed to or served upon the tenant. The failure of the landlord to give notice to a third party designated by the tenant shall not affect the validity of any judgment entered against the tenant.⁶⁵

⁶⁰ Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Modifications under the Fair Housing Act*, March 5, 2008.

⁶¹ Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Modifications under the Fair Housing Act*, March 5, 2008.

⁶² Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Modifications under the Fair Housing Act*, March 5, 2008.

⁶³ “**Disabled**” [Va. Code § 55-79.94 Condominium Conversion definition only] means a person suffering from a severe, chronic physical or mental impairment which results in substantial functional limitations.

“**Disabled**” [Va. Code § 55-487 Cooperative Conversion definition only] means suffering from a severe, chronic physical or mental impairment which results in substantial functional limitations.

⁶⁴ § 55-248.9:1(B).

A family care home, foster home, or group home in which physically handicapped, mentally ill, mentally retarded, or developmentally disabled persons reside, with one or more resident counselors or other staff persons, shall be considered for all purposes residential occupancy by a single family when construing any restrictive covenant which purports to restrict occupancy or ownership of real or leasehold property to members of a single family or to residential use or structure.⁶⁶

The Virginia Fair Housing Law provides that the term “family” includes a single individual, whether male or female.⁶⁷

What Handicap/Disabled Does Not Include

The term “handicap” does not include current, illegal use of, or addiction to, a controlled substance as defined in Virginia or federal law.⁶⁸ In addition, neither the term “individual with handicap” nor the term “handicap” shall apply to an individual solely because that individual is a transvestite.⁶⁹

Validity of Laws and Regulations Affording Handicapped Persons Greater Access

Nothing in the Virginia Fair Housing Law shall be construed to invalidate or limit any Virginia law or regulation which requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by the Virginia Fair Housing Law.⁷⁰

Example: 8-918 of the Fairfax County Zoning Ordinance relaxes zoning requirements by permitting the owner of a single-family residence to create a separate dwelling unit or apartment within their home or on their property, provided the owner lives on the property and rents the accessory dwelling unit to an elderly or disabled person(s). The Fairfax County Accessory Dwelling Ordinance contains very specific requirements and must be approved by the Board of Zoning Appeals. The ordinance should be thoroughly reviewed prior to taking any action.

Example: The City of Falls Church Affordable Dwelling Ordinance permits, in part, qualified individuals to rent certain dwellings at affordable rates. The program establishes priority for the ranking of applicants and gives preference to applicants who are sixty-two (62) years of age or older and to applicants with disabilities.

⁶⁵ § 55-248.9:1(B).

⁶⁶ § 36-96.6(D).

⁶⁷ Va. Code § 36-96.1:1

⁶⁸ Va. Code § 36-96.1:1

⁶⁹ § 36-96.1:1

⁷⁰ Va. Code § 36-96.3(D)

Chapter Twelve

Non-Protected Classes

Does the Act protect persons who illegally use controlled substances?

No, while the Act does protect persons who are recovering from substance abuse, it does not protect persons who are currently engaging in the illegal use of controlled substances. See *United States v. Southern Management Corp.*, 955 F.2d 914, 919 (4th Cir. 1992) (discussing exclusion in 42 U.S.C. § 3602(h) for "current, illegal use of or addiction to a controlled substance").

Examples of Non-Protected Classes

- Smokers
- Source of income
- Sexual orientation

Sexual orientation is not a protected class under fair housing laws, but discrimination may be prohibited by local human rights ordinances.

Does the Act protect persons with disabilities who pose a significant danger to others?

No, the Act does not protect an individual with a disability whose tenancy would constitute a "direct threat" to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by reasonable accommodation.

How can a housing provider determine if an individual poses a direct threat?

The Act does not allow for exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (e.g., current conduct or a recent history of overt acts). The assessment must consider:

- (1) the nature, duration, and severity of the risk of injury;
- (2) the probability that injury will actually occur; and
- (3) whether there are any reasonable accommodations that will eliminate the direct threat.

When evaluating a recent history of overt acts, a landlord must take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat of a significant risk of substantial harm. In such a situation, the landlord may request that the individual document how the circumstances have changed so that he no longer poses a direct threat. A landlord may also obtain satisfactory assurances that the individual will not pose a direct threat during the tenancy. The landlord must have reliable, objective evidence that a person with a disability poses a direct threat before excluding him from housing on that basis.

Example 1: Mega Towers Apartments requires all persons applying to rent an apartment to complete an application that includes information on the applicant's current place of residence. Janet Smith completes an application to rent an apartment at Mega Towers and notes on her application that she currently resides in Cambridge House. The property manager of Mega Towers knows that Cambridge House is a group home for women receiving treatment for alcoholism. Based solely on that information and the property manager's personal belief that alcoholics are likely to cause disturbances and damage property, the manager rejects the applicant.

The rejection is unlawful because it is based on a generalized stereotype related to a disability rather than an individualized assessment of any threat to other persons or the property of others based on reliable, objective evidence about the applicant's recent past conduct. A landlord may not treat this applicant differently than other applicants, based on the property manager's subjective perceptions of the potential problems posed by the applicant's alcoholism, by requiring additional documents, imposing different lease terms, or requiring a higher security deposit.

However, the property manager could have checked this applicant's references to the same extent and in the same manner as Mega Towers Apartments would have checked any other applicant's references. If such a reference check revealed objective evidence showing that this applicant had posed a direct threat to persons or property in the recent past and the direct threat had not been eliminated, the property manager could then have rejected the applicant based on direct threat.

Example 2: James Smith, a tenant at Mega Towers Apartments, is arrested for threatening his neighbor while brandishing a baseball bat. The Mega Towers lease agreement contains a term prohibiting tenants from threatening violence against other residents. Mega Towers' rental manager investigates the incident and learns that James Smith threatened the other resident with physical violence and had to be physically restrained by other neighbors to keep him from acting on his threat. Following Mega Towers' standard practice of strictly enforcing its "no threats" policy, Mega Towers' rental manager provides Mr. Smith with a lease termination notice in accordance with the Virginia Residential Landlord and Tenant Act, which is the first step in the eviction process.

James Smith's attorney contacts Mega Towers' rental manager and explains that James Smith has a psychiatric disability that causes him to be physically violent when he stops taking his prescribed medication. Suggesting that his client will not pose a direct threat to others if proper safeguards are taken, the attorney requests that the rental manager grant James Smith an exception to the "no threats" policy as a reasonable accommodation based on James Smith's disability. Mega Towers' rental manager need only grant the reasonable accommodation if James Smith's attorney can provide satisfactory assurance that James will receive appropriate counseling and periodic medication monitoring so that he will no longer pose a direct threat during his tenancy. After consulting with James Smith, the attorney responds that James Smith is unwilling to receive counseling or submit to any type of periodic monitoring to ensure that he takes his prescribed medication. The rental manager may go forward with the eviction proceeding since James Smith continues to pose a direct threat to the health or safety of other residents.

Chapter Thirteen

Unlawful Discriminatory Housing Practices

Refusing to Negotiate for Rental or Making Dwelling Unit Unavailable

It shall be an unlawful discriminatory housing practice for any person⁷¹ to refuse to rent after the making of a bona-fide offer or to refuse to negotiate for the rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, national origin, sex, elderliness, or familial status.⁷²

It shall be an unlawful discriminatory housing practice for any person⁷³ to discriminate against any person in the terms, conditions, or privileges of rental of a dwelling, or in the provision of services or facilities in the connection therewith to any person, because of race, color, religion, national origin, sex, elderliness, or familial status.⁷⁴

The Act prohibits housing providers from discriminating against housing applicants or residents because of their disability or the disability of anyone associated with them and from treating persons with disabilities less favorably than others because of their disability. The Act also makes it unlawful for any person to refuse “to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises, except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter’s agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.” The Act also makes it unlawful for any person to refuse “to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford ... person(s) [with disabilities] equal opportunity to use and enjoy a dwelling.” The Act also prohibits housing providers from refusing residency to persons with disabilities or, with some

⁷¹ The Virginia Fair Housing Law defines the term “person” to mean one or more individuals, whether male or female, corporations, partnerships, associations, labor organizations, fair housing organizations, civil rights organizations, organizations, governmental entities, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries. See Va. Code § 36-96.1:1

⁷² Va. Code § 36-96.3(A)(1)

⁷³ The Virginia Fair Housing Law defines the term “person” to mean one or more individuals, whether male or female, corporations, partnerships, associations, labor organizations, fair housing organizations, civil rights organizations, organizations, governmental entities, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries. See Va. Code § 36-96.1:1

⁷⁴ Va. Code § 36-96.3(A)(2)

narrow exceptions, placing conditions on their residency because those persons may require reasonable modifications or reasonable accommodations.

Rules and Privileges of Tenancy

A landlord must enforce the rules of tenancy in a nondiscriminatory manner. A landlord's response to a violation of the rules must not differ based on the person's race, color, religion, sex, national origin, disability, or familial status.

After the terrorist attacks of September 11, 2001, HUD noted that persons who are, or are perceived to be, Muslim or of Middle-Eastern or South-Asian descent reported increased discrimination and harassment, sometimes in connection with their housing.⁷⁵ To help address this concern, the U.S. Department of Housing and Urban Development published a review of federal fair housing laws and answers to some questions regarding housing discrimination that have been raised since the events of September 11, 2001. HUD noted that a landlord's response to a violation of the rules must not differ based on the person's race, religion, or national origin. In addition, a landlord may not impose more severe penalties because the person is Muslim or of Middle-Eastern or South-Asian descent.⁷⁶

HUD noted that while landlords must be responsive to complaints from tenants, they should be careful to take action against residents only on the basis of legitimate property management concerns. It was stressed that landlords should consider whether a complaint may actually be motivated by race, religion, or national origin. The following examples were given by HUD:

Example: *A landlord receives a complaint from a tenant who claims a Muslim tenant is "having a group of about five or six other Muslim men over to his apartment every Monday night." The tenant claims "the men appear unfriendly" and thinks they may be "up to something." However, the tenant's visitors do not disturb the other residents in their peaceful enjoyment of the premises. A landlord could be accused of religious discrimination if s/he asks the tenant to refrain from having Muslim guests when there is no evidence of any violation of established property management rules.*⁷⁷

Answer: HUD stressed that landlords must also give all tenants the same privileges. A landlord cannot limit the use of building amenities such as community rooms, gyms, etc. based on the person's race, religion, or national origin.

⁷⁵ See *Rights and Responsibilities of Landlords and Residents in Preventing Housing Discrimination Based on Race, Religion, or National Origin in the Wake of the Events of September 11, 2001*.

⁷⁶ See *Rights and Responsibilities of Landlords and Residents in Preventing Housing Discrimination Based on Race, Religion, or National Origin in the Wake of the Events of September 11, 2001*.

⁷⁷ *Rights and Responsibilities of Landlords and Residents in Preventing Housing Discrimination Based on Race, Religion, or National Origin in the Wake of the Events of September 11, 2001*.

Example: *A landlord typically allows building residents to reserve the community room for activities such as birthday parties. When a tenant who is Arab American asks to reserve the building's community room for a birthday party for his son, his request is denied even though the room was available. Later, the landlord grants the reservation to a tenant who is white of European descent.*

Answer: HUD noted that by failing to give persons of different national origins the same privileges, this landlord could be accused of national origin discrimination.⁷⁸

Miscellaneous Types of Discriminatory Housing Practices

It shall be an unlawful discriminatory housing practice for any person⁷⁹ to represent to any person because of race, color, religion, national origin, sex, elderliness, familial status, or handicap that any dwelling is not available for inspection or rental when such dwelling is in fact so available.⁸⁰

It shall be an unlawful discriminatory housing practice for any person⁸¹ to deny any person access to membership in or participation in any multiple listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against such person in the terms or conditions of such access, membership, or participation because of race, color, religion, national origin, sex, elderliness, familial status, or handicap.⁸²

⁷⁸ *Rights and Responsibilities of Landlords and Residents in Preventing Housing Discrimination Based on Race, Religion, or National Origin in the Wake of the Events of September 11, 2001.*

⁷⁹ The Virginia Fair Housing Law defines the term "person" to mean one or more individuals, whether male or female, corporations, partnerships, associations, labor organizations, fair housing organizations, civil rights organizations, organizations, governmental entities, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries. See Va. Code § 36-96.1:1.

⁸⁰ Va. Code § 36-96.3(A)(4)

⁸¹ The Virginia Fair Housing Law defines the term "person" to mean one or more individuals, whether male or female, corporations, partnerships, associations, labor organizations, fair housing organizations, civil rights organizations, organizations, governmental entities, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries. See Va. Code § 36-96.1:1.

⁸² Va. Code § 36-96.3(A)(5)

It shall be an unlawful discriminatory housing practice for any person⁸³ to include in any rental or lease of housing any restrictive covenant that discriminates because of race, color, religion, national origin, sex, elderliness, familial status, or handicap or for any person to honor or exercise, or attempt to honor or exercise, any such discriminatory covenant pertaining to housing.⁸⁴ Any restrictive covenant and any related reversionary interest, purporting to restrict occupancy of property on the basis of race, color, religion, national origin, sex, elderliness, familial status, or handicap, whether heretofore or hereafter included in an instrument affecting the leasehold property, are declared to be void and contrary to the public policy of this Commonwealth.⁸⁵ No person shall solicit or accept compensation of any kind for the release or removal of any such covenant or reversionary interest.⁸⁶ Any person soliciting or accepting such compensation shall be liable to any person injured thereby in an amount equal to the greater of three times the compensation solicited or received, or \$500, plus reasonable attorneys' fees and costs incurred.⁸⁷

Any person who is asked to accept a document affecting title to real or leasehold property may decline to accept the same if it includes such a covenant or reversionary interest until the covenant or reversionary interest has been removed from the document. Refusal to accept delivery of an instrument for this reason shall not be deemed a breach of a contract to lease or otherwise deal with such property.⁸⁸

A family care home, foster home, or group home in which physically handicapped, mentally ill, mentally retarded, or developmentally disabled persons reside, with one or more resident counselors or other staff persons, shall be considered for all purposes residential occupancy by a single family when construing any restrictive covenant which purports to restrict occupancy or ownership of real or leasehold property to members of a single family or to residential use or structure.⁸⁹

⁸³ The Virginia Fair Housing Law defines the term "person" to mean one or more individuals, whether male or female, corporations, partnerships, associations, labor organizations, fair housing organizations, civil rights organizations, organizations, governmental entities, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries. See Va. Code § 36-96.1:1.

⁸⁴ Va. Code § 36-96.3(A)(6)

⁸⁵ § 36-96.6(A)

⁸⁶ § 36-96.6(C)

⁸⁷ § 36-96.6(C)

⁸⁸ § 36-96.6(B)

⁸⁹ § 36-96.6(D)

It shall be an unlawful discriminatory housing practice for any person⁹⁰ to induce, or attempt to induce, to rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, national origin, sex, elderliness, familial status, or handicap.⁹¹

It shall be an unlawful discriminatory housing practice for any person⁹² to refuse to rent, or refuse to negotiate for the rental of, or otherwise discriminate or make unavailable or deny, a dwelling because of a handicap of (i) the renter, (ii) a person residing in or intending to reside in that dwelling after it is rented or made available, or (iii) any person associated with the renter.⁹³

It shall be an unlawful discriminatory housing practice for any person⁹⁴ to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on the account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the Virginia Fair Housing Law.⁹⁵

⁹⁰ The Virginia Fair Housing Law defines the term “person” to mean one or more individuals, whether male or female, corporations, partnerships, associations, labor organizations, fair housing organizations, civil rights organizations, organizations, governmental entities, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries. See Va. Code § 36-96.1:1

⁹¹ Va. Code § 36-96.3(A)(7)

⁹² The Virginia Fair Housing Law defines the term “person” to mean one or more individuals, whether male or female, corporations, partnerships, associations, labor organizations, fair housing organizations, civil rights organizations, organizations, governmental entities, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries. See Va. Code § 36-96.1:1

⁹³ Va. Code § 36-96.3(A)(8)

⁹⁴ The Virginia Fair Housing Law defines the term “person” to mean one or more individuals, whether male or female, corporations, partnerships, associations, labor organizations, fair housing organizations, civil rights organizations, organizations, governmental entities, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries. See Va. Code § 36-96.1:1

⁹⁵ Va. Code § 36-96.5

It shall be an unlawful discriminatory housing practice for any person⁹⁶ to discriminate against any person in the terms, conditions, or privileges of rental of a dwelling, or in the provision of services or facilities in connection therewith, because of a handicap of (i) that person, (ii) a person residing in or intending to reside in that dwelling after it was rented or made available, or (iii) any person associated with that renter.⁹⁷

Discriminatory Advertising

It shall be an unlawful discriminatory housing practice for any person⁹⁸ to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement, with respect to the rental of a dwelling, that indicates any preference, limitation, or discrimination or an intention to make any such preference, limitation, or discrimination based on race, color, religion, national origin, sex, elderliness, familial status, or handicap. The use of words or symbols associated with a particular religion, national origin, sex, or race shall be prima facie evidence of an illegal preference under this chapter, which shall not be overcome by a general disclaimer. However, reference alone to places of worship including, but not limited to, churches, synagogues, temples, or mosques in any such notice, statement, or advertisement shall not be prima facie evidence of an illegal preference.⁹⁹

In response to inquiries whether potential violations of the Fair Housing Act occur through use of certain words or phrases in advertising, HUD issued a memorandum in 1995 to provide guidance. The memorandum was prepared by Roberta Achtenberg, the Assistant Secretary for Fair Housing and Equal Opportunity, on January 9, 1995. The HUD memorandum is often referred to as the “Achtenberg Memo.” It indicated that HUD will update its guidelines as appropriate.¹⁰⁰ As of the date of this handbook, HUD has not updated its guidelines since 1995.

The Achtenberg Memo was issued to provide guidance on the procedures for the acceptance and investigation of allegations of discrimination by HUD under Section 804(c) of the federal Fair Housing Act involving the publication of real estate advertisements. This guidance in the

⁹⁶ The Virginia Fair Housing Law defines the term “person” to mean one or more individuals, whether male or female, corporations, partnerships, associations, labor organizations, fair housing organizations, civil rights organizations, organizations, governmental entities, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries. See Va. Code § 36-96.1:1

⁹⁷ Va. Code § 36-96.3(A)(9)

⁹⁸ The Virginia Fair Housing Law defines the term “person” to mean one or more individuals, whether male or female, corporations, partnerships, associations, labor organizations, fair housing organizations, civil rights organizations, organizations, governmental entities, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries. See Va. Code § 36-96.1:1

⁹⁹ Va. Code § 36-96.3(A)(3)

¹⁰⁰ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 1.

Achtenberg Memo is meant to express HUD's position on the issues addressed in the memo.¹⁰¹ The Achtenberg Memo stressed that it does not address fair housing issues associated with the publication of advertisements containing human models and does not address 804(c) liability for making discriminatory statements.¹⁰²

The Achtenberg Memo noted that, in some situations, the advertising issues addressed in it cannot be answered by referring to decided cases alone.¹⁰³ It also noted that, in some circumstances, the Advertising Guidelines, previously published at 24 C.F.R. Part 109, had been interpreted to extend the liability for advertisements to circumstances which were unreasonable. HUD stressed that such unreasonable interpretations were usually by persons outside of HUD.¹⁰⁴

The HUD Advertising Guidelines, published at 24 C.F.R Part 109, are no longer officially part of the Code of Federal Regulations because Part 109 was withdrawn from the Code of Federal Regulations by directive no. FR-4029-F-01, effective May 1, 1996. However, the Part 109 Advertising Guidelines appear to still represent the position of HUD on advertising issues except as clarified by the 1995 Achtenberg Memo. The HUD Part 109 Advertising Guidelines are summarized in this handbook because they still provide helpful guidance to landlords.

Basis of Advertising Liability under Fair Housing Laws

Publishers and advertisers are responsible under the federal Fair Housing Act for making, printing, or publishing an advertisement that violates the federal Fair Housing Act on its face. Thus, they should not publish or cause to be published an advertisement that on its face expresses a preference, limitation, or discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin.¹⁰⁵ [RJD Note: VA expands classes]

HUD Standard of Review - Terms and Phrases

To the extent that either the Advertising Guidelines or the case law does not state that particular terms or phrases (or closely comparable terms) may violate the federal Fair Housing Act, a publisher is not liable under the federal Fair Housing Act for advertisements which, in the

¹⁰¹ January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 1.

Applicability of Section 804(C)

Section 804(c) of the federal Fair Housing Act prohibits the making, printing, and publishing of advertisements which state a preference, limitation, or discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin. The prohibition applies to publishers, such as newspapers and directories, as well as to persons and entities who place real estate advertisements. It also applies to advertisements where the underlying property may be exempt from the provisions of the Act, but where the advertisement itself violates the federal Fair Housing Act. See 42 U.S.C. 3603(b).

¹⁰² January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 1, footnote #1.

¹⁰³ January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 1.

¹⁰⁴ January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 1.

¹⁰⁵ January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 2.

context of the usage in a particular advertisement, might indicate a preference, limitation, or discrimination, but where such a preference is not readily apparent to an ordinary reader.¹⁰⁶ Therefore, HUD will not accept complaints against publishers concerning advertisements where the language might or might not be viewed as being used in a discriminatory context.¹⁰⁷

Publisher Reliance

A publisher of an advertisement is entitled to rely on the landlord's assurance that the property is exempt.¹⁰⁸ [RJD - clarify exemption]

HUD Example of Standard of Review - "Female Roommate Wanted"

HUD intake staff should not accept a complaint against a newspaper for running an advertisement which includes the phrase "female roommate wanted" because the advertisement does not indicate whether the requirements for the shared living exception have been met.¹⁰⁹

Publisher Reliance on Landlord's Representations

Publishers can rely on the representations of the individual placing the ad that shared living arrangements apply to the property in question in the preceding example.¹¹⁰

Although a publisher may rely upon the representations of the individuals placing the advertisements, the persons placing such advertisements are responsible for satisfying the conditions for the exemption.¹¹¹ Thus, an advertisement for a female roommate could result in liability for the person placing the ad if the housing being advertised is actually a separate dwelling unit without shared living spaces, but no liability could result against the publisher.¹¹²

HUD Example of Standard of Review - "Housing for Older Persons"

HUD intake staff should not file a familial status complaint against a publisher of an advertisement if the advertisement indicates on its face that it is housing for older persons.¹¹³ While a landlord may be held responsible for running an advertisement indicating an exclusion of families with children if his or her property does not meet the "housing for older persons" exemption, a publisher is entitled to rely on the landlord's assurance that the property is

¹⁰⁶ January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 2.

¹⁰⁷ January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 2.

¹⁰⁸ January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 3.

¹⁰⁹ January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 2.

¹¹⁰ January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 2.

¹¹¹ January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 2-3.

¹¹² January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 3 (citing 24 CFR 109.20). 24 CFR 109.20 has been rescinded but appears to reflect HUD's position unless clarified by the Achtenberg Memo.

¹¹³ January 9, 1995, HUD "Roberta Achtenberg Memorandum" Page 3.

exempt.¹¹⁴

Advertising and Race, Color, or National Origin

Real estate advertisements should state no discriminatory preference or limitation on account of race, color, or national origin.

Prohibited

Use of words describing the housing, the current or potential residents, or the neighbors or neighborhood in racial or ethnic terms (e.g., “white-family home” or “no Irish”) will create liability under this section.¹¹⁵

Acceptable

Advertisements which are facially neutral will not create liability. Thus, complaints over use of phrases such as “master bedroom,” “rare find,” or “desirable neighborhood” should not be filed by HUD.¹¹⁶

Use of the term “master bedroom” does not constitute a violation of the race discrimination provision.¹¹⁷

Advertising and Religion

Prohibited

Advertisements should not contain an explicit preference, limitation, or discrimination on account of religion (e.g., “no Jews” or “Christian home”).

Possibly Acceptable

Advertisements which use the legal name of an entity which contains a religious reference (for example, Roselawn Catholic Home), or those which contain a religious symbol (such as a cross), standing alone, may indicate a religious preference. However, if such an advertisement includes a disclaimer (such as the statement “This home does not discriminate on the basis of race, color, religion, national origin, sex, handicap, or familial status”), it will not violate the federal Fair Housing Act.¹¹⁸ [RJD Note: VA expands]

¹¹⁴ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 3.

¹¹⁵ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 3. RJD Note: clarify “section” reference or simply state federal Fair Housing Act.

¹¹⁶ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 3.

¹¹⁷ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 3-4.

¹¹⁸ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 3.

Acceptable

Advertisements containing descriptions of properties (“apartment complex with chapel”) or services (“kosher meals available”) do not on their face state a preference for persons likely to make use of those facilities and are not violations of the federal Fair Housing Act.¹¹⁹

The use of secularized terms or symbols relating to religious holidays (such as Santa Claus, Easter Bunny, or St. Valentine's Day images) or phrases such as "Merry Christmas," "Happy Easter," or the like does not constitute a violation of the federal Fair Housing Act.¹²⁰

Advertising and Sex

Advertisements for single-family dwellings or separate units in a multi-family dwelling should contain no explicit preference, limitation, or discrimination based on sex under the federal Fair Housing Act.¹²¹

Acceptable

Use of the term “master bedroom” does not constitute a violation of the sex discrimination provisions of the federal Fair Housing Act.¹²²

Terms such as "mother-in-law suite" and "bachelor apartment" are commonly used as physical descriptions of housing units and do not violate the federal Fair Housing Act.¹²³

Advertising and Handicap

Real estate advertisements should not contain explicit exclusions, limitations, or other indications of discrimination based on handicap (e.g., “no wheelchairs”).¹²⁴

Acceptable

Advertisements containing descriptions of properties (“great view,” “fourth-floor walk-up,” or “walk-in closets”), services or facilities (“jogging trails”), or neighborhoods (“walk to bus-stop”) do not violate the federal Fair Housing Act.¹²⁵

Advertisements describing the conduct required of residents ("non-smoking" or "sober") do not

¹¹⁹ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 3.

¹²⁰ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 3.

¹²¹ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 3-4.

¹²² January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 4.

¹²³ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 4.

¹²⁴ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 4.

¹²⁵ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 4.

violate the federal Fair Housing Act.¹²⁶

Advertisements containing descriptions of accessibility features are lawful (“wheelchair ramp”).¹²⁷

Advertising and Familial Status

Advertisements may not state an explicit preference, limitation, or discrimination based on familial status.

Prohibited

Advertisements may not contain limitations on the number or ages of children or state a preference for adults, couples, or singles.¹²⁸

Acceptable

Description of Properties

Advertisements describing the properties (“two bedroom,” “cozy,” or “family room”) are not facially discriminatory and do not violate the federal Fair Housing Act.¹²⁹

Description of Services and Facilities

Advertisements describing services and facilities (“no bicycles allowed”) are not facially discriminatory and do not violate the federal Fair Housing Act.¹³⁰

Description of Neighborhoods

Advertisements describing neighborhoods (“quiet streets”) are not facially discriminatory and do not violate the federal Fair Housing Act.¹³¹

Advertising Includes Internet and All Media

On September 20, 2006, HUD stated in guidance issued to its fair housing regional directors that the Department has concluded that it is illegal for Web sites to publish discriminatory advertisements.¹³²

¹²⁶ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 4.

¹²⁷ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 4.

¹²⁸ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 4.

¹²⁹ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 4. (emphasis in original)

¹³⁰ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 4. (emphasis in original)

¹³¹ January 9, 1995, HUD “Roberta Achtenberg Memorandum” Page 4. (emphasis in original)

¹³² *Fair Housing News*, Fall 2006, U.S. Department.

The Fair Housing Act makes it illegal for advertising media, including newspapers, magazines, television, radio, and the Internet, “to make, print, or publish, or cause to be made, printed, or published, any notice or statement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, national origin, sex, disability, or familial status.”

The guidance was issued in response to the assertion of some Web sites that they are exempt from liability under the Fair Housing Act because of a provision in the Communications Decency Act (CDA), which limits the liability of interactive computer services for content originating with a third-party user of the service. Although the CDA does not state an intent to limit liability under the Fair Housing Act or other civil rights statutes, some believe that Section 230 of the CDA gives Internet publishers immunity from lawsuits brought under federal and state civil rights statutes.

In its guidance, HUD concluded that the CDA does not make Web sites immune from liability under the Fair Housing Act or from liability under state and local laws that HUD has certified as substantially equivalent to the Fair Housing Act.¹³³ HUD also pledged to continue to investigate allegations that Web sites have published discriminatory ads on the Internet.

¹³³ *Fair Housing News*, Fall 2006, U.S. Department.

Chapter Fourteen

Accessibility Requirements

Design of Certain Buildings Constructed after March 13, 1991

The Virginia Fair Housing Law provides certain handicap accessibility requirements with respect to the design and construction of covered multi-family dwellings for first occupancy after March 13, 1991. The term "covered multi-family dwellings" is statutorily defined by the Virginia Fair Housing Law to mean buildings consisting of four or more units if such buildings have one or more elevators and ground-floor units in other buildings consisting of four or more units.¹³⁴

For the purposes of Va. Code § 36-96.3, the Virginia Fair Housing Law states that it shall be discrimination to fail to design and construct dwellings in such a manner that:

1. The public use and common use areas of the dwellings are readily accessible to and usable by handicapped persons. Compliance with the appropriate requirements of the American National Standards for Building and Facilities (commonly cited as "ANSI A117.1") or with any other standards adopted as part of regulations promulgated by HUD providing accessibility and usability for physically handicapped people shall be deemed to satisfy the requirements of subdivision B 3.¹³⁵

2. All the doors designed to allow passage into and within all premises are sufficiently wide to allow passage by handicapped persons in wheelchairs. Compliance with the appropriate requirements of the American National Standards for Building and Facilities (commonly cited as "ANSI A117.1") or with any other standards adopted as part of regulations promulgated by HUD providing accessibility and usability for physically handicapped people shall be deemed to satisfy the requirements of subdivision B 3.¹³⁶

and

3. All premises within covered multi-family dwelling units contain:

- an accessible route into and through the dwelling;
- light switches, electrical outlets, thermostats, and other environmental controls are in accessible locations;
- there are reinforcements in the bathroom walls to allow later installation of grab bars;

¹³⁴ Va. Code § 36-96.3(B)(3)

¹³⁵ Va. Code § 36-96.3(C)

¹³⁶ Va. Code § 36-96.3(C)

- there are usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

Compliance with the appropriate requirements of the American National Standards for Building and Facilities (commonly cited as "ANSI A117.1") or with any other standards adopted as part of regulations promulgated by HUD providing accessibility and usability for physically handicapped people shall be deemed to satisfy the requirements of subdivision B 3.¹³⁷

¹³⁷ Va. Code § 36-96.3(C)

Chapter Fifteen

Rental Application Fair Housing Issues

Occupancy Limits

The Virginia Fair Housing Law does not prohibit a rental application or similar document from requiring information concerning the number, ages, sex, and familial relationship of the applicants and the dwelling's intended occupants.¹³⁸ Information is necessary in order to comply with reasonable local, state, or federal restriction regarding the maximum number of occupants permitted to occupy a dwelling. Owners or managing agents of dwellings¹³⁹ may develop and implement reasonable occupancy and safety standards.¹⁴⁰ Such occupancy and safety standards may be based on factors such as the number and size of sleeping areas or bedrooms and overall size of a dwelling unit so long as the standards do not violate local, state, or federal restrictions.¹⁴¹

The Virginia Fair Housing Law is consistent with the federal Fair Housing Law. The Secretary of HUD noted that there is no basis to conclude that Congress intended that a landlord would be unable to restrict the number of occupants who could reside in a dwelling. Thus, HUD believes that, in appropriate circumstances, owners and managers may develop and implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit.¹⁴²

Local and State Occupancy Limits

Nothing in the Virginia Fair Housing Law limits the applicability of any reasonable local, state, or federal restriction regarding the maximum number of occupants permitted to occupy a dwelling.¹⁴³ The Virginia Fair Housing Law does not prohibit a rental application or similar

¹³⁸ Va. Code § 36-96.2(G)

¹³⁹ For the purposes of the Virginia Fair Housing Law, the term “dwelling” means any building, structure, or portion thereof that is occupied as, or designated or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof. See Va. Code § 36-96.1:1

¹⁴⁰ Va. Code § 36-96.2(G)

¹⁴¹ Va. Code § 36-96.2(G)

¹⁴² See Comments in the final rule implementing the Fair Housing Amendments Act of 1988, relating to HUD’s position. 24 C.F.R. Chapter I, Subchapter A. Appendix I at 566-67 (1990).

There is no basis to conclude that Congress intended that an owner or manager of dwellings would be unable to restrict the number of occupants who could reside in a dwelling. Thus, the Department believes that, in appropriate circumstances, owners and managers may develop and implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit.

¹⁴³ Va. Code § 36-96.2(G)

document from requiring information concerning the number, ages, sex, and familial relationship of the applicants and the dwelling's intended occupants.¹⁴⁴

In a 1991 opinion letter, the Secretary of HUD stated that if a dwelling is governed by state or local governmental occupancy requirements, and the landlord's occupancy policies reflect those requirements, HUD would consider the governmental requirements as a special circumstance tending to indicate that the housing provider's occupancy policies are reasonable.¹⁴⁵

Governmental Restrictions on Occupants

Other Physical Limitations of Housing

In addition to physical considerations such as the size of each bedroom and the overall size and configuration of the dwelling, HUD will consider limiting factors identified by housing providers, such as the capacity of the septic, sewer, or other building systems.¹⁴⁶

Nongovernmental Restrictions

Landlords who deviate from governmental restrictions should be aware that such deviations may be subject to careful scrutiny by HUD. HUD noted that when a complaint alleges discrimination on the basis of familial status, HUD will carefully examine any such *nongovernmental restriction* to determine whether it operates unreasonably to limit or exclude families with children.¹⁴⁷

¹⁴⁴ Va. Code § 36-96.2(G)

¹⁴⁵ March 21, 1991 HUD Opinion Letter

If a dwelling is governed by state or local governmental occupancy requirements, and the housing provider's occupancy policies reflect those requirements, HUD would consider the governmental requirements as a special circumstance tending to indicate that the housing provider's occupancy policies are reasonable.

¹⁴⁶ March 21, 1991 HUD Opinion Letter

¹⁴⁷ See Comments in the final rule implementing the Fair Housing Amendments Act of 1988, relating to HUD's position. 24 C.F.R. Chapter I, Subchapter A. Appendix I at 566-67 (1990).

Criminal Background

A rental application may require disclosure by the applicant of any criminal convictions.¹⁴⁸ In addition, the owner or managing agent may require as a condition of acceptance of the rental application that applicant consent in writing to a criminal record check to verify the disclosures made by applicant in the rental application.¹⁴⁹ The owner or managing agent may collect from the applicant moneys to reimburse the owner or managing agent for the exact amount of the out-of-pocket costs for such criminal record checks.¹⁵⁰

Applicants who Pose a Clear and Present Threat of Substantial Harm

It is not unlawful under the Virginia Fair Housing Law for any owner to deny or limit the rental of housing to persons who pose a clear and present threat of substantial harm to others or to the dwelling itself.¹⁵¹

Nothing in the Virginia Fair Housing Law shall require an owner or managing agent to rent a dwelling to an individual who, based on a prior record of criminal convictions involving harm to persons or property, would constitute a clear and present threat to the health or safety of other individuals.¹⁵² A rental application may require disclosure by the applicant of any criminal convictions.¹⁵³ In addition, the owner or managing agent may require as a condition of acceptance of the rental application that applicant consent in writing to a criminal record check to verify the disclosures made by applicant in the rental application.¹⁵⁴ The owner or managing agent may collect from the applicant moneys to reimburse the owner or managing agent for the exact amount of the out-of-pocket costs for such criminal record checks.¹⁵⁵

¹⁴⁸ Va. Code § 36-96.2(F)

¹⁴⁹ Va. Code § 36-96.2(F)

¹⁵⁰ Va. Code § 36-96.2(F)

¹⁵¹ Va. Code § 36-96.2(E)

¹⁵² Va. Code § 36-96.2(F)

¹⁵³ Va. Code § 36-96.2(F)

¹⁵⁴ Va. Code § 36-96.2(F)

¹⁵⁵ Va. Code § 36-96.2(F)

Applicants Convicted of Illegal Manufacture or Distribution of Drugs

The Virginia Fair Housing Law does not prohibit conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in federal law.¹⁵⁶

VRLTA - Confidentiality of Tenant Records

The VRLTA provides that no landlord or managing agent shall release information about a tenant or prospective tenant in the possession of the landlord to a third party unless:

1. The tenant or prospective tenant has given prior written consent;¹⁵⁷
2. The information is a matter of public record as defined in § 2.2-3701;¹⁵⁸
3. The information is a summary of the tenant's rent payment record, including the amount of the tenant's periodic rent payment;¹⁵⁹
4. The information is a copy of a material noncompliance notice that has not been remedied or termination notice given to the tenant under § 55-248.31 and the tenant did not remain in the premises thereafter;¹⁶⁰
5. The information is requested by a local, state, or federal law-enforcement or public safety official in the performance of his duties;¹⁶¹
6. The information is requested pursuant to a subpoena in a civil case;¹⁶²

¹⁵⁶ Va. Code § 36-96.2(D)

¹⁵⁷ § 55-248.9:1(A)(1).

¹⁵⁸ § 55-248.9:1(A)(2).

§ 2.2-3701 definition:

"Public records" means all writings and recordings that consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording, or other form of data compilation, however stored and regardless of physical form or characteristics, prepared or owned by, or in the possession of, a public body or its officers, employees, or agents in the transaction of public business.

¹⁵⁹ § 55-248.9:1(A)(3).

¹⁶⁰ § 55-248.9:1(A)(4).

¹⁶¹ § 55-248.9:1(A)(5).

7. The information is requested by a contract purchaser of the landlord's property, provided the contract purchaser agrees in writing to maintain the confidentiality of such information;¹⁶³
8. The information is requested by a lender of the landlord for financing or refinancing of the property;¹⁶⁴
9. The third party is the landlord's attorney;¹⁶⁵ or
10. The information is otherwise provided in the case of an emergency.¹⁶⁶

¹⁶² § 55-248.9:1(A)(6).

¹⁶³ § 55-248.9:1(A)(7).

¹⁶⁴ § 55-248.9:1(A)(8).

¹⁶⁵ § 55-248.9:1(A)(9).

¹⁶⁶ § 55-248.9:1(A)(10).

Chapter Sixteen

Virginia Human Rights Act

The Virginia Human Rights Act¹⁶⁷ was enacted in 1987 and has been amended several times since its enactment. It is contained within Chapter 39 of Title 2.2 of the Code of Virginia and consists of only three code sections.

Policy of the Commonwealth

The Virginia Human Rights Act confirms that it is the policy of the Commonwealth to safeguard all individuals within Virginia from specified forms of unlawful discrimination.¹⁶⁸ The Virginia Human Rights Act also confirms that it is the policy of the Commonwealth to protect citizens of Virginia against unfounded charges of unlawful discrimination.¹⁶⁹

Interpretation of Virginia Human Rights Act

The provisions of this chapter shall be construed liberally for the accomplishment of its policies.¹⁷⁰ However, nothing contained in the Virginia Human Rights Act shall be deemed to repeal, supersede, or expand upon any of the provisions of any other state or federal law relating to discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability.¹⁷¹

Unlawful Discriminatory Practices

For the purposes of the Virginia Human Rights Act, “unlawful discriminatory practice” is defined as conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of any of the following:

- **Race**

¹⁶⁷ Code of Virginia, Title 2.2, Chapter 39 (§§ 2.2-3900 - 2.2-3902). Chapter 39 shall be known and cited as the Virginia Human Rights Act. See Va. Code § 2.2-3900(A)

¹⁶⁸ Va. Code § 2.2-3900(B)(1)

It is the policy of the Commonwealth to safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions; in employment; preserve the public safety, health, and general welfare; and further the interests, rights, and privileges of individuals within the Commonwealth.

¹⁶⁹ Va. Code § 2.2-3900(B)(2)

¹⁷⁰ Va. Code § 2.2-3902

¹⁷¹ Va. Code § 2.2-3902

- **Color**
- **Religion**
- **National origin**
- **Sex**

The terms "because of sex or gender" or "on the basis of sex or gender" or terms of similar import when used in reference to discrimination in the Code and acts of the General Assembly include because of or on the basis of pregnancy, childbirth, or related medical conditions.¹⁷²

▪ **Pregnancy, childbirth, or related medical conditions**

Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all purposes as persons not so affected but similar in their abilities or disabilities.¹⁷³ The terms "because of sex or gender" or "on the basis of sex or gender" or terms of similar import when used in reference to discrimination in the Code and acts of the General Assembly include because of or on the basis of pregnancy, childbirth, or related medical conditions.¹⁷⁴

- **Age**
- **Marital status**
- **Disability**¹⁷⁵

Nothing contained in the Virginia Human Rights Act shall be deemed to repeal, supersede, or expand upon any of the provisions of any other state or federal law relating to discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability.¹⁷⁶

¹⁷² Va. Code § 2.2-3901

¹⁷³ Va. Code § 2.2-3901

¹⁷⁴ Va. Code § 2.2-3901

¹⁷⁵ Va. Code § 2.2-3901

¹⁷⁶ Va. Code § 2.2-3902

Effect on Programs that Aid Persons with Disabilities

Nothing in the Virginia Human Rights Act shall prohibit or alter any program, service, facility, school, or privilege that is afforded, oriented, or restricted to a person because of disability or age from continuing to habilitate, rehabilitate, or accommodate that person.¹⁷⁷

Effect on Governmental Programs, Laws, and Activities Differentiating between Persons Based on Age

Nothing in the Virginia Human Rights Act shall be construed to affect any governmental program, law, or activity differentiating between persons on the basis of age over the age of eighteen years (i) where the differentiation is reasonably necessary to normal operation or the activity is based upon reasonable factors other than age or (ii) where the program, law, or activity constitutes a legitimate exercise of powers of the Commonwealth for the general health, safety, and welfare of the population at large.¹⁷⁸

Complaints Filed with the Human Rights Council Alleging Unlawful Discriminatory Practice**Complaints Alleging Violation of Federal Statute or Regulation**

The Human Rights Council may investigate complaints alleging an unlawful discriminatory practice under a federal statute or regulation and attempt to resolve it through conciliation.¹⁷⁹ Unsolved complaints shall be referred by the Human Rights Council to the federal agency with jurisdiction over the complaint.¹⁸⁰ Upon such referral, the Human Rights Council shall have no further jurisdiction over the complaint.¹⁸¹

Complaints Alleging Violation of Local Ordinance

The Human Rights Council shall have no jurisdiction over any complaint filed under a local ordinance adopted pursuant to Va. Code § 15.2-965.¹⁸² Section 15.2-965 provides, in part, that any locality in Virginia may enact an ordinance, not inconsistent with nor more stringent than any applicable Virginia law, prohibiting discrimination in housing on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital

¹⁷⁷ Va. Code § 2.2-3902

¹⁷⁸ Va. Code § 2.2-3902

¹⁷⁹ Va. Code § 2.2-3902

¹⁸⁰ Va. Code § 2.2-3902

¹⁸¹ Va. Code § 2.2-3902

¹⁸² Va. Code § 2.2-3902

status, or disability.¹⁸³ The locality may enact an ordinance establishing a local commission on human rights, which shall have the powers and duties granted by the Virginia Human Rights Act.¹⁸⁴

Complaints Alleging Violation Enforced by Another Virginia Agency

Complaints filed with the Human Rights Council in accordance with Va. Code § 2.2-2634¹⁸⁵ alleging unlawful discriminatory practice under a Virginia statute that is enforced by a Virginia agency shall be referred to that agency.¹⁸⁶

¹⁸³ Va. Code § 15.2-965(A)

¹⁸⁴ Va. Code § 15.2-965(B)

¹⁸⁵ Va. Code § 2.2-2634 provides in relevant part:

§ 2.2-2634. Powers and duties of Council.

In addition to the other powers and duties prescribed in this article, the Council shall have the following powers to:

...

5. Promote creation of local commissions to aid in effectuating the policies of this article and to enter into cooperative worksharing or other agreements with federal agencies or local commissions, including the deferral of complaints of discrimination to federal agencies or local commissions;

6. Adopt, promulgate, amend, and rescind regulations consistent with this article pursuant to the Virginia Administrative Process Act (§ 2.2-4000 et seq.). No such regulation shall be inconsistent with any state or federal law or regulation. However, the Council shall not have the authority to adopt regulations on a substantive matter when another state agency is authorized to adopt such regulations;

7. Receive, investigate, seek to conciliate, refer to another agency, hold hearings pursuant to the Virginia Administrative Process Act (§ 2.2-4000 et seq.), and make findings and recommendations upon complaints alleging unlawful discriminatory practices;

...

11. Inquire into incidents that may constitute unlawful acts of discrimination or unfounded charges of unlawful discrimination under state or federal law, and to take such action within the Council's authority designed to prevent such acts;

...

13. Seek, with the approval of the Attorney General, through appropriate enforcement authorities, prevention of or relief from an alleged unlawful discriminatory practice; however, the Council itself shall have no power to issue subpoenas, award damages, or grant injunctive relief.

¹⁸⁶ Va. Code § 2.2-3902

Local Human Rights Ordinances and Commissions

Any locality in Virginia may enact an ordinance, not inconsistent with nor more stringent than any applicable Virginia law, prohibiting discrimination in housing on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, or disability.¹⁸⁷ The locality may enact an ordinance establishing a local commission on human rights, which shall have the powers and duties granted by the Virginia Human Rights Act.¹⁸⁸

Enforcement of County, City, or Town Human Rights Ordinances in Effect on January 1, 1991

The Virginia Fair Housing Law provides that any county, city, or town which has any ordinance in effect on January 1, 1991, enacted under the Virginia Human Rights Act (§ 2.2-3900 et seq.), may continue to enforce such ordinance and may amend the ordinance, provided the amendment is not inconsistent with the Virginia Fair Housing Law.¹⁸⁹

¹⁸⁷ Va. Code § 15.2-965(A)

¹⁸⁸ Va. Code § 15.2-965(B)

¹⁸⁹ Va. Code § 36-96.21(A)

Appendix

Additional Sources of Information

The Virginia Fair Housing Office

http://www.dpor.virginia.gov/dporweb/fho_index.cfm

U.S. Department of Housing and Urban Development (HUD) - Fair Housing/Equal Opportunity

http://portal.hud.gov/portal/page/portal/HUD/program_offices/fair_housing_equal_opp

The Equal Rights Center

<http://www.equalrightscenter.org/>

The Point Newsletter

National Fair Housing Advocate Online

<http://www.fairhousing.com/>