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## Courtside *Real Estate Newsletter*

### Fair Housing Laws You Need to Know



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In recent years, fair employment and housing laws have continued to expand in an effort to protect persons from discrimination in the employment and housing process. California's Department of Fair Employment and Housing ("DFEH") was created to protect California citizens from unlawful discrimination in employment, housing, public accommodations, and from the perpetration of acts of violence.

The DFEH investigates these violations and enforces California's fair housing laws. As many in the real estate industry are aware, the perimeters that constitute fair housing law violations and discrimination are not always clear. As a result, the DFEH is currently in the process of creating and publishing housing regulations that will help clarify the law as it applies to fair housing.

#### Applicable Laws

The two key laws that the DFEH enforces are California's Unruh Civil Rights Act ("Unruh") and the Fair Employment and Housing Act ("FEHA"). Unruh, which is substantially broader in its application than federal law, protects individuals in "all business establishments." Any violations under Unruh also constitute a violation of the federal Americans with Disabilities Act of 1990 ("ADA") and FEHA.

The protected characteristics under Unruh have continued to expand since the creation of the law in 1897. They now include the following categories: race; color; ancestry; national origin; primary language; citizenship; immigration status; sex; gender; religion; sexual orientation; disability; medical condition; genetic information; and marital status.

Under FEHA, the following characteristics are protected: race; color; ancestry; religion; sex (including discrimination against a survivor of domestic violence); gender; gender identity; gender expression; sexual harassment; sexual orientation; national origin; familial status; marital status; source of income; medical condition; genetic information; and disability.

The Fair Employment and Housing Commission ("FEHC") is also currently considering proposing additional housing regulations. These new regulations will include prohibiting a housing provider from using certain criminal history information to determine the status of a candidate's application for housing. These

regulations would clarify that it is unlawful to have a blanket policy that prevents anyone with a criminal record from renting. In fact, amendments to FEHA have "expressly prohibit employers from inquiring about an applicant's criminal history prior to a conditional offer of employment, and strictly limiting an employer's use of an applicant's criminal history following a conditional offer."

There is pending legislation in the California legislature, (AB 53: "Rental Housing Discrimination" – Criminal Records - Jones-Sawyer and Bonta). This law would make it unlawful for the owner of any rental housing accommodation to deny the rental or lease of housing without first allowing the applicant to satisfy the requirements of the initial application process. This means the owner would be prohibited from inquiring about a criminal record during the initial application assessment phase, unless otherwise required by state or federal law. Additionally, the owner would only be able to request a criminal background check after the successful completion of the initial application assessment phase.

#### Disability & Reasonable Accommodations

A disability has the same definition under both FEHA and Unruh. There are two types of disabilities recognized by DFEH: "actual" and "perceived". An "actual" disability is a person's physical or mental impairment, disorder, or condition that limits one or more major life activities, and is recognized as such by the Americans with Disability Act (ADA). A "perceived" disability is a disability recognized by the housing provider as a condition that makes major life activity difficult. This means that a "perceived" disability is not always acknowledged as a limitation to major life activity by the ADA. Major life activities include everything from physical, mental, and social activities to a person's ability to work. A "reasonable accommodation" is a change in policies, practices, or services that are necessary to afford a disabled person an equal opportunity to use and enjoy a dwelling. As such, determining a reasonable accommodation is dependent upon the facts of any particular situation. A landlord must allow a "reasonable" accommodation request, unless the request demonstrates an undue financial or administrative burden or fundamental change in the nature of the policy, property or program. However, the landlord is

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not financially responsible for these modifications and can request that the tenant restore the property to its former use upon his or her departure.

A landlord may also request third-party verification of an individual's disability if it is not obvious. The verification does not need to come from a health care provider. Furthermore, a landlord is not entitled to specific information relating to the disability. The landlord must engage in an interactive process by having open dialogue with the person requesting the accommodation and always be respectful.

### Service & Support Animals

Fair housing laws regarding service and support animals are ill-defined. To clarify, service animals are generally trained to perform specific tasks or to act on behalf of the disabled person. On the other hand, support animals (a.k.a. emotional or comfort animals) do not require specific training and do not perform specific tasks.

A landlord cannot apply a pet deposit, liability insurance, or pet addendums to service animals. However, a tenant is responsible for any damage caused by the service animal. Moreover, a housing provider cannot generally apply breed, weight, or size restrictions to assistance animals. When it comes to allowing a support animal, however, determining the reasonableness of the accommodation is fact-specific and should be decided on a case-by-case basis.

### Familial Status Discrimination

Familial status discrimination has also been increasingly reported to the DFEH. Familial status is defined as having one or more individuals under 18 years-of-age who reside with a parent, person with legal custody, a designee of that parent, or other person with legal custody. Housing providers cannot refuse to rent to persons because they have minor children, except for senior housing, as generally defined in California Code Section 51.3. A landlord cannot make overly restrictive rules regarding a child's play or use of amenities, nor can they segregate families with children to certain units of the complex because of alleged safety concerns.

Some landlords have occupancy standards for their rental units which limit the number of people who can live in a dwelling. These occupancy standards may also be considered as pretext for intentional discrimination based on familial status by having a disparate impact on families with children. The FEHC has indicated that the intent to discriminate can be inferred from an overly restrictive enforcement of occupancy standards. In determining this, the DFEH looks at all circumstances and conditions to determine how many people should reside in the residence.

### Remedies

Further, if a person or entity is found guilty of discrimination under Unruh or FEHA, then that person or entity is responsible for every offense for damages, up to a maximum of three times the amount of actual damages. There are several remedies for discrimination under fair housing laws. These remedies include the following: sale or rental of the housing accommodation; elimination of the discriminatory practice; policy changes; reasonable

accommodation; out-of-pocket expenses; actual damages; punitive damages; attorney's fees; and costs.

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