

FOCUS:  
HOUSING LAW

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The recent surge in COVID-19 cases will likely result in a corresponding surge in claims of housing discrimination. While many of these complaints will be filed by people who have or have had COVID-19, there will also likely be claims asserted by Asian Americans blamed for the pandemic, persons of particular racial, ethnic or religious groups who live in areas which have a greater numbers of COVID-19 cases, or perhaps physicians and other health care professionals who have treated persons with COVID-19.

This article will explore legal issues related to persons discriminated against when obtaining housing because of COVID-19. There are two general principles that apply in housing discrimination cases. They are (1) anti-discrimination laws do not stop a housing provider from protecting the safety of residents and staff and (2) any exclusions or rules must be based on evidence and not stereotypes, assumptions or conclusions without an evidentiary basis. Those principles will be applied to the issues discussed.

### Is COVID-19 a Disability Under Housing Discrimination Laws?

The Federal Fair Housing Act<sup>1</sup> and the Americans with Disabilities Act<sup>2</sup> (for public housing) bars housing discrimination on the basis of a disability. The key question, though, is whether COVID-19 is considered a “disability” covered by these laws. There has been no case law developed on this issue as of yet.

The first element of the definition of “disability” in these laws states that a disability is a condition that substantially limits a major life activity.<sup>3</sup> These functions are usually considered to be ability to work, learn, eat, or partake in daily living activities.<sup>4</sup> Using the first element of the definition, it is not clear whether a person who has or has had COVID-19 would qualify for coverage under the laws. Some people with COVID-19 have been asymptomatic and would not fall under the definition, while others have had lingering impairments and would be covered.

However, the definition of “disability” also covers persons who are regarded as being disabled or have a record or history of disability.<sup>5</sup> If a landlord or a cooperative or condominium board takes an action against a person with COVID-19, it is likely that

# Housing Discrimination Issues Related to COVID-19

such person will be “regarded” as having a “disability.” Such a person would be covered by the Federal anti-discrimination laws related to housing.

The Federal Fair Housing Act obviously covers landlords, cooperative and condominium boards that exclude people with disabilities from housing because of their disabilities.<sup>6</sup> The laws also cover landlords, cooperative and condominium boards that place different terms and conditions on people with disabilities.<sup>7</sup> The question of whether different terms and conditions placed on people with COVID-19 violate the anti-discrimination laws will likely be the subject of considerable litigation.

Housing rules relating to persons with COVID-19 can generally be broken into two categories — (1) those that specifically affect people with COVID-19 such as required quarantining or exclusion from public rooms and (2) those that are disability neutral such as the exclusion of all visitors from a building. The Fair Housing Act does not require a building to place its residents or staff in danger. However, assumptions or fears about such persons cannot play a role in a determination about housing.

Therefore, if a person with COVID-19 is found by medical evidence to be a risk to other persons in a building if not quarantined or excluded from certain areas, the building will not run afoul of the Federal anti-discrimination laws.<sup>8</sup> However, if a building bases its policies on unjustified assumptions or conclusions, it will be in violation of the Federal Fair Housing Act.<sup>9</sup>

Disability neutral policies must be considered on a case by case basis. If a person with COVID-19 needs visitors to provide medical care or food and cannot leave their home, the building must make a reasonable accommodation of any “no-visitor” rules to allow that person to have visitors.<sup>10</sup> However, if a building closes certain facilities to all residents and a person with a disability does not demonstrate need on account of a disability, the building’s conduct will likely not violate the anti-discrimination laws.

The New York State Human Rights Law<sup>11</sup> and the Nassau County Human Rights Law<sup>12</sup> have a somewhat different definition of what constitutes a “disability” under the Federal law, but those definitions are not so drastically different that they would require a different result.

### National Origin Discrimination and Discrimination Based on Area

There has been considerable anecdotal evidence that there has been discrimination against Asian Americans on the presumption that Asian Americans brought the pandemic to the United States. Clearly, any discrimination against Asian Americans in housing is barred by current anti-discrimination laws.<sup>13</sup>

As well, African Americans, Latinos, and Orthodox Jews have incurred more cases of COVID-19 than persons of other racial, religious or ethnic groups. Clearly, discrimination against African-Americans, Latinos and Orthodox Jews simply because those groups have had more exposure to COVID-19 than others would violate the anti-discrimination laws.<sup>14</sup>

A more interesting question is whether a landlord who singles out individuals from an area or zip codes that has experienced an influx of COVID-19 cases, rather than because of being part of a particular racial, ethnic or religious group, is in violation of the anti-discrimination laws. The answer depends upon whether an area or zip code has a particular identification with a religious, ethnic, or racial group.

If an area or zip code is associated with a particular group, exclusion of persons from that area or zip code may have a disparate impact on those persons because of their race, ethnicity, or national origin and may therefore violate the anti-discrimination laws.<sup>15</sup> Discrimination against a larger geographic area, such as the entire city of New York City or all of Nassau County, would be less likely to be in violation of the anti-discrimination laws.

### Occupational Discrimination

Finally, while it may seem implausible, it is conceivable that persons such as physicians and nurses who work at hospitals treating COVID-19 patients may be subjected to housing discrimination solely because of their contact with COVID-19 patients. With few exceptions, New York State law is simply not applicable.

Except in New York City, there is no bar to occupational discrimination under the anti-discrimination laws. Attorneys and actors have been excluded from cooperative buildings. Such exclusions, based on a person’s occupation, does not violate the anti-discrimination laws.

However, an argument might be made that health care workers excluded from housing are being excluded because of their association with people with disabilities, namely

people with COVID-19. Associational discrimination is in violation of the Federal Fair Housing Act.<sup>16</sup>

### Conclusion

While these issues will likely be decided a case by case basis, the guiding overall principle will most likely be whether a building-wide rule is necessary to protect residents and staff and is not based on speculation, assumptions, or unjustified conclusions. Courts, in all likelihood, will balance the safety of residents or staff while will not condoning factually unsupported assumptions and conclusions.

- 42 USC § 3604(f)(1).
- 42 USC § 12132.
- 42 USC § 3602(h)(1); 42 USC 12102(1)(A).
- 24 CFR § 100.201; see *Rodriguez v. Village Green Realty*, 788 F.3d 31, 44 (2d Cir. 2015) (working and learning are major life activities).
- 42 USC § 3602(h)(2), (3); 42 USC 12102(1)(B), (C).
- 42 USC § 3604(f)(1).
- 42 USC § 3604(f)(2).
- 42 USC § 3604(f)(9) (building is not required to allow threats to health and safety of residents and staff).
- See, e.g., *Human Resources Research Management Group, Inc. v. County of Suffolk*, 687 F.Supp.2d 237 (E.D.N.Y. 2010) (county law regulating substance abuse houses found violative of the Federal Fair Housing Act because it was based on unjustified assumptions and stereotypes).
- 42 USC § 3604(f)(3)(B); see, e.g., *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328 (2d Cir. 1995) (building had to make an accommodation for parking space for resident with a disability).
- Executive Law 292(21).
- NCAC § 21-9.2(e).
- 42 USC § 3604(a) (national origin discrimination barred by the Fair Housing Act).
- 42 USC § 3604(a); see, e.g., *MHANT Management, Inc. v. County of Nassau*, 819 F.3d 581, 606–08 (2d Cir. 2016) (law discriminating against persons because of their race or ethnicity violative of Fair Housing Act).
- Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015); *Tsombanidis v. West Haven Fire Department*, 352 F.3d 565, 575 (2d Cir. 2003).
- 42 USC § 3604(f)(1)(C).



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