

Basic Coverage of the Fair Housing Laws – San Diego Outline

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- I. Housing is an important right even though the Supreme Court has not labeled it a fundamental right

The Fair Housing Act passed in April 1968 was the last of the Civil Rights Acts passed during the Second Reconstruction. It took years to pass: in 1966, the open housing movement in Chicago led by Martin Luther King appeared to end in failure – in 1968, Dr. King was assassinated and the Kerner Report was issued. This year marks the 50th anniversary of these important events.

- II. Protected Classes under Federal Law (Michael P. Seng)

- A. Protected Classes under the Fair Housing Act (FHA) are different from suspect classes under the Equal Protection Clause of the 14th Amendment – Equal protection requires state action and the standard of scrutiny depends upon the extent to which the courts recognize the classification as suspect. Suspect classes include race, national origin, sex (intermediate scrutiny), illegitimate children, and aliens.

- B. 1866 Civil Rights Act (42 U.S.C. sections 1981, 1982)

- Resurrected in *Jones v. Alfred Meyer*, 392 U.S. 409 (1968)
- Grounded on the 13th Amendment—no state action required
- protects only race
- covers all property
- no exemptions
- judicial remedies only
- follows state statute of limitations
- covers only purposeful discrimination

- C. Protected Classes under FHA

1. Race
2. Color
3. National Origin (There is no separate protected class of non-citizens or immigrants; but housing providers cannot discriminate among aliens because of race, national origin, or other class status protected by federal law.)

4. Religion (There is not separate duty to accommodate religious beliefs, but persons may not be targeted because of their religious beliefs.)
5. Sex
 - added in 1974, does not explicitly include sexual orientation. However, new HUD regulations do prohibit sexual orientation in federally subsidized housing programs and the FHA may apply when the discrimination is based on the sex of the applicant or of the applicant’s partner
 - includes harassment – both quid pro quo and hostile environment
 - also covers domestic violence
6. Handicap
 - defined by FHAA of 1988 (42 U.S.C. section 3602(h))
 - a. a physical or mental impairment that substantially limits a major life activity
 - b. a record of such an impairment
 - c. regarded as having such an impairment
 - excludes current users of drugs (42 U.S.C. section 3602(h)(3)) or persons who are dangerous to the health or safety of others (42 U.S.C. section 3604(f)(9))
7. Familial Status
 - also defined by FHAA of 1988 (42 U.S.C. section 3602(k))
 - protects children under 18
 - sometimes used as a proxy for race
 - no “separate but equal” defense
 - does not include marital status as such

III. Protected classes under state law (Beth Rosen-Prinz)

- A. California law includes all classes enumerated under the FHA and, in addition, protects:
 1. ancestry
 2. marital status
 3. sexual orientation
 4. gender
 5. gender identity
 6. gender expression
 7. source of income
 8. genetic information
 9. medical condition
 10. age
 11. citizenship
 12. primary language
 13. immigration status
- B. Disability is more broadly defined as a physical or mental impairment that limits (**not** substantially limits) a major life activity (CA Gov Code section 12926(k)(1)(B))
- C. Civil Code §51 (Unruh Civil Rights Act) includes any arbitrary discrimination

IV. Covered Property and Exemptions under Federal Law (Michael Seng)

- A. What is a Dwelling? (42 U.S.C. section 3602(b))
- occupied or designed as a residence, examples
 - includes vacant land
 - different from a hotel or motel
 - nursing homes
 - homeless shelters
- B. Exemptions
1. Owner occupied, four units or less (42 U.S.C. section 3603(b)(2))
 2. Single family homes, except use of broker or agent or discriminatory advertisement under 804(c) or more than 3 sales in any 24 month period if not owner occupied (42 U.S.C. section 3603(b)(1)). Also, mortgage lending for single family homes is covered by 42 U.S.C. section 3605
 3. Private Club – not generally open to the public and not commercial (42 U.S.C. section 3607(a))
 4. Religious organizations – cannot base it on race, not commercial (42 U.S.C. section 3607(a))
 5. Housing for older persons – 62 and older or 55 and older, exempt only from familial status and not other provisions in act. This a fertile area for discrimination on race and disability (42 U.S.C. section 3607(b)(2))
 6. Shared living arrangements (Court created exemption by Ninth Circuit Court of Appeals)

V. Covered Property under State Law (Beth Rosen-Prinz)

- A. CA law covers all housing accommodations except the rental or leasing of a portion of an owner occupied single-family dwelling to one roomer or boarder (CA Gov Code section 12927(c)(2)(A))
- B. Senior Housing – 62 and older or 55 and older, like federal law, is exempt only from familial status but requirements more stringent than FHA (CA Gov Code 12955.9; CA Civil Code, sections 51.2, 51.3, 51.4, 51.10, 51.11, 51.12)

VI. Prohibited Practices under Federal Law (Michael P. Seng)

- A. Section 3604 –
1. (a) refusal to rent or sell
 2. (b) discriminatory terms or conditions
 3. (c) discriminatory advertising or statements
 4. (d) false representations
 5. (e) block busting
 6. (f) disability – requires affirmative duties, reasonable accommodations or modifications or accessibility

- B. Section 3605 – mortgage lending or appraisals – can include predatory lending practices they involve discrimination
- C. Section 3606 – discrimination in allowing access to brokerage services
- D. Section 3617 – interference, coercion or intimidation, includes retaliation – First Amendment concerns expressed in *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) and *Virginia v. Black*, 123 S.Ct. 1536 (2003)
- E. Section 3631 – criminal penalties

Higher standard of proof than in a civil case

Can only be instituted by a prosecutor

- F. Theories of Liability
 - 1. intentional discrimination – disparate treatment (member of class, applied and qualified, and turned down)
 - 2. mixed motive cases
 - 3. disparate impact – HUD’s Disparate Impact Regulation, 78 Fed. Reg. 11460 (Feb. 15, 2013) and *Texas Dept. v. Inclusive Communities*, 135 S.Ct. 2507 (2015)
 - 4. Secretary’s duty affirmatively to further fair housing – Section 3608 – HUD Regulation on the Duty Affirmatively to Further Fair Housing, 80 Fed. Reg. 42271 (July 16, 2015) (withdrawn by the Trump Administration)

VII. Prohibited Practices under State Law (Beth Rosen-Prinz)

California law includes all prohibited practices identified under the FHA and, in addition, includes:

- A. existence of restrictive covenants in property documents (provide procedures for removal) (CA Gov Code sections 12956.1, 12956.2)
- B. use of income standard that fails to account for aggregate income of unmarried persons on same basis as aggregate income of married persons (CA Gov Code section 12955(n))
- C. use of income standard not based on actual portion of rent paid by recipient of government rental subsidy (CA Gov Code section 12955(o))

VIII. Enforcement and Remedies under Federal Law (Michael Seng)

- A. HUD investigation (42 U.S.C. section 3610)
 - one year to file
 - prompt judicial action -- TRO
 - HUD duty to conciliate
 - HUD duty to finish investigation within 100 days, but not jurisdictional

- finding of reasonable cause
- choice of ALJ or court action through Justice Department
- 20 days to make election
- remedies that can be obtained
- appeal from ALJ to Court of Appeals

B. Pattern & Practice by DOJ ((42 U.S.C. section 3614)

C. Private civil suit in state or federal court (42 U.S.C. section 3613)

- two years to file
- stayed during HUD investigation
- remedies

D. Parties – who can be complainants (standing) and respondents (agency)

E. HUD has authority to pass rules and regulations to enforce the FHA (42 U.S.C. section 3614a).

IX. Enforcement and Remedies under State Law (Beth Rosen-Prinz)

California law includes all investigative elements identified under the FHA except:

After finding of reasonable cause:

- mandatory dispute resolution (CA Gov Code section 12981)
- court action by DFEH (CA Gov Code sections 12981, 12989.2)
- one year from the date of filing of complaint for DFEH to file civil action in civil court (CA Superior Court) (CA Gov Code sections 12980, 12965)