

RE19RC20: Fair Housing

Updated July 2020

1. Fair Housing: definition and history

All home seekers shall have the opportunity to buy or rent any home in any neighborhood of their choice subject only to whether the home is within their financial capabilities.

The real estate licensee has an important role to play in making sure any home seeker is given all choices. The real estate licensees therefore need to review their practice regularly to ascertain that they are in compliance with the various regulations.

History of legislations:

- a. Civil Right Act of 1866: makes discrimination based on race illegal, no exemption
- b. MA Civil Rights Law M.G.L. c. 151B, 804 CMR §§ 1, 2, 3 8, 10 & 12
 - i. Massachusetts is a pioneer in anti-discrimination laws.
 - ii. Mid 1940's: Massachusetts established a commission to enforce laws prohibiting discrimination.
 - iii. In 1950 Commission's name changed to the Massachusetts Commission Against Discrimination (MCAD), and its jurisdiction and power enforcement was widely expanded.
- c. Civil Rights Act of 1968 and further amendments, also referred to as Federal Fair Housing Laws (FFHL)
- d. American with Disability Act (ADA) - 1990

2. Federal Fair Housing Laws and Massachusetts Civil Rights Law -

- a. General information
 - i. MA Civil Right Laws are considered “substantially equivalent” to the Federal Fair Housing Laws. Many elements in both regulations are similar, and therefore both laws will be reviewed together.
 - ii. Covered transactions:
 1. The Federal Fair Housing Laws prohibit all discrimination in the sale and rental of residential properties.
 2. Massachusetts civil rights laws prohibit all discrimination in sale or rental of all residential and commercial real property. Virtually all residential land, housing accommodations, commercial space, and all land intended to be put to commercial use in the Commonwealth are covered by this law.

iii. Notices/posters–

1. Both federal and state law provide for posters and the appropriate display thereof.
2. Massachusetts Fair Housing Poster - M.G.L. c. 151B, § 7 - Massachusetts law requires every real estate office and rental office that has public traffic to display this poster in a conspicuous place.
3. Federal Fair Housing Poster - HUD's written policy a failure to display the Federal Fair Housing poster shall be deemed prima facie evidence of a discriminatory housing practice.

b. Enforcement

i. Testing and testers:

1. Using testers is legal to prove discrimination: in the case of *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982), the United States Supreme Court ruled testers are legal.
2. Testers do not identify their role.
3. Treating people with identical procedures and standards - Many complaints filed based on way they were treated during application process.
4. All persons have right to complete and accurate information.
5. Testers entitled to damages for humiliation, mental anguish and emotional distress.
6. Testers lack of intent is NOT a defense.
7. With testers, lying (prevarication) is legal - While lying on an application is thought to be an unpardonable sin, the U.S. Supreme Court justified lying in this context as a powerful means to uncover housing discrimination.

ii. Enforcement procedures

HUD (Housing & Urban Development) is the federal agency responsible for enforcing fair housing laws.

Massachusetts Commission Against Discrimination (MCAD) is the state agency whose mission is to enforce Massachusetts anti-discrimination laws in employment, housing, public accommodations, credit, mortgage lending and education.

MCAD is empowered by statute to enforce the following anti-discrimination laws:

1. Primary civil rights regarding discrimination M.G.L. c. 151B
2. Public accommodations civil rights M.G.L. c. 272, §§92A, 98, 98A
3. Sexual harassment M.G.L. c. 151B, § 3A
4. Maternity leave M.G.L. c. 149, § 105D
5. Civil rights and education M.G.L. c. 151C
6. Lead paint M.G.L. c. 111, § 199A

Complaint process in Massachusetts –

1. Any person filing a complaint with MCAD for an alleged violation of Massachusetts anti-discriminatory laws must do so within:
2. 300 days after the alleged employee related act of discrimination,
3. 12 months after the alleged housing related act of discrimination

Complaint process under the Federal Law

1. File complaint with HUD
2. File civil action in US District Court
3. Administrative process (Administrative Law Judge or Civil Action)

iii. Remedies: civil penalties, damages (actual and/or punitive), and injunctive relief

Civil penalties amounts, in addition to any other sanction, not to exceed:

- \$10,000 for a first offense;
- \$25,000 for the second offense within a 5-year period;
- \$50,000 for the third offense within a 7-year period.

iv. MCAD and Real Estate License Law

MCAD determination of unlawful discriminatory practice is a violation of the real estate license law. The Board of Registration of Real Estate Brokers & Salespersons will:

- suspend the licensee for a minimum period of 60 days.
- if second violation within two years then automatic minimum 90-day suspension.

c. Protected Classes

i. Federal law - seven protected classes:

1. Race
2. Color
3. National Origin
4. Religion
5. Sex/ Gender
6. Familial Status
7. Handicap/ Disability: physical or mental, seen or unseen

Note: Massachusetts and federal laws recognize recovery from substance abuse a disability.

- ii. Massachusetts law **adds** eight additional protected classes:
 - 1. Age
 - a. Inquiry of age illegal.
 - b. Permissible to determine if an individual has reached age of majority, credit worthiness
 - 2. Ancestry
 - 3. Children
 - a. Any individual who has not yet attained the age of 18 years
 - b. Discrimination against persons with children extends to pregnant women
 - c. Discrimination against persons with children shall extend to persons who are in the process of securing legal custody of a child or children.
 - d. Discriminate against children on the basis of existence of lead paint.
 - 4. Genetic Information
 - 5. Marital Status
 - 6. Public/ Rental Assistance
 - 7. Sexual Orientation/ Gender Identity
 - 8. Veteran/ Military Status

iii. Not included in protected classes

- 1. Illegal Drug Use
- 2. Persons posing direct threat to health or safety of others
- 3. Registered Sex Offenders
- 4. Smoking, Smokers
- 5. Animals - with the exception of assistance/ service animals
Discussion of types and limits of service animals: use as basis for the discussion the HUD notice published Jan 2020: Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act

d. Prohibited discriminatory practices

Covered by both the Federal and the MA laws. Note that MA laws apply to any type of real estate transactions – residential and commercial alike.

Behavior does not have to be explicit to be considered discriminatory. Subtle, indirect comments, actions may also qualify as discrimination.

- i. Refusal to sell, rent or deny accommodation to anyone included in a protected class
- ii. Representing a dwelling as unavailable when it actually is available;
- iii. Discrimination of a prospective tenant based upon public or rental assistance

- iv. A lessor of real property has no legal right to determine maximum number of people to occupy a dwelling unit
 - v. Blockbusting
 - vi. Redlining (lenders)
 - vii. Steering. Example of activities considered steering:
 - 1. Selecting properties based on the opinion of the agent
 - 2. Not showing all available properties to a buyer
 - 3. Suggesting to a buyer to check the area after dark, to go shopping at the local supermarket, etc.
 - 4. Discussions to manage properly:
 - a. School information should be limited to official school reports, and factual
 - b. Safety questions should be referred to local law enforcement
 - viii. Denying access to membership or participation in multiple listing service, or any trade organization based upon a protected class.
 - ix. Offering different terms, conditions or privileges
 - 1. Providing different lease or sale terms or privileges to different people
 - 2. Charging different rental amount
 - 3. Requiring different security deposit amounts
 - 4. Imposing different rates and terms on a loan
 - 5. Different conditions from the real estate licensee before working with a consumer, such as:
 - a. Some people have to show ID, others not
 - b. Some buyers need to provide proof of financial qualification, others not
 - x. To make any inquiries or records concerning a protected class
 - xi. Selecting based on a criteria creating disparate impact
 - xii. Making notations indicating discriminatory preferences
 - xiii. Sexual harassment
 - xiv. Retaliation as a consequence of claiming a protected right
 - xv. Coercion, intimidation, interference with any person in exercise of their rights
 - xvi. Discriminatory advertising
- e. Advertising and marketing –
- No exemptions to discriminatory practice in any type of advertising or marketing.
- i. Unlawful to make, print, publish or cause to be made, printed or published in any media, any notice, statement or advertisement, with respect to the sale or rental of a dwelling, that indicates any preference, limitation, or discrimination because of a protected class.
 - 1. Exempt Homeowner (from Fair Housing laws) may not employ discriminating advertising.
 - 2. Determining Violations in Advertising or marketing - how an “ordinary viewer” would interpret.

ii. Illegal, Words, Phrases, Symbols and Illustrations

1. Regulations prohibit use of any words, phrases, symbols, photographs and illustrations that convey dwellings are available or not available to a particular group of persons because of membership in any protected class.
2. Human models in advertising may be viewed as discriminatory. Exclusive use of young, old, white, black, athletic (non-handicapped), single, Catholic, Jewish or other ethnic or religious group may violate the law.
3. Selective media: the selective use of media catering to a specific population within an area which may discriminate against another segment of the population is a violation of Fair Housing laws.
4. Selective geographic advertisements.
5. Selective use of equal opportunity slogan or logo.

f. Exemptions

Exemptions from Fair Housing laws do exist, but may differ under federal and state laws. Broker/Salesperson - NO exemption allowed if licensee involved.

- i. Approved senior housing are exempt on the basis of children (Housing for Older People Act HOPA)
- ii. Three dwelling units or less when one apartment occupied by elderly or infirmed person for whom presence of children would constitute a hardship - exempt.
- iii. Owner-Occupied residential
 1. Leasing dwelling units in owner-occupied building of four dwelling units or less exempt under federal law.
 2. Massachusetts limits maximum exemption to single dwelling unit in an owner-occupied, two-family house.
- iv. Private Organizations (Federal & Massachusetts law)
- v. Legal to restrict housing to members only
- vi. Religious Organizations (Federal & Massachusetts law)
- vii. May restrict admission or provide preference to persons as to occupancy or employment.
- viii. Single Dwelling Unit (Massachusetts law)
- ix. Temporary leasing, not to exceed one year, by owner of principal residence.
- x. Never Exempted from Fair Housing Laws
 1. Race (Civil Rights Act of 1866)
 2. Recipient of rental or public assistance (Massachusetts law)

g. Best Practices

- i. Uniform behavior and procedures in all real estate activities:
- ii. Landlords, rental agents and licensees need to treat all prospective tenants the same
- iii. All real estate licensees need to treat prospective buyers the same way
- iv. Any questionnaire used cannot inquire about any protected class area.
- v. Handicap/ disabled circumstances:

NOTE: Terms “handicapped” and “disabled” interchangeable terms.

1. Inquiry whether an individual has a physical or mental disability is prohibited.
2. Landlord should never attempt to assess disabled person’s capabilities.
3. Property owner shall not establish or impose additional rent or other charges for handicap-accessible housing
4. Landlord cannot refuse renting to disabled person because of special needs
5. Reasonable Accommodations and Modifications in Existing Dwelling Units
6. Landlord required to make “reasonable accommodations” in rules, policies, procedures, practices or services
7. Interactive Process - Landlord must engage interactive process with disabled prospective tenant.
8. Service Animals – Signal dog, service animal, seeing eye dog or other animal individually and specifically trained to provide assistance to the disabled cannot be excluded from any housing or any public place. Refer to the FHEO notice below.

3. American with Disability Act (ADA)

ADA integrated into Massachusetts law. Intended to protect qualified persons with disabilities from discrimination in employment, transportation, public accommodations, telecommunications and government services and programs.

For more details on the ADA, refer to course RE21RC01: American with Disability Act

References:

- Legal cases
 - Shapiro v. Cadman Towers, 844 F. Supp. II 6 (E.D.N.Y. 1994)^[L]_[SEP]
 - Devita v. Ferlisi, 15 MPLR 1444 (1993)
 - Banai v. HUD, 102 F.3d 1203, 1208 (11th Cir. 1997)
 - Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990) 13, 14, 15
- FHEO Notice: FHEO-2020-01, Issued: January 28, 2020: Assessing a Person’s Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act
- MCAD website
- NAR Fair Housing Video
- Newsday Article – November 2019, Long Island Divided