



HUD Clarifies ‘Discriminatory Effects’ for Rental Housing

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Russell Rutherford authored an article for Multi-Housing News detailing a new rule from the U.S. Department of Housing and Urban Development (HUD) clarifying how it will apply prohibitions against discrimination under the Fair Housing Act (FHA) when a housing provider’s facially neutral practices are challenged based on “disparate impact” or “discriminatory effects.”

“Under the Fair Housing Act, it is unlawful for a seller, lessor, or financier of housing to discriminate on the basis of race, color, religion, sex (including sexual orientation and gender identity), disability, familial status, or national origin,” Rutherford explained. “Obviously, the FHA prohibits housing providers from engaging in practices that are facially discriminatory—meaning any practice that overtly treats people less favorably because of their status as a member of one of these protected classes. Beyond that, it can also be illegal to engage in practices that are facially neutral if they have discriminatory effects.”

An example of this could be where a multifamily property gives leasing priority to applicants who live or work in the area, which is a facially neutral policy that could potentially be challenged under the FHA, where the claimant asserts the policy has a disproportionately adverse effect on members of a protected class due to the demographics of the area.

HUD’s new 2023 rule clarifies the standard applicable to “discriminatory effects” claims and provides for the application of a burden-shifting analysis in discriminatory effects claims. Rutherford explained this analysis in three steps:

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1.

First, the burden is on the plaintiff to make a *prima facie* showing, using statistical evidence, that a specific neutral policy or practice has had a greater impact on members of a protected class than on others. It must be shown that any statistical disparities were actually caused by the challenged policy.

2.

If the plaintiff is able to carry its burden, the burden shifts to the defendant to prove that the challenged policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory purpose.

3.

If the defendant satisfies that burden, the burden shifts back to the plaintiff to show that the defendant could achieve the purpose supporting the challenged policy using another practice or policy that has a lesser discriminatory impact. The plaintiff will prevail if able to satisfy that burden.

For the full article and more details on the rule and how housing providers may adjust practices and policies, please [click here](#).