



HUD Clarifies Standard Applicable to “Discriminatory Effects” Claims Under Fair Housing Act

Article

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Under the Fair Housing Act, it is unlawful for a seller, lessor, or financier of housing to discriminate based on race, color, religion, sex (including sexual orientation and gender identity), disability, familial status, or national origin. This means it is illegal to engage in facially discriminatory practices—meaning any practice that overtly treats people less favorably because of their status as a member of one of these protected classes. It is also illegal to engage in facially neutral practices, but that have discriminatory effects. For example, if a multifamily property institutes a local preference, meaning it gives leasing priority to applicants who live or work in the area, this is a facially neutral policy that could be the subject of a challenge under the FHA because it has a disproportionately adverse effect on members of a protected class. The success of such a challenge will depend on the facts and how the preference is implemented.

In March 2023, HUD published a new rule that will clarify the standard applicable to this type of “discriminatory effects” claim. The 2023 rule abrogates a 2020 rule and reinstates a 2013 rule, which itself was simply a codification of longstanding case law. The 2023 rule provides for the application of a burden-shifting analysis in “discriminatory effects” actions. 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. If the plaintiff can carry its burden, the burden shifts to the defendant to prove that the challenged policy or

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practice is necessary to achieve a substantial, legitimate, nondiscriminatory purpose. 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.

In light of this burden-shifting framework, housing providers need to consider whether any policies or practices could have discriminatory effects. Best practices dictate that providers (and their legal counsel) should carefully plan to avoid instituting any policies unless they are narrowly tailored to achieve a legitimate business purpose.