

# The Fair Housing Act: Enforcement Actions

A Practical Guidance® Practice Note by  
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This practice note explains how the Fair Housing Act (FHA) is enforced by the U.S. Department of Housing and Urban Development (HUD), including the filing of the complaint, the investigative and conciliation processes, the issuance of written findings, and the role of state agencies in the enforcement process. In addition, this practice note discusses potential remedies available to victims of unlawful discrimination and provides best practices for avoiding and defending against a discrimination complaint.

For detailed guidance on the FHA, including, discriminatory practices and policies prohibited by the FHA, the types of discrimination that frequently serve as the basis of fair housing litigation (with an emphasis on discrimination based on disability and an in-depth analysis of reasonable accommodation and reasonable modification requests under the FHA) and a road map for housing providers explaining how to properly implement fair housing policies, see the companion note to this practice note—[The Fair Housing Act: Prohibited Practices, Types of Claims, and Compliance Strategies](#).

## FHA Overview

The Civil Rights Act of 1968 (more commonly known as the Fair Housing Act or FHA), was the third major civil rights law passed in the 1960s. The FHA followed on the heels of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. At the time it was initially passed, the FHA prohibited discrimination based on race, color, religion, and national origin. Sex-based discrimination protections were added in 1974. The FHA was amended again in 1988 to prohibit discrimination based on familial status and disability (Fair Housing Amendments Act or FHAA). Proposed legislation amending the FHA is routinely introduced in Congress, including proposals to prohibit discrimination based on sexual orientation, gender identity, marital status, source of income, and status as a military servicemember or veteran.

Currently, the FHA prohibits discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin in the sale or rental of housing, the

financing of housing, the provision of brokerage services, and in residential real estate-related transactions. The FHA applies to most housing providers, both public and private, including owners and agents of single-family homes, apartments, condominiums, mobile homes, and others. The FHAs coverage of “residential real estate-related transactions” further includes both the “making [and] purchasing of loans secured by residential real estate [and] the selling, brokering, or appraising of residential real property.” 42 U.S.C. § 3605.

The HUD through its Office of Fair Housing and Equal Opportunity (FHEO), receives and investigates complaints under the FHA and determines if there is reasonable cause to believe that an act of discrimination occurred or is likely to occur. Many state and local fair housing agencies are also tasked with investigating complaints arising from alleged acts of discrimination in their jurisdiction, which may cite federal, state, and local fair housing laws. If the alleged discriminatory act takes place in a state or locality that has adopted a fair housing enforcement agency similar to the FHEO, HUD may refer the complaint to that local agency for investigation.

## HUD Enforcement of the FHA – What Happens When a Complaint Is Filed?

Anyone can file a fair housing discrimination complaint with HUD or with a state or local agency charged with enforcing housing discrimination laws in the jurisdiction. Filing a complaint with HUD is as easy as logging onto the [HUD website](#), completing a one-page form, and clicking submit. Complaints can also be submitted to HUD by [telephone or email](#). Sometimes, a complainant will file a complaint with both a local jurisdiction and with HUD. Certain jurisdictions (e.g., local counties) may not have reciprocity with HUD. If identical complaints have been filed with HUD and such a local jurisdiction, then both cases may proceed simultaneously. It is important to note the differences in the investigative process by an agency and account for the additional time and expense likely to be incurred from defending two simultaneously pending investigations (or reaching a global settlement agreement that covers both cases). It should be noted that filing a complaint with HUD, a state agency, or a local fair housing commission, are not the only enforcement avenues available to the complaining party. The complainant also has a private cause of action and can file a civil lawsuit at any time, even if a complaint is pending with a federal, state, or local agency.

Claims under the FHA are subject to a two-year statute of limitations. See 42 U.S.C. § 3613(a)(1)(A); *Tolbert v. State of Ohio Dept of Transp.*, 172 F.3d 934, 939 (6th Cir. 1999). The limitations period begins to run on the date of the last occurrence of discrimination. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 381 (1982).

The FHA prohibits housing providers from retaliating against anyone for filing a discrimination complaint. 24 C.F.R. § 100.400. Forms of retaliation could include:

- Issuing a notice of lease violation (even for an unrelated issue not the subject of the discrimination complaint)
- Offering different terms or conditions at lease renewal
- Allowing the lease to expire and convert to a month-to-month tenancy at a higher rate
- Choosing not to renew the tenancy
- Disregarding maintenance requests or correspondence from the complainant
- Increasing the complainant's rent; offering different terms or conditions of tenancy because the person filed a complaint –or–
- Failing to offer the same terms and conditions of tenancy because the person filed a complaint

Housing providers should also be aware that they have a duty to protect their residents from known harassment based on the resident's status in a protected class. This means that housing providers are responsible for the actions of their employees, agents, contractors, maintenance workers, housekeepers, builders/developers, neighbors, and anyone else over whom the housing provider can exercise control.

Upon receiving and reviewing the complaint, HUD will assign a case number to the complaint once it has been accepted. HUD will then serve a letter and a copy of the complaint on the respondent(s), the party, or parties who are being accused of committing an illegal act of discrimination. (Information on this process can be found on HUD's [website](#).) HUD requires that the investigation be completed in 100 days, unless it is impractical to do so. 42 U.S.C. § 3610(a)(1)(B)(iv); see also 24 C.F.R. § 103.225. Quite often, these investigations are not completed in 100 days, and the investigator assigned to the case will send all parties a notice explaining why additional time is needed to complete the investigation. The authors' experience in recent years is that most investigations are not completed within the 100 days and there is no remedy for either the failure to timely complete the investigation or the failure of the agency to identify a reason. Plan on the investigation taking as long as it takes (often 12 to 24 months).

If a state or local fair housing agency enforces rights and remedies that are substantially similar to the FHA, HUD may refer the complaint to the state or local agency where the alleged discriminatory acts occurred or where the housing provider is located. Thereafter, the state agency will take the lead investigating the accusations of the complaint. The state agency (e.g., a professional licensing board or a commission tasked with enforcing human rights) will assign its own case number and its own investigator to the case.

## The Investigative Process

The state agency will serve a letter and a copy of the complaint on the respondents, notifying them of the charges against them, requesting a written response to the allegations, and likely issuing a series of requests for information or document production. (See HUD's [website](#) for further guidance.) Procedures and timelines vary by jurisdiction, but one can expect to receive a deadline of approximately 10 to 30 days to respond to the allegations in the complaint. It is critical that a knowledgeable fair housing attorney draft the respondent's answer to the complaint (commonly referred to as the position statement). The contents of the position statement lay the foundation for respondent's defenses and will be cited by the investigator in their written report at the conclusion of the investigation. Indeed, any admission or acknowledgment (albeit inadvertent) by any named respondent may be used against you. A violation of the FHA does not require intent. Even an unintentional action or inaction can be a violation, particularly when the action or inaction had an adverse impact on someone in a protected class. (See disparate impact analysis in [The Fair Housing Act: Prohibited Practices, Types of Claims, and Compliance Strategies](#).) The timeline of events, the narrative of the interactions that preceded the filing of the complaint, and the tone of the position statement all play a vital role in shaping the respondent's defenses and in providing a clear and concise picture to obtain an ultimate finding of no cause. Moreover, no position statement should be submitted without a thoughtful and thorough review of the allegations, the housing provider's policies, employees' statements (emails or otherwise), and strategy.

Upon receipt of respondent's position statement and supporting documentation, the investigator will conduct interviews of fact witnesses who may have personal knowledge of the events described in the complaint and

of the ongoing interactions between the parties after the filing of the complaint. These interviews may be conducted via teleconference or in person, on-site at the housing provider's property, or at the state agency's office. Frequently, these interviews are taken under oath, and they may be recorded. Providing reliable, consistent, and convincing testimony is key to presenting a strong defense to any discrimination complaint. It is important to have an experienced attorney who practices in this field to not only be present for the witness interviews, but to prepare the respondent's witnesses to anticipate the questions that may be asked and frame confident and accurate responses to those questions. The investigator will cite to these interviews in the ultimate written finding, and there is nothing more valuable than multiple witnesses for respondent providing consistent and cogent responses. Conversely, an unprepared witness giving an off-the-cuff response, misremembering the dates when events occurred, or providing a response that may insinuate an implicit bias can be devastating to the housing provider's defense. (See HUD's [website](#) for further guidance.)

## The Conciliation Process

During the investigative process, sometimes right after the complaint is filed, the investigative agency will reach out to the parties to engage in conciliation (mediation). (Find more information [here](#).) Depending on the jurisdiction, conciliation may be mandatory or optional. In the District of Columbia for example, a mandatory conciliation conference is scheduled at the outset to see if the parties can resolve the matter before the investigative process begins. Indeed, this may be scheduled within 30 days of the charge being issued against the respondent(s). (Find information [here](#).) In other jurisdictions, like [Virginia](#) and [Maryland](#) conciliation at the outset is voluntary and not on a strict timeline. Regardless of the format, either party may terminate conciliation at any time and elect to proceed with the investigative process. Similarly, throughout the investigative process the parties can reengage in conciliation to seek a mutually agreeable resolution. Be aware that an uncooperative party, unwilling to conciliate, may be viewed as lacking credibility or reasonableness on a contested fact or issue. The housing provider will want to participate in conciliation to get a glimpse of how the complainant "tells their story" and their version of how the housing provider's representatives interacted with the complainant in the encounters that resulted in the filing of the complaint.

In the event conciliation efforts are successful, HUD or the local agency will have a template conciliation agreement for the parties to execute. This form agreement will typically include relief for the complainant (monetary or in-kind relief), relief in the public interest (mandatory fair housing training, adoption of a nondiscrimination policy, etc.), a period of monitoring (for the agency to monitor the respondent's practices), a provision disclaiming liability by either party, certification requirements to confirm the parties have performed their obligations under the agreement, and various other relief as mandated by the agency or sought by the parties. A signed conciliation agreement terminates the investigative process and closes the case. Parties should note that the conciliation agreement is a public document, as is the initial complaint. See, e.g., [Standard Operating Procedures For Complaint Processing](#) (DC Office of Human Rights).

## Written Finding – Cause or No Cause

If the investigation continues, and after completing witness interviews, the investigator may issue a supplemental document production request to either (or both) parties. Once the investigator determines that all evidence needed to complete the file has been received (or, at least, requested), the investigator will prepare a written report or summary of findings. This should be an objective analysis of the law, the evidence presented, and whether there is reason to believe an act of discrimination occurred. The report is reviewed by the agency's director or a board of superiors, who will then decide whether there is cause or no cause to believe respondent violated a federal or local fair housing law. See, e.g., [Standard Operating Procedures For Complaint Processing](#) (DC Office of Human Rights). Regrettably, the quality and impartiality of the investigator may vary and, therefore, a recommendation of a for cause finding may not be fully supported by the investigator's file.

In the event of a finding of no cause the agency will issue correspondence to all parties noting the finding and dismissing the case. If the case was referred to a state agency by HUD, then the state agency will coordinate with HUD to close out the initial HUD complaint. Most jurisdictions (such as [Maryland](#)) provide a short time period during which the complainant may submit a request for reconsideration. This is not a de novo review of the case. Rather, it may include a review of (1) whether the investigator failed to consider or review relevant evidence, (2) whether the investigator acted improperly, or (3) whether the investigator failed to properly analyze the evidence presented, among other factors.

In the event of a finding of cause, some jurisdictions will require a final but mandatory conciliation session for the parties to negotiate a mutually agreeable resolution. See, e.g., Va. Code Ann. § 36-96-13. If the final mandatory conciliation fails, some jurisdictions require that the agency refer the case to the state's Office of Attorney General or other similar office charged with prosecuting violations of the civil code. See, e.g., Virginia Code Ann. § 36-96-14. In certain jurisdictions, the prosecuting attorney has discretion in filing a civil suit on behalf of the complainant. In other jurisdictions, the law states that the prosecuting attorney **must** file charges, in some cases, within 30 days of the matter being referred from the state agency who reached a finding of cause. Virginia Code Ann. 36-96-14. If a civil case is filed, violations of the FHA (federal and/or state) are brought against the respondent on behalf of the complainant, although there is no cost to the complainant for the attorney's services in prosecuting the case. Respondents are strongly advised to enlist an experienced fair housing attorney to represent the housing provider's interests in any litigation. The possible consequences the respondent faces from an adverse finding in the civil case range from compensatory damages (i.e., out-of-pocket expenses incurred by complainant), punitive damages and civil penalties (fines), attorney's fees (even if the complaining party receives free representation), injunctive relief (a court order to not discriminate), and/or equitable relief (restoring or granting the lost housing opportunity).

Be mindful, the grant to the complainant of the lost housing opportunity may be the most expensive relief for the housing provider. The award may require the housing provider to provide complainant with residency in the specific apartment or dwelling that was denied, even if it is now rented to someone else. This may require the housing provider to buy the current occupant out of the lease or compensate the successful litigant in a private (and large) settlement.

## Best Practices – Guidance for Housing Providers

The key to successfully defending a fair housing discrimination complaint is strong recordkeeping protocols. A consistent document retention policy is your first and best defense. In this regard, housing providers should make certain that they have policies and procedures in place requiring detailed written accounts of all interactions with applicants, residents, visitors, staff, contractors, and anyone else who regularly visits your property. Specific best practices include:

- Maintaining a written nondiscrimination policy
- Maintaining a written policy detailing how to handle reasonable accommodation/modification requests
- Transparency in the leasing process (a written list of qualifications for tenancy distributed to potential applicants)
- Requiring everyone who works or services your property to document all of their interactions with interested future residents, applicants, and residents in writing
- Maintaining a written policy for all aspects of operating the housing accommodation (e.g., maintenance requests, pet policies, parking procedures, communications with residents, third-party vendors, etc.)
- Requiring employees and staff to obtain annual fair housing training
- Engaging a fair housing attorney to review the property's internal policies –and–
- Seeking counsel when unsure on how to respond to a fair housing request

If a housing provider does not know the answer to a request from a resident—do not guess—seek advice from an attorney experienced in fair housing. The cost of defending a fair housing discrimination complaint will likely far exceed the cost of obtaining advice from counsel to identify and address the issue before a complaint is filed.

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### **Gwendolyn Roy-Harrison, Principal, Offit Kurman**

Gwendolyn's practice in real estate law focuses on litigating landlord-tenant disputes, particularly, representing residential and commercial landlords of all sizes. She spends the majority of her time in court prosecuting and defending cases on behalf of large property management companies, medium to small business owners, and individual home owners. She competently and aggressively leads clients through the entire litigation process. Gwendolyn has also honed a specialty in resolving housing disputes for condominium and cooperative housing associations. Outside of the courtroom, she dedicates considerable time to the transactional sphere, which includes lease drafting, non-disclosure agreements, and confidential settlements outside of court.

Gwendolyn frequently conducts presentations on the nuances in landlord-tenant law across the three local jurisdictions (VA, MD, DC) and best practices for landlords to avoid a Fair Housing complaint.

### **John B. Raftery, Managing Principal of Legal Operations, Offit Kurman**

John Raftery is currently the Managing Principal of Legal Operations and a member of the Office of Managing Principal – which is responsible for the legal operations of the firm and is directly responsible for attorney retention, management as well as management of the firm's practice groups. John is also a member of the firm's management committee.

Leveraging years of counseling clients in real estate litigation, fair housing matters and business law, John serves as a trusted advisor to businesses, real estate owners and management companies. John provides strategic, practical and industry-based advice to clients negotiating or litigating through legal obstacles and difficulties– always with keen focus on cost benefit parameters. John's clients include large and small property management industry partners, managers and owners of residential and commercial real estate, C-level officers of small and midsize corporations, directors of not-for-profit organizations and entrepreneurial individuals seeking cost-conscious and practical representation.

John is sought by business leaders for representation and guidance on all matters involving real estate, leases, construction, landlord-tenant disputes, fair housing training, investigations and litigation, mold and pest-infestation claims, business torts, discrimination claims, and business transactions. He focuses on establishing industry-focused partnerships with individuals and organizations, advocating for his clients through cost-effective representation - including offensive litigation when necessary. His experience as a litigator spans most trial courts in New York, Virginia, Maryland, and the District of Columbia. Earlier in his career, John served as a special trial attorney for the U.S. Department of Justice.

A recognized authority on fair housing and landlord-tenant matters (commercial and residential), John lectures to local and national industry associations. The thrust of John's programs are squarely focused on education and avoidance of claims through a practical analysis of applicable law and regulations coupled with real life examples to illustrate the applicable issues.

### **Ryan Patino, Attorney**

Ryan Patino is a Landlord Representation attorney. His focus is on counseling corporations and small businesses in matters involving complex real estate transactions, litigation, and compliance with federal and D.C. housing laws. Mr. Patino handles all aspects of litigation on behalf of real estate development and property management companies, which includes landlord and tenant matters, contract disputes, defending against allegations of discrimination, and administrative cases. He is a decisive and aggressive litigator who is adept at determining the financial value of a given case and designing a strategy that leads to the best possible outcome for his clients. Aside from litigation, Mr. Patino also assists clients with negotiating and drafting residential and commercial leases, secondary lease documents, purchase and sale agreements, bylaws, and contractor agreements.

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