

RENEWAL POLICIES REDUCE EXPOSURE AND STRENGTHEN YOUR DEFENSE AGAINST FAIR HOUSING DISCRIMINATION COMPLAINTS

We handle countless day-to-day situations for our clients. Unfortunately, sometimes situations illustrate the lack of a needed policy or procedure. Potential fair housing retaliation scenarios usually demonstrate that many communities do not have a well thought-out and consistently applied non-renewal policy. All too frequently we are told, “I don’t know what our non-renewal policy is”. You have the right to establish reasonable policies and procedures to manage your property, especially renewal policies based on resident conduct. Training your onsite staff to consistently carry out a well-designed non-renewal policy will significantly reduce potential fair housing exposure, including exposure to fair housing retaliation claims.

Several recent situations have raised potential fair housing retaliation claims. One, a resident slips and falls on the property, and then files a lawsuit against the property. Two, a resident on a single occasion storms the management office, and behaves in an aggressive, rude, and hostile manner which interferes with property operations to the point that the onsite team fears for its safety. Three, a resident has countless issues, and even though the onsite team has bent over backwards to address the resident’s concerns, the resident is not satisfied and will never be satisfied. In all three cases, the communities want to non-renew, and have legitimate non-discriminatory business reasons for non-renewing. However, in all three cases, prior to the communities notifying the resident of the non-renewal, the residents make requests for reasonable accommodations.

Assuming that the communities follow through with a non-renewal notice, these situations all meet the legal criteria for a fair housing retaliation claim. The resident exercised a fair housing right. The community took adverse action against the resident, non-renewing a resident is adverse action. Further, the resident will argue that the community only non-renewed because the resident exercised a fair housing right by asking for a reasonable accommodation. The community will counter that it had a legitimate non-discriminatory business reason for not renewing (being sued, resident’s behavior, resident’s dissatisfaction). However, the resident will counter that the reasons are just a pretext. Specifically, the stated reasons were not the real reason for the non-renewal, but were only given to justify the decision.

You may be able to convince the Colorado Civil Rights Division (“CCRD”), or a jury that you had legitimate non-discriminatory business reasons for a non-renewal. However, this is more difficult than you may think. The business legitimacy of your reasons, and whether they are a pretext to cover up discriminatory action, will largely be determined by your past actions. When residents sued you in the past, did you non-renew those residents? When a resident has had an altercation with the onsite team, to the point that the staff fears the resident, did you non-renew the resident? When a resident was dissatisfied no matter what, did you non-renew the resident? Regardless of the specific situation or what the resident did, did you non-renew similarly situated residents in the past? Similarly situated residents are called comparators.

Without a specific non-renewal policy, the similarly situated question is difficult to answer for many reasons. Because there is no policy, the onsite team often doesn't know the answer to this question. Frequently, we are told either that "I don't know" or "this has never come up before". OK, it's never happened before. "Then tell us the reasons why residents don't get renewed, what's the policy?" "We don't have a policy, we just make the call on a case-by-case basis". "Alright, you've told us this resident was never going to be satisfied. If the CCRD goes through all of your files, did you renew other residents that complained all the time?" "I'm not sure, we may have". Because there is no policy, there is no consistency. Additionally, the lack of a policy results in a lack of comparators. The reason it has never come up before is because there is no policy. If there were a policy that residents who cannot be satisfied are non-renewed, over time there would be an example of another resident who was not renewed because he was never satisfied.

Without comparators, the playing field gets tilted in the resident's favor. First, it opens the door to credibility issues. "Let me get this straight. You non-renewed Ronnie Resident because he was always dissatisfied? You say this has never come up? You run a 400-unit property? You have been there for 5 years? You have seen thousands of residents come and go? Yet, you never had a resident who was constantly dissatisfied"? If it is a common issue, but has never come up before, it can create the impression that you are just making it up as you go along. No policy and a corresponding lack of comparators also places the entire emphasis on the reasons given for nonrenewing the resident at issue, and whether your reasons were pretextual. A well-thought-out policy and the result of that policy places the emphasis on the policy, its rationale (the legitimate non-discriminatory business reasons for the policy), and the fact that the policy has been applied to other residents. With no policy, in a worst-case scenario, there could be a comparator bomb in your files. You think it has never come up before. However, are you willing to bet the ranch that the CCRD or some aggressive attorney won't find an example of another resident in your files that had the same issue, but was renewed?

A solid non-renewal policy addresses the comparator issue and much more, and thus greatly reduces your exposure. A non-renewal policy will eventually almost always generate favorable comparators over time. However, if a situation arises before the policy generates any comparators, you can now defend your actions based on the policy alone. The policy was adopted for legitimate non-discriminatory business reasons. For example, if the resident has sued the property, the property will expend time and money defending the lawsuit. Some, if not most, residents who sue the property are litigious in nature and may look for any reason to sue again. Lawsuits typically allege that the onsite team failed to do its job, was negligent, or even incompetent. Lawsuits create a hostile relationship between the resident and onsite team. Resident lawsuits can affect the ability of the onsite team to provide resident services to the suing resident, and to other residents. Lawsuits can go on for a long time. The onsite team shouldn't have a cloud hanging over them while the lawsuit takes its course. You had the foresight to determine that the likelihood of a resident eventually suing the property was significant, and in order to avoid allegations that your actions were retaliatory (made in response to the lawsuit), you decided what your response was going to be if the issue ever came up.

A non-renewal policy strikes at the heart of a resident's retaliation claim by addressing the critical issues of timing, intent, and causation. Adverse action against a resident

(nonrenewing the resident) shortly after exercise of a fair housing right is strong circumstantial evidence of discriminatory intent. Further, timing evidence by itself could prove that the “cause” for the nonrenewal was in retaliation for the exercise of a fair housing right. If you adopted your non-renewal policy prior to having any idea about a resident’s issue, timing had nothing to do with it. You were only carrying out a policy based upon a legitimate non-discriminatory business reason. Also, you could not have intended to discriminate against the resident, because the decision to non-renew was made well before you knew the resident had an issue. Because the decision is automatic, based on policy, the resident will have great difficulty successfully arguing that your reasons for not renewing were a pretext.

While your policy can and should be built up over time based on your experiences with residents, based on situations reported to us, you may want to consider one or more of the following policies. Except for fair housing lawsuits or complaints, the community will not renew any resident who sues or threatens to sue the community. The community will not renew any resident who has three or more aggressive, rude, discourteous, or hostile interactions with the onsite team. The community won’t renew residents who have a single altercation with the onsite team that results in onsite staff fearing for their safety, including a threatening altercation, and regardless of whether the resident was arrested or charged with a crime. The community will not renew residents who demonstrate, in the onsite staff’s reasonable judgment, ongoing dissatisfaction with the community or the staff regardless of significant efforts to satisfy the resident.

Almost all of our clients have non-renewal policies. The problem is that most of them are not in writing, and the people on the ground (the onsite teams) are not either aware of the policies or do not understand them. Policies may address some or all of the issues discussed in this article, or may include additional policies. Your non-renewal policy should also address both monetary and non-monetary lease violations to promote consistency and to avoid fair housing problems. For example, you won’t renew a resident that has been late three or more times, has been served two or more demands for rent or possession, or that has been served more than one three-day demand for compliance or possession for a nonmonetary issue.

Only you can determine what nonrenewal policies you should adopt based on your experience, and on legitimate non-discriminatory business reasons. However, you cannot just arbitrarily adopt policies. Any policy has to be supported by legitimate non-discriminatory business reasons. The legitimate non-discriminatory business reasons for most policies are obvious. If you can’t come up with legitimate non-discriminatory business reasons for policy, the policy should not be adopted. To avoid being accused of making them up at the time a resident issue arises, and to promote consistency, you must put your non-renewal policies in writing and make sure that your teams are trained to consistently enforce them. The onsite team should specifically document a resident’s file in writing when it is known that a resident will not be renewed pursuant to the policy.

When it comes to fair housing, discretion is your enemy. Making the non-renew call on a case-by-case basis is a recipe for disaster. A well-thought-out non-renewal policy will greatly eliminate discretion and promote consistency. A non-renewal policy can also prevent a resident from holding you hostage over a potential retaliation claim. Residents can and do file fair

housing discrimination complaints, including retaliation claims. If the Colorado Civil Rights Division knocks on your door for non-renewing a resident, a non-renewal policy puts you in the strongest position to defend. If the policy has been in place for a while, the policy is likely to demonstrate that you have consistently and conclusively non-renewed other similarly situated residents regardless of protected class status. Even if the policy hasn't generated any comparators to use in your defense, the policy will almost conclusively show that you lacked a discriminatory or retaliatory intent.