

OCCUPANCY STANDARDS ARE UNDER ATTACK - YOU MAY NEED TO ADJUST YOUR POLICY

What is the Federal occupancy standard under the Fair Housing Act (FHA)? This is a question I frequently ask at THS fair housing classes. The question is designed to test the attendees' fair housing knowledge because it is a trick question. There are no federally approved occupancy standards for multifamily or rental housing. HUD has only published guidelines. Some of the rental industry locked onto a portion of HUD guidelines to set an occupancy policy at two persons per bedroom. For a long time, HUD acquiesced in the industry's choice by not challenging the two persons per bedroom standard. However, as discussed at the recent NAA Legal Symposium, the two persons per bedroom standard is under assault both by HUD and fair housing advocacy groups. Given the current HUD enforcement climate and mounting legal challenges by fair housing groups, you should immediately consider policy changes to reduce legal risk if your policy is two per bedroom.

Because the assault on the two per bedroom rule is likely to be a sea of change for many, a detailed historical review and explanation is helpful. Families with children (familial status) became a protected class with the adoption of the 1988 Fair Housing Amendments. Accordingly, policies or actions that impact families because of their protected class status are discriminatory under the FHA. Because occupancy policies can directly affect the ability of families to live at an apartment community, the multifamily industry needed to develop policies that would not unduly restrict the ability of families to rent. On the other hand, for obvious reasons, an unlimited number of persons cannot occupy a rental. After passage of the 1988 amendments, the question became how many is too many in a rental? In 1991, HUD addressed the occupancy issue in a memo. The Memo was written by HUD's General Counsel (Frank Keating) to HUD's Regional Counsel to provide guidance (the factors HUD would consider) in fair housing enforcement actions based on familial status (occupancy limits). Specifically, the "Keating Memo" set forth criteria HUD would consider in determining whether a housing provider had violated the FHA by committing familial status discrimination by overly restricting the number of occupants that may reside in a rental. Significantly, the original Keating Memo was dated February 21, 1991 (the "Original Memo"). However, due to widespread confusion and misunderstanding, the Keating Memo was revised and republished (the "Clarifying Memo") on March 20, 1991. In the Clarifying Memo, Keating stated that "It (the Original Memo) was not intended to create a definitive test for whether a landlord or manager would be liable in a particular case, nor was it intended to establish occupancy policies or requirements for any particular type of housing. In discussions within the Department, and with the Department of Justice and the public, it is clear that the February 21 memorandum has resulted in a significant misunderstanding of the Department's position on the question of occupancy policies, which would be reasonable under the Fair Housing Act. In this respect, many people mistakenly viewed the February 21 memorandum as indicating that the Department was establishing an occupancy policy which it would consider reasonable in any fair housing case, rather than providing guidance to Regional Counsel on the evaluation of evidence in familial status cases which involve the use of an occupancy policy adopted by a housing provider."

The Keating Memo lists six main factors that HUD will consider when evaluating occupancy standards. One, the number and size of sleeping areas or bedrooms. Two, the overall size of a rental, also known as the square footage factor. Three, the age of the children occupants. Four, configuration of the unit, which ties in with the overall size of a unit and number of sleeping areas. Five, limiting factors identified by housing providers, such as the capacity of the septic, sewer, or other building systems. Six, state and local law. “If a dwelling is governed by State or local governmental occupancy requirements, and the housing provider’s occupancy policies reflect those requirements, HUD would consider the governmental requirements as a special circumstance tending to indicate that the housing provider’s occupancy policies are reasonable.” Other relevant factors include any evidence that indicates occupancy limits are pretextual (reasons to prevent families with children from renting). Examples of facts that would be considered circumstantial or direct pretext evidence for occupancy limits include: “(1) discriminatory statements; (2) discriminatory rules governing the use of common facilities; (3) taking other steps to discourage families with children from living in its housing; or (4) enforced its occupancy policies only against families with children.”

Based on an erroneous interpretation of the Keating Memo and a desire for clear standards that could be uniformly applied, the default occupancy standard for much of the rental industry became two persons (two heartbeats) per bedroom. The rationale for adopting the two per bedroom policy stemmed from a portion of the Keating Memo that stated, “the Department believes that an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act.” However, as argued by fair housing advocacy groups and critics of the two per bedroom policy, such a justification overlooks other statements in the Clarifying Memo that a two person per bedroom policy is not a safe harbor.

Again, the Clarifying Memo made it clear that HUD’s memo “was not intended to create a definitive test for whether a landlord or manager would be liable in a particular case, nor was it intended to establish occupancy policies or requirements for any particular type of housing.” With respect to a two-person per bedroom policy, the Clarifying Memo further went on to state that “the reasonableness of any occupancy policy is rebuttable, and neither the February 21 memorandum (Original Memo) nor this memorandum (Clarifying Memo) implies that the Department will determine compliance with the Fair Housing Act based solely on the number of people permitted in each bedroom.” “Indeed, as we stated in the final rule implementing the Fair Housing Amendments Act of 1988, the Department’s position is as follows: [T] here is nothing in the legislative history which indicates any intent on the part of Congress to provide for the development of a national occupancy code.”

Until recently, a two per bedroom policy has been adequate and fairly risk-free because neither HUD nor anyone else has challenged it for the most part. However, the confluence of several events is accelerating challenges to the policy, and challenges are only likely to increase as those challenging the policy become emboldened with the success of prior challenges. In addition to calls for rent control and affordable housing solutions, the tight housing market is in part fueling the challenges to the two per bedroom occupancy policy. The rise of disparate impact fair housing cases, combined with studies (statistical evidence) demonstrating that the policy significantly impacts families with children also encourages challenges to the policy. One study found that families with children were ten times more likely to run afoul of the two-person

per bedroom standard as opposed to other households. HUD also appears to have stepped up its challenge to the two per bedroom policy resulting in a federal court order consent decree against an apartment community. These factors combined have led to fair housing advocacy groups filing complaints. Recently, a group of fair housing advocacy groups filed a fair housing complaint (the multi-state complaint) against a regional management company that manages 1000s of apartments in five states.

The multi-state complaint started when the management company refused to allow a woman and her husband to rent a large, two-bedroom unit because the family had three children. Based on this denial, a fair housing advocacy group started a comprehensive investigation into the management company's policies and practice. The fair housing complaint alleges that through "investigation, Complainants confirmed that management company enforces a strict, two person per bedroom maximum occupancy policy at a number of its properties. Management company enforces the policy regardless of the size or configuration of the apartment unit or the size of the unit's bedrooms or other living areas. For at least one of its properties, management company represents that children are counted as occupants at birth, so even a family of five including an infant who sleeps in a crib in her parents' room would be unable to rent a spacious two-bedroom unit at management company's property. Management company's two-person per bedroom policy applies equally to one-bedroom units at many of its properties and thus prevents a couple with any children from renting those units at all, regardless of the size or configuration of the apartment. Management company's maximum occupancy policy is more restrictive than occupancy limitations imposed by applicable local law, which would allow more than two persons per bedroom to live in a number of its apartments."

Based on these allegations, the fair housing advocacy group argued that management company's "unreasonable policy operates both to exclude and limit the number of families with children who can live at management company's properties and thus discriminates against and has a discriminatory adverse impact (disparate impact) on families with children." In short, the fair housing advocacy group argues that their "investigation reveals that management company ignores everything that HUD specifically directs housing providers to consider in setting occupancy standards and instead enforces the same rigid policy, regardless of the size of the unit, its bedrooms, or any other factors. Under similar circumstances, HUD has issued charges of discrimination against housing providers for rigidly enforcing a two-person per bedroom occupancy policy, particularly where, as here, the occupancy policy at issue was more restrictive than the local occupancy code."

Based on the foregoing, every owner and management company with a two per bedroom occupancy policy should consider making policy changes. Until you can comprehensively evaluate your portfolio and develop specific policies for each community (if that is possible), we recommend considering adopting the following policies. First, if you currently have a two per bedroom policy, this policy should be changed to two per bedroom plus one. Second, your occupancy policy should not count infants (0 to 3 years) or don't start counting until the individual is a toddler (generally age three). Third, you should consider not publishing (especially on the internet) your occupancy policies. While these policy recommendations won't make you immune from occupancy based fair housing complaints, they are practical steps that can be immediately taken to significantly reduce your risk.

Fair housing advocacy groups use information about your community published on the internet to target apartment communities for investigation and testing. By publishing on the internet, a two per bedroom occupancy policy, you are painting a target on yourself. They can still discover your community's policy, but why make it easy? Further, by not counting infants, and increasing from a two to a two plus one policy, you have significantly reduced the number of potential complainants (families with children) that can allege that your policy either intentionally (disparate treatment) or unintentionally (disparate impact) discriminates against them.

The multi-state complaint was brought by a group of fair housing groups and was filed with HUD on their behalf by a fair housing law firm. A Denver based fair housing advocacy group constantly communicates with these groups and has previously retained the law firm involved in the multi-state complaint in an unrelated matter. Accordingly, we urge prompt action because it is only a matter of time before the two per bedroom policy becomes a problem for a Colorado owner or management company. Prompt action should also include pushing out and otherwise educating your onsite teams regarding occupancy policy changes. Fair housing advocacy groups frequently test (look for litigation targets) through telephone inquiries. Your teams need to be prepared if fair housing groups call your communities.

Long term, you will need time to develop occupancy policies that will reduce or eliminate legal challenges. The strongest occupancy policies will incorporate all or as many of the factors set forth in the Keating Memo (number of bedrooms, square footage, size and configuration of unit, age of occupants, limitations on facilities, and state and local ordinances). Evaluating age, facility limitations and local ordinances pose challenges. Everyone is or should be properly trained not to ask the age of occupants because that could be viewed as discrimination. However, onsite teams need to be trained to "explain" that occupants under 3 (or the age you set) are not counted for occupancy purposes. Explaining a policy is not equivalent to directly asking the age of the occupants.

Existing case law on occupancy supports limiting occupancy based on facility limitations (building systems such as water, sewer, etc.) However, any occupancy policy setting limits based on this factor will have to be well documented, and cannot be arbitrarily set. Building limitations are related to state and local laws that set forth square footage standards for living areas. Unfortunately, state and local laws can either support lower occupancy (set forth a higher square footage number per occupant) or support higher occupancy (set forth a lower square footage number per occupant). For example, in the multi-state complaint, the complainants argue that the IPMC (the International Property Maintenance Code) only requires bedrooms to be 70 square feet, and if occupied by more than one person, a minimum of 50 square feet per occupant. By comparison, Denver's code is 150 square feet of living space with an additional 100 square feet required for each additional person. The inconsistency between state and local laws will also make setting portfolio-wide occupancy rules problematic.

Unfortunately, the discussion at the NAA Legal Symposium revealed no magic solutions or easy answers. A major thrust of the discussion was how to gather data and study how occupancy (over occupancy) impacts building systems and overall resident quality of life. Part of

the discussion also focused on researching and compiling how fire and zoning codes address and limit the number of occupants in residential rental property. In the short run, we recommend adopting the policies discussed (2+1, don't count if < 3 years of age, and don't publish your occupancy policies) because they should significantly reduce the number of persons who may challenge your occupancy policies. In the long run, only occupancy policies that consider all factors set forth in the Keating Memo will reduce your risk to the greatest extent possible.