

## COVID-19, Illegal Housing Discrimination, and Protections for People with Disabilities and Those Who Care for Them under the Fair Housing Act

April 9, 2020

People who currently have COVID-19, those who have a history of having the virus, and those who are perceived as having the virus may be protected against housing discrimination under long-standing interpretations of the Fair Housing Act and other civil rights laws.

One of the primary purposes of disability discrimination laws is to protect individuals with disabilities from discrimination based on prejudice, stereotypes, or unfounded fears.<sup>1</sup> While there is currently much that remains unknown about COVID-19 and its effects on a person's functions, people suffering from COVID-19 may have a disability as defined by the federal Fair Housing Act and state or local laws. In addition, family members who live with and people who care for those who have COVID-19 are protected by the same laws. The law covers discrimination that may occur in apartment buildings, condominiums, nursing homes, homeless shelters, transitional housing and other kinds of housing, regardless of how the housing is funded. It also covers different types of housing transactions, like lending or home appraisals. Therefore, housing discrimination such as the unlawful denial of housing, inquiries about whether a person has COVID-19, or imposition of limitations in access to housing or housing-related services because of COVID-19 may constitute illegal discrimination.

### Definition of Disability & COVID-19

The Fair Housing Act defines a person with a disability to include an individual with a physical or mental impairment that substantially limits a major life activity, a record of having such impairment, or being regarded as having such impairment.<sup>2</sup> This definition is broad and covers a wide range of impairments, regardless of their origin.<sup>3</sup> Importantly, it covers an impairment that limits someone's ability to obtain or sustain housing opportunities.<sup>4</sup>

Whether a person has a disability under the Fair Housing Act is a fact-specific question that depends on how their impairment is affecting their activities. Therefore, having a disease is not always a disability per se, although it can be regarded as one for a particular individual. Many individuals who contract COVID-19 may experience impairments that limit major life activities substantially in various ways, including not being able to walk long distances, go to the grocery store, drive a car, or care for oneself. If someone with the COVID-19 virus has limitations on their mobility or ability to care for themselves, they may have impairments that have been held to constitute a disability under the Act in other settings.<sup>5</sup>

<sup>1</sup>H.R.Rep. No. 100-711 at 13, 1988 U.S.Code Cong. & Admin.News at p. 2174.

<sup>2</sup>42 U.S.C. § 3602(h).

<sup>3</sup>Schwemm, R., "Housing Discrimination: Law and Litigation," § 11D:2 (2019).

<sup>4</sup>Rodriguez v. Village Green Realty, Inc., 788 F.3d 31, 49 (2d Cir. 2015); United States v. S. Mgmt. Corp., 955 F.2d 914, 919 (4th Cir.1992).

<sup>5</sup>See e.g., Marriot Senior Living Services, Inc. v. Springfield Tp., 78 F. Supp. 2d 376, 379 n.2 (E.D.Pa. 1999)( though old age itself is not a disability per se, elderly people who can no longer live safely on their own covered under the Act); Casa Marie, Inc. v. Superior Court of Puerto Rico for Dist. Of Arecibo, 752 F. Supp. 1152, 1168 (D.P.R. 1990)(vacated on other grounds)(disability definition covers elderly persons suffering from chronic illnesses or diminished ability to ambulate).

Persons with COVID-19 may be regarded as having a disability just as persons with other communicable diseases have been regarded as having a mental or physical impairment that qualifies as having a disability under the Fair Housing Act. The legislative history of the 1988 Amendments Act and subsequent court rulings make clear that a "physical or mental impairment" extends to persons suffering from communicable diseases, including AIDS/HIV,<sup>6</sup> tuberculosis, hepatitis, and others. HUD regulations specify that the term physical or mental impairment expressly includes, but is not limited to, HIV infection.<sup>7</sup> This broad coverage of AIDS/HIV under the Act, as a communicable disease that has varied impacts on a person's major life activities, suggests that COVID-19 also may constitute a disability.

## Inquiries About Disability

The Fair Housing Act prohibits landlords and others from asking whether an individual has a disability and from asking about the type of disability or how severe it is.<sup>8</sup> This prohibition applies both to applicants and to tenants, as well as homeowners or borrowers.<sup>9</sup> For this reason, asking for information about the nature of a communicable disease, or asking for evidence about exposure or test results, will generally violate the Act. Housing providers and housing-services providers should not require homeowners, applicants or tenants to disclose whether they have medical conditions that make the homeowners, applicants or tenants particularly vulnerable to COVID-19. Housing providers may encourage tenants and homeowners to adopt infection-control practices such as regular hand washing, wearing cloth face coverings, and physical distancing, which does not violate the FHA. Landlords may ask a tenant or applicant to self-report about exposure or an underlying medical condition, but not about treatment. Due to the extreme lack of testing available and because scientists report that some with the virus may be asymptomatic, inquiries about whether someone has been diagnosed with contracting COVID-19 is insufficient to identify whether they have the virus. Housing providers who apply consistent policies and practices recommended by the Centers for Disease Control to prevent spread of the virus are justified, and these policies and practices are designed to assume that everyone may have the virus.

## Temporary and Long-term Impacts

Scientists have only studied COVID-19 for several months, so it is not yet clear what the long-term impacts of the disease on anyone may be. But in assessing the extent to which COVID-19 may be considered a disability under fair housing laws, it is important to note that – unlike the Americans With Disabilities Act – the Fair Housing Act has never been held not to apply to temporary disabilities, so long as an individual experiences an impairment that substantially limits a major life activity.<sup>10</sup> Further, COVID-19 may have long-term effects which supports an assertion that associated impairments are substantial under the Act. In addition, a person with a history of having COVID-19 may be a person who has a record of having a disability or as being regarded as having a disability.<sup>11</sup>

<sup>6</sup> 54 Fed. Reg. 3245 (Jan. 23, 1989)(HUD commentary citing House Report, note 21 in Section 11D:1, at 22 n.55 and other legislative history); see e.g. L.C. v. LeFrak Organization, Inc., 2013 U.S. Dist. LEXIS 175756 (S.D.N.Y. 2013).

<sup>7</sup> 24 C.F.R. § 100.201(a)(2). ("The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction--other than addiction caused by current, illegal use of a controlled substance--and alcoholism.")

<sup>8</sup> 24 C.F.R. § 100.202(c).

<sup>9</sup> See, e.g., Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act, questions 16-18.

<sup>10</sup> Unlike the Americans with Disabilities Act, which provides a limited defense under the "regarded as" prong of the law when a disability is transitory or limited, 24 CFR 1630.15(f), neither the Fair Housing Act nor its regulations contain any language limiting its application to short term or transitory disabilities. See also, Summers v. Altarum, 740 F.3d 325 (4th Cir. 2014), discussing limitations on the defense in EEOC regulations, and holding that a sufficiently severe leg injury, although temporary, constituted a disability under the ADA.

<sup>11</sup> See, e.g. Shumaker, E., "What we know about coronavirus' long-term effects," ABC News (Mar. 28, 2020), available at <https://abcnews.go.com/Health/coronavirus-learn-effects/story?id=69811566>.

## Being Regarded as Having an Impairment

A person may be discriminated against in violation of the Act if they are denied housing opportunities for having a record of contracting COVID-19 or for being regarded as having COVID-19. For example, a landlord may unlawfully seek to evict or refuse housing to a healthcare worker merely because of unsubstantiated fears that the worker may have been exposed to or contracted the virus.<sup>12</sup> In other settings, HUD has stated that people living with HIV/AIDS “need not be symptomatic” to file a complaint of discrimination under the Fair Housing Act.<sup>13</sup> This supports the assertion that someone who may have tested positive for the virus but who has recovered or who was in proximity with patients being treated for the disease, may be illegally denied housing even if they are asymptomatic and do not have actual impairments from the disease, but are regarded as having a disability.

There have been reports that some housing providers are refusing to accept persons who are moving from nursing homes, without any evidence of infection with COVID-19, apparently based on assumptions having to do with the supposed prevalence of COVID-19 in nursing homes. Making overly broad assumptions about whether or not a person has a contagious disease fails to use the individualized assessment that is required when considering decisions about persons with disabilities.

## Reasonable Accommodation Requests

The Fair Housing Act provides an affirmative right to persons with disabilities to reasonable accommodations, which are changes or exceptions to a housing provider’s rules, policies, or practices that are needed for a person with a disability to use housing on an equal basis.<sup>14</sup> A person with COVID-19 may make a request to relocate to a private room within a congregate living facility or request an extra bedroom for a live-in aide. A tenant may request rescission of an eviction notice as a reasonable accommodation under the Fair Housing Act when the eviction or termination is based on disability-related behavior.<sup>15</sup> To the extent a person experienced a short period of disability, followed by recovery, a reasonable accommodation may no longer be needed past the time of recovery.

## Direct Threat Exception

Despite these protections, the Fair Housing Act provides that housing need not be made available to people “whose tenancy would constitute a direct threat to the health or safety of other individuals.”<sup>16</sup> COVID-19 is a highly contagious disease, raising the question of whether this “direct threat” exception would preclude Fair Housing Act protections in particular circumstances. Application of this exception must be based on an individualized evaluation of the individual and informed by the reasonable medical judgments of the Centers for Disease Control or state or local health authorities. If the threat can be reduced or eliminated by making a reasonable accommodation, an accommodation should be offered.

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<sup>12</sup> State and local laws may preclude discrimination based on “lawful occupation” or other protected classes which may further protect healthcare workers. N.Y.C., N.Y., Administrative Code § 8-107 (2016).

<sup>13</sup> HUD guidance, “Housing Discrimination because of HIV/AIDS is Illegal” (April 7, 2015), available at: <https://www.hudexchange.info/news/housing-discrimination-because-of-hiv-aids-is-illegal/>.

<sup>14</sup> 42 U.S.C. § 3604(f)(3)(B).

<sup>15</sup> See, e.g., *Siniscallo v. Islip Hous. Auth.*, 2012 WL 1888140 (E.D.N.Y. May 23, 2012) (temporarily enjoining eviction based on tenant’s likelihood of success on reasonable accommodation claim for a probationary period to demonstrate that changes in medication and mental health treatment would prevent tenant from further threatening safety of neighbors).

<sup>16</sup> 42 U.S.C. § 3604(f)(9). A “direct threat” assessment in the employment context where person-to-person contact is a necessary component of job performance is distinguishable from the “direct threat” analysis in housing where consumers and providers are able to engage in the physical distancing measures instituted by public officials.

At a time when the public is advised to apply physical distancing measures by staying home, evicting someone with COVID-19 is antithetical to the recommendations of public officials. For a person with symptoms who is regarded as a potential direct threat, offering self-quarantine procedures may be regarded as an appropriate reasonable accommodation that must be considered to alleviate the threat. Alternatively, someone who has a record of having a communicable disease but who has recovered may be protected because their tenancy no longer poses a threat of infection.<sup>17</sup> A conclusion about whether the tenancy of an individual constitutes a direct threat to the health or safety of others may not be based on stereotypes or assumptions but on objective factual evidence.

## Other Discriminatory Acts

Media reports also suggest incidents of discriminatory treatment based on national origin relating to the erroneous perception that persons from Asia or China, or elsewhere, are responsible for the COVID-19 virus.<sup>18</sup> This type of stereotyped assumption constitutes direct evidence of national origin discrimination under the Act when associated with a housing or lending related transaction.

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*NFHA will update this memo as more definitive information on COVID-19 becomes available. For more information about fair housing protections for persons with COVID-19, their family members or associates, contact NFHA General Counsel Morgan Williams at [mwilliams@nationalfairhousing.org](mailto:mwilliams@nationalfairhousing.org) or (202) 898-1661.*

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<sup>17</sup> See e.g., *School Board of Nassau County v. Arline*, 107 S Ct 1123 (1987)(the Supreme Court determined that a teacher with tuberculosis may or may not be dangerous to others, depending on their individual infectivity).

<sup>18</sup> Tavernise, S. and Oppel, R., "Spit On, Yelled At, Attacked: Chise-Americans Fear for Their Safety," *New York Times* (March 23, 2020), available at <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html>.