

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

September 2, 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.

## I. 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>

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<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).

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>

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.

## II. 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

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<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)(holding that disability definition covers elderly persons suffering from chronic illnesses or diminished ability to ambulate).

<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.

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 Fair Housing Act. While housing providers may not require homeowners, tenants or applicants to disclose whether they have COVID-19 or an underlying medical condition, they may request that tenants or applicants voluntarily disclose exposure to COVID-19. This does not obligate a resident or applicant to provide such information. 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.

### III. Temporary and Long-term Impacts

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> 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>

Scientists have only studied COVID-19 for several months; however, recent research suggests that the virus may have long-term effects which are severe enough to constitute a substantial impairment under the Act. Even symptomatically mild cases may cause permanent damage to a patient's health. A new report shows that some people who mostly recovered from COVID continued to experience "debilitating" health effects for months afterwards, including shortness of breath, extreme fatigue, intermittent fevers, cough, concentration issues, chest pressure, headaches, and heart palpitations, among others.<sup>12</sup> Experts highlight especially the impact the

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<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 C.F.R. 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 (4<sup>th</sup> 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) <https://abcnews.go.com/Health/coronavirus-learn-effects/story?id=69811566>.

<sup>12</sup> Joshua Cohen, *Report Suggests Some 'Mildly Symptomatic' Covid-19 Patients Endure Serious Long-Term Effects*, FORBES (June 13, 2020) <https://www.forbes.com/sites/joshuacohen/2020/06/13/report-suggests-some-mildly-symptomatic-covid-19-patients-endure-serious-long-term-effects/#56e2ecff5979>.

disease has had on the lung structure of patients, damaging lung functionality potentially irreparably or causing chronic respiratory and pulmonary conditions.<sup>13</sup>

## IV. 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>14</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>15</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.

## V. 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>16</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

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<sup>13</sup> See, e.g., *What are the Long-Term Effects of COVID-19?* U MIAMI HEALTH NEWS (July 1, 2020), <https://news.umiamihealth.org/en/what-are-the-long-term-effects-of-covid-19/>; Bobby Boland, *What Long-Term Effects Could COVID-19 Have on Your Lungs?* BANNER HEALTH (June 22, 2020), <https://www.bannerhealth.com/healthcareblog/teach-me/what-long-term-effects-could-covid19-have-on-your-lungs>.

<sup>14</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>15</sup> HUD Guidance, *Housing Discrimination because of HIV/AIDS is Illegal* (Apr. 7, 2015) <https://www.hudexchange.info/news/housing-discrimination-because-of-hiv-aids-is-illegal/>.

<sup>16</sup> 42 U.S.C. § 3604(f)(3)(B).

a reasonable accommodation under the Fair Housing Act when the eviction or termination is based on disability-related behavior.<sup>17</sup> While a disability will not excuse a tenant from paying rent, some courts have held that an accommodation to pay late rent may be reasonable, where the delay results from the tenant's cognizable disability.<sup>18</sup> Fair housing advocates have suggested other examples of COVID-19-related accommodations: extensions of deadlines to complete yard work or other household maintenance, acceptance of belated recertification paperwork, appointment of another person to handle the tenant's affairs for the duration of the illness, or ending a lease early.<sup>19</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.

Moreover, a resident with a cognizable disability – separate from contracting COVID-19 itself, but that may make a resident more vulnerable to COVID-19 – may request a reasonable accommodation to help minimize the likelihood of contracting COVID-19. For example, a resident may request to be able to use the laundry room immediately after it has been cleaned, or at a time when other residents are not present, or a delay in inspection of their unit due to the increased risk of exposure. In addition, if a building has a preventative policy, such as only allowing one person in an elevator at a time, a resident with a disability may ask the building to continue that policy until the threat of contracting COVID-19 is diminished. A disabled resident might request a reasonable accommodation for an exception to a policy adopted to enforce social distancing, such as being allowed to use gym facilities needed for treatment which have otherwise been closed for the duration of the pandemic. Keep in mind that virtual tours and meetings with prospective residents must be accessible to visually impaired and hard-of-hearing residents generally, independent of the individual requesting a reasonable accommodation. Finally, people with disabilities who receive personal attendant services are entitled to continue to have their attendants visit them as a reasonable accommodation, even if the building they live in has a no-visitors, or limited-visitation policy.

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<sup>17</sup> See, e.g., *Sinigallo 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>18</sup> See, e.g., *Fair Housing Rights Center in Southeastern Pennsylvania v. Morgan Properties Management Company, LLC*, 2017 WL 1326240 (E.D. Pa. Apr. 11, 2017) (holding that a reasonable accommodation request to pay rent late reasonable where the tenant depended on SSDI benefits which were disbursed later in the month); *Giebeler v. M & B Assocs.*, 343 F.3d 1143 (9th Cir. 2003) (reversing summary judgment in favor of an apartment complex because the plaintiff's disability prevented him from being able to earn an income that allowed him to meet the minimum income requirement). But see *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998); and *Schanz v. Vill. Apartments*, 998 F. Supp. 784 (E.D. Mich. 1998) ("It is plaintiff's financial situation which impedes him from renting an apartment at The Village, and it is plaintiff's financial situation which he is requesting that defendants accommodate.").

<sup>19</sup> NATIONAL HOUSING LAW PROJECT, *Reasonable Accommodations and Disability Discrimination in the Context of COVID-19* (Apr. 6, 2020) <https://www.nhlp.org/wp-content/uploads/Reasonable-Accommodations.pdf>; FAIR HOUSING COACH, *How to Comply with Fair Housing Law While Dealing with COVID-19* (May 14, 2020) <https://www.fairhousingcoach.com/article/how-comply-fair-housing-law-while-dealing-covid-19>.

If you have COVID-19 or another cognizable disability and require accommodation(s) from your housing provider to protect your use and enjoyment of your residence, begin by contacting your provider to make the request. For more information on your eligibility for a reasonable accommodation, or if your provider has already denied or failed to respond to your request, contact a local fair housing center in your area.<sup>20</sup>

## VI. Examples of COVID-19-Related Discrimination

In the months since the beginning of the COVID-19 pandemic, NFHA has learned of discriminatory practices against people who have COVID-19 or assist people who do, which may violate the FHA in accordance with the analysis in this memo. Local fair housing organizations have reported instances of tenants being evicted after testing positive for the virus or being told to self-quarantine due to possible exposure. There are also reports of housing providers refusing to accept potential tenants who are exiting nursing homes, due to the perception that residence in such facilities increases one's risk of exposure to the virus. Screening questions in and of themselves may or may not violate the Fair Housing Act.<sup>21</sup>

Additionally, there are numerous reported examples of housing providers discriminating against healthcare workers, based on the same perception of increased exposure. Healthcare workers have been denied housing once the provider learned of their employment, and in other cases, evicted from their current residence.<sup>22</sup> Although one's employment in the healthcare sector does not entitle them to protected class status, these examples may constitute discrimination based on *perceived* disability, or the provider's subjective belief that they have COVID-19.

## VII. 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>23</sup> COVID-19 is a highly contagious disease, raising the question of whether this "direct threat" exception would preclude Fair

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<sup>20</sup> Information on local fair housing centers across the country using searchable map is available at: <https://nationalfairhousing.org/find-nfha-operating-supporting-members/>.

<sup>21</sup> Stories of COVID-related housing discrimination is available at: <https://nationalfairhousing.org/covid-19-housing-stories/>.

<sup>22</sup> E.g., Emily Shugerman, *Coronavirus Heroes Are Getting Tossed From Their Homes By Scared Landlords*, THE DAILY BEAST (Jun. 23, 2020), available at <https://www.thedailybeast.com/coronavirus-nurses-face-eviction-housing-discrimination-from-scared-landlords>.

<sup>23</sup> 42 U.S.C. § 3604(f)(g). 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.

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.

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>24</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.

## VIII. 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>25</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. Such discrimination is prohibited under the Act even when committed by fellow residents, rather than by a housing provider or their agent.<sup>26</sup>

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<sup>24</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>25</sup> Tavernise, S. and Oppel, R., "*Spit On, Yelled At, Attacked: Chise-Americans Fear for Their Safety*", N.Y. TIMES (March 23, 2020) <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html>.

<sup>26</sup> *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 81 Fed. Reg. 63,054.