

Keeping It Fair

Understanding ADA, FHA Accommodations and Modifications

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Several laws prohibit housing discrimination against people with disabilities, with the two major federal civil rights laws being the Fair Housing Act (FHA), which became law in 1968 and was amended in 1988 to include people with disabilities, and the Americans with Disabilities Act (ADA), which was enacted in 1990.

Although these laws have been in place for over 30 years, people with disabilities continue to experience the highest rate of discrimination in housing transactions. According to the National Fair Housing Alliance's (NFHA) *2019 Fair Housing Trends Report*, the number of housing discrimination complaints in 2018 increased by 8 percent to 31,202, the highest since NFHA began producing the report in 1995. Complaints of discrimination based on disability represent 56.3 percent of these. NFHA's full report is online at <https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf>.

The Takeaway

Both the Fair Housing Act and the Americans with Disabilities Act protect people with disabilities against housing discrimination. However, there are differences between the laws, including what is covered and who pays for changes. Real estate professionals need to understand how each law works.

The FHA and the ADA share the goal of preventing discrimination by requiring reasonable accommodations and modifications to allow individuals with disabilities to have the full use and enjoyment of their dwelling and any associated common areas. However, there are significant differences between each law, including who pays for changes. Understanding these differences will help license holders and their clients avoid discrimination complaints and possibly costly fines.

What is Considered a Disability Under the Law?

The FHA and ADA have similar definitions for “disability,” although the FHA uses the term “handicap” instead of disability. Both acts define a person with a disability as an individual with a physical or mental impairment that substantially limits one or more major life activities, an individual who is regarded as having such an impairment, or an individual who has a record of such an impairment.

The federal interpretation of what constitutes a physical or mental impairment is broad and includes most any ailment or condition as long as it “substantially limits” a “major life activity.” This includes alcohol or drug addiction so long as it does not involve current illegal drug use.

The U.S. Department of Justice’s (DOJ) Civil Rights Division has interpreted a major life activity to be “those activities that are of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, caring for one’s self, learning, and speaking.” They interpret “substantially limits” to mean “the limitation is ‘significant’ or ‘to a large degree.’”

What is Covered?

The FHA covers almost all public and private housing transactions and prohibits housing providers from discriminating against housing applicants or residents because of their disability or the disability of someone associated with them. Examples of discrimination against a person with a disability would be when the owner, landlord, property manager, property owners’ association (POA), or real estate license holder:

- refuses to sell or rent to that person;
- refuses to make reasonable accommodations in rules, policies, or services;
- refuses to allow a reasonable modification of the premises; or
- imposes different terms, conditions, or deposits on that person.

The ADA’s reach is more narrow. It provides that places of “public accommodation” in governmental, public, and private facilities must meet specific accessibility standards to accommodate individuals with disabilities. These standards are set out in the *ADA Accessibility Guidelines* (ADAAG).

Types of Accommodations, Modifications

Reasonable accommodation. The DOJ and the U.S. Department of Housing and Urban Development (HUD)

have issued a joint statement that provides technical assistance regarding reasonable accommodations and the rights and obligations of housing providers and individuals with disabilities. This useful resource is online at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf.

They define a “reasonable accommodation” as “a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common-use spaces.” A housing provider must make a requested reasonable accommodation if there is a nexus between the requested accommodation and the individual’s disability. Here are some examples.

- An apartment complex has a “no pets” policy. The policy is waived for a blind person so her guide dog can live with her.
- A property manager’s policy requires tenants to pay rent at the property manager’s office in person each month. A tenant has a mental disability that causes him to fear leaving his own premises. The policy is altered to allow this tenant to have a friend drop off his rent check to the property manager.

Reasonable modification. The DOJ and HUD have also issued a joint statement that provides technical assistance regarding reasonable modifications and the rights and obligations of housing providers and individuals with disabilities. That statement is online at https://www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf.

This statement says a reasonable modification is “a structural change made to existing premises, occupied or to be occupied by a person with a disability, to afford such person full enjoyment of the premises. Reasonable modifications can include structural changes to interiors and exteriors of dwellings and to common and public-use areas.” Again, there must be an identifiable relationship between the requested modification and the individual’s disability; otherwise, the housing provider does not have to allow it.

Examples of a reasonable modification are:

- installing visual doorbells or fire alarms for a tenant who is hearing impaired, or
- installing a ramp for access to a POA’s community clubhouse that has several steps, so a homeowner in a wheelchair can enjoy that amenity.

Public accommodation. The ADA applies only to a “public accommodation,” which is defined as any of

the 12 categories of businesses or facilities listed in the ADA that are open to the public. Although residential housing is not one of those categories, many of the listed categories, such as places of exercise or recreation, public place of gathering, libraries, or laundromats, are found in apartment complexes, residential subdivisions, or condominium complexes.

The ADA requires these places of public accommodation to maintain certain accessibility features to allow individuals with disabilities equal access. A private homeowner's community is not subject to the ADA unless the common facilities are open to the public. This distinction is important because there is a difference in who pays depending on whether an accommodation or modification falls under the FHA or ADA.

Who Pays?

Under the FHA, the housing provider is responsible for any cost associated with a reasonable accommodation unless the housing provider can prove that would cause an undue financial or administrative burden. The housing provider cannot charge the individual with a disability additional fees or rent because of the accommodation. The cost of a reasonable *modification*, on the other hand, is borne by the individual with the disability. The housing provider can request proof of financial ability to pay for a significant modification and require individuals to pay for the removal of the modification when they move out. The housing provider is usually responsible for maintenance of the modifications made to common areas.

However, if an individual requests a modification that the housing provider should have already made under the ADA, the housing provider is responsible for the cost. The ADA requires the housing provider to pay for all modifications for public accommodations.

To illustrate how a fact pattern can change who pays for the modification under these acts, consider a scenario where a POA owns and maintains a community pool. If the pool is available only to that community's homeowners, then a homeowner in a wheelchair who requests a modification for a pool lift chair will have to pay for it, because the modification falls under only the FHA. However, if the POA rents the pool out to members of the public for private events, allows general membership, or holds public swim meets at the pool, then it could be considered a public accommodation under the ADA. In this case, the POA would be required to pay for the installation of the pool lift chair.

Reactive vs. Proactive Accommodations

FHA accommodation provisions are reactive. That means housing providers are not required to make any reasonable accommodation or modification unless requested by a person with a disability. Housing providers should be aware that there are no formal requirements for any such request. No specific words need to be used, and the request is not required to be in writing (although this is always the best practice).

ADA requirements, on the other hand, are proactive. Housing providers who have public accommodations must meet the ADA standards for accessibility whether a request is made by an individual with a disability or not.

Inquiries and Action

Once a housing provider receives a request, what inquiries can the provider make, and what is "reasonable"? The housing provider may request additional information regarding the request only if the disability is not obvious or the relationship between the disability and the requested accommodation or modification is not clear. Although housing providers may ask for documents to confirm that the disability falls under the FHA's definition of "handicap" or "disability," they may not request medical records or specific details of the disability. The housing provider may also ask for an explanation from the requester or documentation from a third party regarding how the requested accommodation or modification will help the requestor overcome an effect of his disability.

In their joint statement, the DOJ and HUD note that an accommodation request is considered reasonable unless "it would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the provider's operations. The determination of undue financial and administrative burden must be made on a case-by-case basis involving various factors, such as the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would effectively meet the requester's disability-related needs."

A housing provider who claims that an accommodation is not reasonable is encouraged to work with the requester to find an alternative accommodation that is acceptable to both parties.

Who Enforces?

The DOJ enforces the ADA, and the DOJ and HUD are jointly responsible for enforcing the FHA. HUD has certified that the Texas Fair Housing Act is substantially similar to the FHA, so complaints in most of Texas are received and enforced by the Texas Workforce Commission's (TWC) Civil Rights Division.

Fair Housing complaints from Austin, Corpus Christi, Dallas, Fort Worth, and Garland are handled by each city's fair housing office. Housing providers should be aware of any additional requirements imposed by their

local jurisdiction. Individuals can also file a civil lawsuit in federal district court.

Both HUD and TWC try to facilitate a resolution where possible between the housing provider and the individual with the disability. This practice benefits both parties since litigation takes time and money, and fines for housing providers who do not follow the law can be substantial. ➡

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