NATIONAL MULTIFAMILY HOUSING COUNCIL

1775 Eye Street, N.W., Suite 1100
Washington, D.C. 20006
202 974 2300 Phone | www.nmhc.org

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COVID-19 and Fair Housing: Frequently Asked Questions

By Lynn Calkins and Christine Walz, Holland & Knight

The information provided herein is general in nature and is not intended to be legal advice. It is designed to assist our members in understanding this issue area, but it is not intended to address specific fact circumstances or business situations. For specific legal advice, consult your attorney.

About NMHC

Based in Washington, DC, the National Multifamily Housing Council (NMHC) is a national association representing the interests of the larger and most prominent apartment firms in the U.S. NMHC's members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living. Nearly one-third of Americans rent their housing, and almost 15 percent live in an apartment (buildings with five or more units). For more information, contact NMHC at 202/974-2300, email the Council at info@nmhc.org or visit NMHC's website at www.nmhc.org.

COVID-19 and Fair Housing: Frequently Asked Questions

1. What should a property operator do if there is a known case of COVID-19 at a multifamily property?

When operator has knowledge that a resident on site has a medical diagnosis of COVID-19, it should respond as it would whenever it becomes aware of a potentially dangerous condition on the property (for example, a hazardous condition on site or known criminal activity on the property).

Specifically, it should consider taking what steps it can to reduce the risk to the extent it is reasonable to do so (including those recommended by the Guidelines from the Centers for Disease Control and Prevention ("CDC Guidelines")). It should also consider warning residents of the risk so that they can make their own decisions on what precautions to take. Importantly, any notice should be provided as soon as practical and consistent with maintaining the privacy of residents, such as not disclosing names or unit information of residents or any underlying health condition.

2. Should property operators continue to respond to maintenance requests from residents?

Many property operators have determined that, at this time, in order to ensure the health and safety of their staff and other residents, they can only respond to emergency maintenance requests from residents.

As long as individual dwelling units remain safe and habitable, this type of across-the-board determination about what maintenance requests property operators will respond to is reasonable given state-ordered restrictions limiting available on-site staff and concerns regarding transmission of the COVID-19 virus. It is advisable to make those decisions across all properties to the extent possible to ensure that determinations about responding to maintenance requests are uniformly applied at the property level to avoid claims of discrimination on the basis of color, disability, familial status, national origin, race, religion, sex, or any other class of individuals protected under state or local law.

Prior to sending an employee into a dwelling unit to respond to a maintenance request, in order to protect the health and safety of that employee, a property operator may request information about whether anyone in the unit has been knowingly exposed to, shown symptoms of, or has tested positive for COVID-19. Because, at this time, there is no obligation on residents to affirmatively provide this information and residents may not have knowledge of their exposure, it may be most prudent to treat every unit as one that has a COVID-19 positive resident in it and proceed accordingly.

3. How should property owners respond to maintenance requests from residents who have been exposed to, shown symptoms of, or have tested positive for COVID-19?

The CDC Guidelines recommend that someone who has been exposed to, shown symptoms of, or has tested positive for COVID-19 should self-isolate. Therefore, consistent with these Guidelines, property operators are best served by leaving these individuals alone to recover in their unit and respect their privacy.

If one of these residents makes a request for maintenance or assistance, the property operator should assess whether the request is something that it can reasonably undertake, using the framework you would generally apply to requests for reasonable accommodation even though that framework may not be directly applicable to a temporary illness such as COVID-19 is for many individuals. Specifically, in deciding whether to undertake the request or provide the assistance, a property operator will want to assess whether the request would pose an undue financial and administrative burden on the property operator or it would fundamentally alter the nature of the housing provider's program. If so, it would be reasonable to deny that request.

4. Subject to the limitations of the eviction moratorium in any particular jurisdiction, can a property operator ask a resident with COVID-19 to vacate their apartment unit?

The CDC Guidelines recommend that someone who has been exposed to, shown symptoms of, or has tested positive for COVID-19 should self-isolate in their homes. Therefore, in most situations, property operators should allow individuals to self-isolate in their units and respect their privacy.

However, if an individual with a medical diagnosis of COVID-19 is not following the CDC Guidelines about home isolation, a property operator can consider taking steps to protect other residents and the property. These steps should not be taken lightly and should only be undertaken after consulting with your legal teams. Specifically, the federal Fair Housing Act does not protect an individual whose tenancy constitutes a "direct threat" to the health or safety of other individuals.

Although the Fair Housing Act does not protect an individual whose tenancy would constitute a "direct threat" to the health or safety of other individuals,[1] the determination of what constitutes a "direct threat" cannot be based upon generalized fear, speculation, or stereotypes.

FOOTNOTES

[1] Individuals only with COVID-19 and no other underlying health condition likely would not fall directly within a class protected by the federal Fair Housing Act because, given current medical reports, COVID-19 usually manifests itself as a temporary illness for most individuals rather than a disability. However, for some individuals, COVID-19 may aggravate existing conditions such that an individual now may have a disability whereas prior to this infection, they did not. At least one fair housing organization has publicly suggested that infected individuals should be considered disabled individuals under the federal Fair Housing Act.

Instead, a determination that an individual poses a "direct threat" must rely on an individualized assessment that is based on reliable objective evidence (e.g., current conduct, or a recent history of overt acts). Specifically, the assessment is to consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat.

In very limited situations, based on specific and serious circumstances relating to an individual behavior, a property operator may consider asking a resident to vacate their unit or to consider eviction proceedings. However, given the eviction moratoriums and due to the urgency if one believes an individual is a "direct threat," an operator should consider contacting the public officials.[2]

5. Should property operators close common areas and amenities?

Property operators should consider whether common areas and amenities can or should be closed to minimize resident interactions, especially where public gatherings have been restricted under state or local laws.

Some amenities, like trash and laundry rooms, may need to remain open as they serve essential functions for residential communities. In making decisions about what common areas or amenities should remain open, property operators should look to federal, state, and local guidance about essential operations. Any decisions about what areas and amenities are to be closed should be made applying objective factors based on the specific circumstances.

In making decisions about closing common areas and amenities, property owners will want to avoid decisions that could be viewed as discriminatory—for example, closing playgrounds but no other recreational facilities. There may be legitimate, non-discriminatory reasons for that decision, but property owners should carefully evaluate those reasons when closing and re-opening amenities to ensure there is a legitimate non-discriminatory basis for the decision.

For any amenities that remain open, property operators will likely want to ensure that the amenities are cleaned more frequently in accordance with CDC Guidelines, post notices regarding state or local restrictions at the entrance to the amenity, and take steps to limit any unnecessary interactions between residents and the amenity (removing common laundry baskets, tables).

6. How should property operators respond to reasonable accommodation requests from residents with disabilities?

FOOTNOTES

[2] On March 25, 2020, *The Washington Post* reported that the U.S. Department of Justice is considering whether the intentional spread of COVID-19 should be treated as a terrorist act. *See* Matt Zapotosky, "Terrorism laws may apply if people intentionally spread coronavirus, Justice Dept. says," *The Washington Post* (March 25, 2020). If so, alternative steps may need to be taken if it is determined that an individual is actively behaving as a "direct threat" on site.

The U.S. Department of Housing and Urban Development has made clear that responses to COVID-19 concerns must be made in accordance with legal obligations under the Fair Housing Act and related regulations.

As noted above, in most instances, an individual with COVID-19 alone will not likely be considered a disabled person given that COVID-19 is currently believed to be a temporary illness. However, for some individuals, COVID-19 may aggravate existing conditions such that the individual does have a disability whereas before they did not, or a person with an underlying disability may develop new needs because they have contracted COVID-19. And, at least one fair housing organization has publicly suggested that infected individuals should be considered disabled individuals under the federal Fair Housing Act.

Therefore, requests from individuals with COVID-19 should be considered by property operators on a case-by-case basis. Whether a person is disabled or not, a property operator will want to assess a request to modify its policies and procedures under the same general parameters applicable to a reasonable accommodation: Whether the adaptation can be made without imposing an undue financial and administrative burden on the housing operator and without fundamentally altering the nature of the provider's operations.

In assessing whether the request would cause an undue financial and administrative burden, a property operator will want to assess a variety of 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.

Requests that would pose a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others can be denied.

7. What do leasing staffs need to consider at this time?

As amenities close, leasing staff need to remember that the federal Fair Housing Act continues to apply and to make accommodations as necessary to avoid claims of discrimination against protected classes. For example, virtual tours should accommodate blind or visually impaired visitors, and leasing staff should work with prospective residents with disabilities to further accommodate any additional needs they may have.

8. What considerations should be made for accepting rent payments online?

If property operators are encouraging residents to pay rent through online portals, they should ensure that the online payment portals are accessible to individuals with disabilities. They should provide an alternative means of paying rent for individuals who are unable to use the online portal due to a disability.

9. If property operators are offering payment plans for rent, what do they need to consider?

The Fair Housing Act prohibits setting different terms, conditions or privileges for sale or rental of a dwelling on the basis of race, color, religion, sex, disability, familial status, or national origin. This prohibition restricts discriminatory treatment (or intentionally setting terms and conditions on the basis of a protected characteristic) and discriminatory effects (or setting terms and conditions that have a negative impact on individuals in a protected class without a legitimate business justification).

To avoid Fair Housing Act claims, property operators should apply objective criteria to any payment plans for rent, including who is eligible for payment plans and what the terms of the payment plans are.

If payment plans are not offered to all residents and are instead negotiated on a case-by-case basis, there should be uniformity in how plans are offered and the terms that are offered to ensure that individuals are not treated differently on the basis of any protected class.

If a property operator becomes aware that terms disadvantage a protected group at a property, it will want to revisit the terms to see whether they should be modified to avoid that result while continuing to achieve the property operator's legitimate business interests.

10. Can a property owner reject an application from or refuse maintenance to a healthcare worker or does that fall under impermissible discrimination?

The federal Fair Housing Act prohibits discrimination on the basis of color, disability, familial status, national origin, race, religion, sex. State and local laws also prohibit discrimination based on various characteristics, including disability. Although specific occupations are not generally recognized as protected classes, rejecting applications from or refusing maintenance to a healthcare worker would likely be viewed as a pretext for exposure to COVID-19 and advocacy groups are likely going to contend that a medical diagnosis of COVID-19 is a disability thus a protected class. The response to Question 4 above provides more information about responding to individual residents who may have been exposed to COVID-19.