

# DISABILITY

**Definition of Disability:** Federal laws define a person with a disability as "Any person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such impairment; or is regarded as having such impairment."

In general, a physical or mental impairment includes hearing, mobility and visual impairments, chronic alcoholism, chronic mental illness, AIDS, AIDS Related Complex, and mental retardation that substantially limit one or more major life activities. Major life activities include walking, talking, hearing, seeing, breathing, learning, performing manual tasks, and caring for oneself.

If you have a disability or you're rooming with someone who does, you're entitled to some important protections against discrimination -- as long as the disability fits the Fair Housing Acts (FHA) definition.

What the FHA considers to be a disability may be broader -- or narrower -- than you think. In a nutshell, here are the characteristics of a qualifying disability:

- **The disability must "substantially limit" one or more "major life activities."** This means that a disability must significantly affect activities such as walking, talking, seeing, hearing, breathing, performing manual tasks, caring for one's self, learning, and working.
- **The disability doesn't have to be obvious.** People don't need to be able to know you have a disability just from seeing you or even from spending time with you. For example, you might be an asthmatic who, thanks to medication, doesn't have noticeable difficulty breathing when meeting with a leasing agent.
- **Your disability doesn't have to require you to use any assistive device.** If you have mobility impairment, it can qualify as a disability under the FHA even though you don't use a wheelchair, cane, or any other assistive device. Similarly, if you have a hearing impairment, you don't have to use a hearing aid to be eligible for the FHA's protections.
- **Your disability doesn't have to be physical.** The FHA protects prospects and tenants who have "physical or mental impairments." Chronic fatigue syndrome, a learning disability, and mental illness all fit the FHA's definition.
- **Addictions are disabilities, too.** People who have a drug or alcohol condition qualify as having a disability.

Even if you or your roommate fits the definition of disability, you're not entitled to any of the FHA's protections if you pose a direct threat to other tenant's health or safety or if renting to

you would lead to substantial property damage. But a landlord can't decide you pose a threat just on a hunch -- he must be able to point to specific past behavior that would justify either rejecting your rental application or evicting you.

The following persons are **not** included in the definition of disability:

- Persons currently engaging in the illegal use of a controlled substance;
- Persons whose tenancy would constitute a “direct threat” to the health or safety of other individuals or whose tenancy would cause substantial physical damage to the property of others;
- Persons convicted of illegal manufacture or distribution of a controlled substance; and offenders and sex offenders, by virtue of that status.

### **QUESTIONS DURING THE APPLICATION PROCESS**

A prospective tenant does not have to disclose a disability unless he or she is seeking a reasonable accommodation or modification. Even if the disability is apparent, the landlord should not ask about it. If the applicant discloses a disability, the landlord may then ask follow-up questions but only to the extent necessary to determine the reasonableness of a particular accommodation.

The landlord must be careful to ask the same questions and apply the same screening criteria to all potential tenants and to ensure that the questions asked do not have the effect of probing for information that relates to a disability. For example, the landlord may not ask whether a person is capable of living independently. While it appears to be neutral, the question may have the effect of eliciting information about a disability.

### **WHAT QUESTIONS ARE LEGAL?**

The following are examples of questions that landlords may ask regarding an applicant’s ability to follow the terms of the lease:

1. Will the applicant pay rent and other fair charges in a timely manner?
2. Will the applicant care for and avoid damaging the unit and the common areas, use facilities and equipment in a reasonable way, create no health, safety or sanitation hazards, and report maintenance needs?
3. Will the applicant avoid interfering with the rights and enjoyment of others and avoid damaging the property of others?
4. Will the applicant avoid criminal activity that threatens the health, safety, or rights of others and avoid drug-related criminal activity?
5. Will the applicant comply with necessary and reasonable house rules, program requirements of HUD (if applicable), and health and safety codes?

### **WHAT QUESTIONS CANNOT BE ASKED?**

Generally, it is illegal for landlords to ask:

1. Whether an applicant has a disability;
2. Whether an applicant has a particular type of disability;
3. Questions about an applicant’s disability, including its severity;

4. Any question, such as “Do you take any medications?” that would require an applicant to tell about his or her disability;
5. Whether any member of the applicant’s family or any friend or associate has a disability; and
6. Whether the applicant has the ability to live independently or evacuate safely

## **THE SPECIAL CASE OF ILLEGAL SUBSTANCE USE AND ALCOHOLISM**

### **CURRENT USE**

Individuals who currently use illegal drugs are explicitly excluded from protection under all of the antidiscrimination laws, including Section 504 of the Rehabilitation Act, the Americans with Disabilities Act (ADA), the Fair Housing Amendments Act of 1988 (FHAA), and state law.

### **HISTORY OF ILLEGAL USE**

Federal and state law distinguishes between individuals who are currently using illegal drugs and individuals who are not currently using illegal drugs but who have a history of addiction. Individuals who meet the Fair Housing Act definition of disability and are not currently using but have a history of illegal drug addiction are protected, by law, from discriminatory conduct. The laws are clear that an individual is protected if he or she is not using illegal drugs and (1) has successfully completed a rehabilitation program, (2) has otherwise been successfully rehabilitated, or (3) is participating in a treatment program or self-help group.

### **ALCOHOLISM**

Persons with alcoholism are treated differently under Section 504 than under the Fair Housing Act and the ADA.

- HUD regulations for Section 504 explicitly exclude from its definition of “individual with handicap” anyone whose current alcohol use prevents that person from participating in federally funded housing programs (which includes meeting the terms of the lease) or whose current alcohol abuse would constitute a direct threat to property or the safety of others.
- The Fair Housing Act’s definition of an individual with a handicap includes alcoholism as a covered disability but provides a general exclusion for any individual whose tenancy would pose a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others, provided reasonable accommodation could not eliminate the threat.

### **DEFINING REASONABLE ACCOMMODATIONS**

As opposed to modifications, which involve physical alterations to a property, the term “reasonable accommodation” refers to procedural changes such as changes in rules or policies. The mandate for making reasonable accommodations is found in both the Fair Housing Act, as amended, and Section 504.

The Fair Housing Act requires housing providers to make reasonable accommodations as outlined in 24 CFR 100.204 (a), which states:

It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.

The need for a reasonable accommodation may arise at the time a person is applying for housing, during the tenancy, or to avoid an eviction. It is the responsibility of the tenant to ask for a specific, reasonable accommodation whenever one is needed.

The law does not establish any clear threshold (financial, administrative, or otherwise) for determining what is reasonable, but it does specify that landlords are not required to provide an accommodation if it would impose an “undue burden” or result in a “fundamental alteration” of the nature of the housing program. An undue burden is an unreasonable financial or administrative cost, which is demonstrated by comparing the administrative and financial costs of regular operation, the overall financial resources available to the landlord, and the costs of making the accommodation. A fundamental alteration is an accommodation that would change the basic operation or nature of services provided by significantly modifying, eliminating, or adding to the services that a landlord provides. A request for reduced rent payments is not a reasonable accommodation.

### **INDIVIDUALS WITH VISUAL, SPEAKING, OR HEARING IMPAIRMENTS**

Landlords must ensure that individuals with visual, speaking, or hearing impairments can effectively communicate with them. For example, visually impaired persons may need to have the rental application or other written documents read to them. Landlords should also be familiar with the Telecommunications Relay Service (TRS) which allows a deaf, hard of hearing, deaf-blind, or speech impaired individual to use special equipment to call to the 711 Relay Center, where a specially trained operator relays messages between the relay user using a text telephone or an assistive device and a hearing person using a standard telephone.

### **REQUESTS FOR REASONABLE ACCOMMODATIONS**

Upon receiving a request for a reasonable accommodation, the landlord should take the following three steps. If a landlord denies a request for reasonable accommodation, and the individual who made the request files a complaint, the landlord’s defense will rest upon proving that these steps were taken before the request was denied.

1. In requesting an accommodation the individual has disclosed that he or she has a disability. If the disability is not apparent, the landlord may ask for verification that the tenant has a disability as defined by the Fair Housing Act. No additional inquiry into the nature or extent of the disability, beyond establishing the need for the accommodation, is allowed.
2. Establish that the accommodation is necessary. In other words, the accommodation will enable the person with the disability to have equal opportunity to use and enjoy a dwelling unit, including public and common use areas.

3. Determine that the accommodation is reasonable, i.e. it would not impose an “undue burden” or result in a “fundamental alteration” of the nature of the housing program.

Once an accommodation is determined to be reasonable, the landlord cannot directly or indirectly impose on the tenant the expense of providing the accommodation (for example, a pet deposit cannot be required for a service animal). The landlord must bear this expense. Though not required, the recommended practice is to have requests for reasonable accommodations be made in writing.

### **DEFINING REASONABLE MODIFICATIONS**

A reasonable modification is a change in the physical arrangement of the interior of a housing unit, common spaces, or parking areas of rental housing covered by the Fair Housing Act. The landlord must allow physical modifications if they are “reasonable” and necessary for the tenant to enjoy and use the dwelling unit, common spaces, or parking areas.

### **REQUESTS FOR REASONABLE MODIFICATION**

Upon receiving a request for a reasonable modification, the landlord should take the following three steps. If a landlord denies a request for reasonable modification, and the individual who made the request files a complaint, the landlord’s defense will rest upon proving that these steps were taken before the request was denied:

1. In requesting a modification the individual has disclosed that they have a disability. If the disability is not apparent, the landlord may ask for verification that the tenant has a disability as defined by the Fair Housing Act. No additional inquiry into the nature or extent of the disability, beyond establishing the need for the modification is allowed.
2. Establish that the modification is necessary. In other words, the modification will enable the person with the disability to have equal opportunity to use and enjoy a dwelling unit, including public and common areas.
3. Determine that the modification is reasonable, i.e. whether the modification is structurally possible, cost effective and will overcome the barrier.
4. Ensure that the modification will not damage the property or interfere with other tenant’s use of their units or common areas. Though not required, the recommended practice is to have requests for reasonable modification be made in writing.

### **WHO PAYS FOR THE MODIFICATION?**

Three questions must be asked in order to determine who will pay for a reasonable modification:

1. If the property was developed, even in part, with federal funds (see section below), the landlord must pay for the modification, as long as it does not cause a significant financial or administrative hardship.
2. If a building was ready for occupancy for the first time after March 13, 1991, it is subject to the Fair Housing Act and must be physically accessible. If the modification requested is necessary because the building is out of compliance with the Fair Housing Act, owners are financially responsible for all expenses necessary to have the property meet these requirements.<sup>7</sup> The fact that a building was approved by a local building inspector and received a Certificate of Occupancy does not prove that it meets Fair Housing Act requirements.
3. If the property did not receive funding from a federal source and meets the minimum accessibility requirements required by law, then the tenant can be required to pay for the modification.

### **STANDARDS FOR MODIFICATIONS**

If the tenant is paying for the alteration, it is reasonable that the landlord require all work be done correctly and that it comply with all necessary building and architectural codes and that a certified contractor complete the work.

The landlord can also require that at the end of the tenancy the modification be removed and the unit restored to its original condition, but only if the modification will interfere with a future tenant's use of the unit. Many modifications, such as the installation of grab bars or widening doorways, do not interfere with a future tenant's use. If the alterations are substantial and the tenant cannot provide adequate assurances regarding payment for the restoration, the landlord can further require that a tenant pay into an interest-bearing escrow account. Any escrow agreement should be described in writing and signed by both the tenant and landlord.

### **REASONABLE ACCOMMODATION AND MODIFICATION PROCEDURES**

Accommodating tenants with disabilities requires flexibility and the application of good management techniques. The number of possible accommodations or modifications will be as numerous and diverse as the number of tenants they assist. Many variations can be made to the suggestions below, and appropriate alternatives should be considered. Landlords should also draw upon outside experts and organizations that provide information and technical assistance. The first step, however, is creating an environment that is receptive to change, supportive of people with disabilities, open to a tenant's disclosure of a disability, flexible in discussing accommodations and modifications, and sensitive to relationships among tenants.

### **GENERAL MANAGEMENT PRACTICES**

All landlords should:

1. Make sure they understand their obligations under federal and state antidiscrimination laws.

2. Increase their awareness of disability issues. Disabilities come in many forms and affect each person differently.
3. Prominently display lists of community resources and contacts as well as information from supportive service providers.
4. Clearly communicate their expectations to the tenants, both in writing and orally, at move-in and throughout the term of tenancy. Expectations should be clearly set out in the lease (and rules, if any).
5. Establish a process for handling requests for accommodations or modifications.
6. Not discuss the tenant's disability with other tenants or third parties without the tenant's specific written permission.
7. Decisions involving denying a request for a reasonable accommodation or modification should be made by senior management personnel or the property owner, not the site manager.

### **ADMISSIONS POLICIES**

Landlords may not reject a prospective tenant application because of his or her disability or factors relating to the disability. Landlords also may not use stereotypes to reject an applicant. A refusal based on concerns about the health and safety risk to others, for instance, should be based on documented past history of the person rather than on the landlord's judgment about possible future behavior. Landlords can refuse to rent to someone who either:

- Fails to meet legitimate screening criteria, such as the financial ability to pay the rent, or who would pose a direct threat to the health or safety of other individuals or would result in substantial physical damage to the property of others
- The vast majority of issues that arise in the screening process are handled without litigation, thus case examples are not available. Two of these, poor credit and criminal history, are common barriers for many tenants, including persons with disabilities. Some frequent situations of disability-related credit concerns are shown in the following scenarios:
  - Mary had a serious illness that interrupted her working life and resulted in bankruptcy.
  - John had an untreated mental illness that created a period of uncontrolled spending, causing him to default on loans, pay bills late and hurt his credit history.
- Similarly, a prospective tenant may have a criminal record as a result of their disability:
  - Susan, who is in recovery from addiction to illegal drugs, was convicted in the past on drug charges.

- Samuel had an untreated mental illness that resulted in homelessness and convictions for trespassing, vagrancy and assault, all of which can be part of surviving on the streets.

All of the above are reasons to consider making a reasonable accommodation.

Landlords should follow these next steps to determine what a reasonable accommodation is in the tenant screening process:

1. In requesting an accommodation the individual has disclosed that they have a disability. If the disability is not apparent, the landlord may ask for verification that the tenant has a disability as defined by the Fair Housing Act. No additional inquiry into the nature or extent of the disability, beyond establishing the need for the accommodation, is allowed.
2. Establish that the accommodation is necessary. In other words, the issue causing concern is a result of the individual's disability and the accommodation will enable the person with the disability to have equal opportunity to use and enjoy a dwelling unit, including public and common areas.
3. Determine that the accommodation is reasonable, i.e. it would not impose an "undue financial or administrative burden" or result in a "fundamental alteration" of the nature of the housing program.

Using the examples from the scenarios above, some circumstances that could warrant an accommodation in the application procedure may include:

- After Mary declared bankruptcy, she has paid her bills on time;
- John is receiving psychological counseling for his mental illness and is in compliance with a repayment plan;
- Susan no longer uses illegal drugs and has not been arrested since she completed substance abuse treatment; and
- Samuel has not been convicted of a crime since he began taking medications to treat his mental illness.

Unfortunately, the regulations and settled case law in this area are inadequate to provide useful guidance; therefore the illustrations above are not taken directly from a legal authority.

In considering requests for reasonable accommodations in the screening process, as elsewhere, the landlord must consider individual circumstances and facts. Before making an accommodation, landlords are within their rights to have assurances that issues from the tenant's past have been adequately addressed. The requested accommodation must be reasonable, i.e. it will not cause an undue financial or administrative burden or result in a fundamental alteration of the nature of the housing program. The landlord does not have to



waive the protective policy entirely, but can accommodate an applicant by modifying it for the situation.

In the case of poor credit, if the period of paying bills on time has been too short to establish a pattern of financial responsibility, the tenant may be asked to have a cosigner for the initial term of their lease until they can demonstrate their ability to pay rent on time. In the case of a past criminal history a lease addendum could clearly state that criminal activity in violation of the lease will lead to eviction proceedings.

No person comes with a guarantee that they will be a good tenant, but a thoughtful and well documented reasonable accommodation process can both protect the landlord from undue risk and allow the tenant with a disability access to housing.

### **DENIAL OF TENANCY OR ACCOMMODATIONS**

When any application for tenancy is denied, the landlord should indicate that an opportunity to request a reasonable accommodation is available if the applicant believes it would enable him or her to meet the terms of the lease. A landlord could include the following language in a rejection letter: "If you are a person with a disability, and the reason your application is being denied is related to your disability, you may contact us no later than (date, time) to discuss whether a reasonable accommodation by us would make your application acceptable".

If an applicant's request for a reasonable accommodation is denied, the applicant should be told the reason for the denial and given an opportunity to respond. In responding, the applicant could point out that:

- The reason given for the denial is actually the result of the disability;
- That there has been a change in the applicant's ability to be a good tenant; or
- There is a plan that will enable the applicant to be a good tenant.

Any one of these outcomes, if applicable, is grounds for reconsideration. If the request is reconsidered, each step of considering the request should be repeated and documented.

### **LEASE VIOLATIONS AND OTHER TENANCY MATTERS**

Tenants sometimes fail to follow important parts of the lease or repeatedly break minor rules. Persons with disabilities, like all other tenants, may be evicted for failure to comply with the terms of the lease or rules of the property. However, as with initial occupancy, landlords are required to make reasonable accommodations to the extent necessary to allow the tenants with disabilities to have an opportunity to comply with the terms of the lease.

The following suggestions should help landlords work effectively with tenants that have a disability and violate a lease.

1. Managers must distinguish between behavior that is merely irritating and behavior that is so destructive of the rights of other tenants that it violates the lease. Tenants do not

have a right to be shielded from seeing or interacting with persons with disabilities. However, tenants do have a right to be protected from behavior that threatens their quiet enjoyment or safety.

2. Education of tenants may be helpful so that problems do not occur or escalate. Ideally, a neutral, expert third party would provide such education with the goal of increasing the tenants' understanding. Local human service organizations offer tapes, workshops, and lectures on disabilities. Advocacy and vocational support groups also can provide assistance.
3. If a tenant violates the lease agreement, the landlord may issue a notice of lease violation or lease termination. This notice should clearly communicate the reason and include information about reasonable accommodations.
4. All notices of denial, lease violation, and lease termination should include the opportunity for an informal meeting.
5. Landlords must treat all tenants with respect, especially when discussing reasonable accommodations.
6. Landlords should offer assistance such as referrals to social service agencies, to help tenants comply with the stated expectations.
7. If a tenant violates his or her lease after receiving reasonable accommodation, the landlord may pursue enforcement options. However, another reasonable accommodation may be appropriate if the previous accommodation did not adequately address the tenant's disability.
8. Landlords should take into account the degree to which the problematic behavior is involuntary. Many disabilities result in behavior that cannot be readily controlled and that some neighbors may consider annoying or disturbing. In such cases, landlords should accept the behavior and discuss with the tenant with the disability his or her willingness to permit or participate with the landlord in providing information to neighbors that will allay their concerns and help to eliminate further conflict.
9. Landlords should respect an individual's privacy. Not everyone with a disability wants their neighbors to know about their disability. However, if a tenant indicates a willingness to discuss his or her condition, the landlord may want to facilitate such a discussion.

### **STEP-BY-STEP PROCESS FOR HANDLING LEASE VIOLATIONS**

When confronted with a tenant who breaches his or her lease, the landlord can use the steps listed below as a model. Of course, the particular circumstances of each situation will determine which of the steps are warranted or appropriate.

1. When a tenant commits a violation that provides sufficient cause for immediate lease termination, the manager should:
  - Send the tenant a termination letter explaining how the tenant's action constituted a violation of the lease;
  - Allow the tenant the opportunity to discuss his or her termination; and
  - Tell the tenant that if a disability caused the violation, the tenant may request an accommodation.
  
2. When a tenant commits a violation that does not warrant immediate lease termination, the landlord should:
  - Send the tenant a warning letter explaining how the tenant's action constituted a violation of the lease;
  - Allow the tenant the opportunity to discuss the matter; and
  - Inform the tenant that if a disability caused the violation, the tenant may request an accommodation.

Landlords should provide the opportunity to request a reasonable accommodation for a disability to all tenants who violate their lease agreement. A landlord offering such a provision only to those whom the landlord suspects of having a disability may be considered discrimination.

3. During the meeting with the tenant to discuss the lease violation, the landlord should:
  - Discuss the matter openly with the tenant;
  - Use a copy of the tenant's lease as reference when explaining how the tenant's action constituted a violation; and
  - Ask the tenant if he or she understands everything explained in the warning/lease termination letter. This will give the tenant the chance to discuss his or her disability, if any.
  
4. If the tenant discloses a disability and requests an accommodation, the landlord should:
  - Have an experienced health care provider verify the disability, if the disability is not readily apparent; and
  - Use the qualified person verifying the disability as a resource for providing the reasonable accommodation.
  
5. When reviewing a request for a reasonable accommodation, the landlord may consider the following:

- Will the accommodation prevent future violations?
  - Will the accommodation place an undue financial or administrative burden on the management company or owner? If so, and if the accommodation is unlikely to prevent future lease violations, then the landlord is not required to make the accommodation. (See pages 10-11 for a more complete explanation of how to determine whether or not an accommodation is reasonable.)
6. If the manager decides that a reasonable accommodation should be made for the tenant, the manager should prepare a lease addendum that includes this accommodation. The addendum should also include a provision stating that the lease may be terminated if the violation occurs again.
7. If the tenant does not disclose a disability or attend a meeting to discuss the violations, the manager should suggest possible sources of support for the tenant, (i.e., family, friends, and social service agencies). The landlord must respect the tenant's right to privacy. Before a third party becomes involved, however, the landlord should try to resolve the matter with the tenant.
- If this is not possible, the tenant must give written permission before a third can become involved.
  - If permission is granted, the landlord should contact the source of assistance informing them that if the tenant has a disability, the tenant has the right to request an accommodation.
    - **NOTE:** One exception to this right of privacy may apply. If the landlord can determine, with a reasonable degree of certainty, that the tenant is incapable of making a request due to a handicap or disability, the landlord may contact a third party without the tenant's permission. This issue must be handled carefully.
8. If a meeting is successfully arranged between the manager, tenant, and support for the tenant, the manager should encourage an active discussion of the problem between all three parties. In order to facilitate discussion, the manager should:
- Try to foster an atmosphere in which the tenant may speak freely about his or her problems and disclose a handicap or disability, if any; and
  - Allow the tenant's support person to make suggestions that might help prevent future violations and use the support person as a resource if an accommodation is requested.

The tenant is not required to participate in any meeting with third parties. If the tenant decides not to participate with the third party, the landlord has met its duty by providing the tenant the opportunity to request an accommodation or to have a request made on the tenant's behalf.

If the tenant does not disclose a disability and the landlord decides to contact a relative or social service representative, then these steps must be taken for all tenants who do not discuss or disclose a disability and not just for those tenants thought to have a disability.

### **EARLY TERMINATION OF A LEASE**

A tenant may develop a disability, or an existing disability may become so severe during the term of a lease, that he or she cannot meet the obligations of their lease. In cases in which there is no reasonable modification or accommodation that can remedy the situation, the tenant may have no choice but to find alternative housing. The tenant should request that the landlord permit an early termination of the lease, and the landlord should grant the request, if it is reasonable. Either the tenant or the landlord may offer an alternative accommodation, such as another, more suitable unit.

As with other determinations of reasonableness, a landlord may only refuse to terminate the lease without penalty if the accommodation would result in an undue burden or substantially alter the terms of the agreement. In determining reasonableness, the landlord may consider the following:

- Likelihood of filling the vacancy given vacancy rates in the area/building; any particular characteristics of the dwelling that make it desirable or undesirable;
- The amount of time remaining on the lease term; the size of the owner's business; and the owner's overall resources.<sup>9</sup>

### **CONSEQUENCES**

Failure to comply with fair housing laws can have significant negative consequences for management companies and owners, including:

- Actual damages to a tenant, including pain and suffering;
- Injunctive relief, which could cover future business activities, such as preventing a company from buying other apartment complexes;
- Civil penalties of \$10,000 for the first offense; and punitive damages.

In addition, projects that receive Low Income Housing Tax Credits can have their credits recaptured by the IRS under Treasury Regulation 1.42-9.