

National Origin Discrimination and SB 1070

With all the furor over SB 1070 property owners and managers are raising a lot of questions as to whether they are legally obligated to determine the legal status of their residents in order to avoid a violation of the law.

The answer – loud and clear from both the Civil Rights Division of the Arizona Attorney General's Office and the federal Department of Housing and Urban Development (HUD) – is that SB 1070 does not affect a property's obligations to refrain from discriminating against residents and applicants on the basis of their national origin. The further answer – again from both agencies – is that properties that improperly screen for legal status may find themselves facing complaints of national origin discrimination in violation of the federal and Arizona fair housing laws.

Agency Statements Concerning SB 1070

SB 1070 is specifically concerned with the obligations of federal, state and local governmental officials to determine the immigration status of persons when there is a reasonable suspicion that a person is an alien who is unlawfully in the United States. Unlike state and federal laws that prohibit employers from hiring persons who are unlawfully in the United States, and that require employers to determine that their employees are authorized to work in the United States, SB 1070 imposes no such requirements on property owners and management companies.

Because of misunderstandings concerning the legal obligations for the residential rental market, the Civil Rights Division issued an advisory, http://www.azag.gov/civil_rights/fairhousing/SB1070Advisory.html, that specifically reminds property owners and managers that SB 1070 does not impose new duties or obligations on housing providers. It also emphasizes that actions taken to screen potential and existing tenants for immigration status may constitute a violation of federal and state laws prohibiting national origin discrimination.

This advisory echoes recent comments made by John Trasvina, HUD assistant secretary for fair housing and equal opportunity, at a meeting of in Las Vegas on June 9, 2010. Alluding to SB 1070, Trasvina noted:

"The Fair Housing Act still applies in Arizona. Our message to them (landlords) is the (immigration) law does not give them the right to check on the immigration status of tenants."

What Actions Property Owner/Managers Can Take

While HUD and the Civil Rights Division specifically warn that screening for immigration status may constitute a violation of fair housing laws, HUD has previously provided guidance on when and how such screening may take place. That guidance, which was issued by the Bush administration and has not yet been retracted, provides that landlords may screen for immigration status of their rental applicants but only if they screen everyone who applies to rent at a property, and not merely persons who don't speak English or who look foreign. In relevant part those guidelines explain:

[A]sking housing applicants to provide documentation of their citizenship or immigration status during the screening process would not violate the Fair Housing Act. In fact, such measures have been in place for a number of years in screening applicants for federally-assisted housing. For these properties, HUD regulations define what kind of documents are considered acceptable evidence of citizenship or eligible immigration status and outline the process for collecting and verifying such documents.* These procedures are uniformly applied to every applicant. Landlords who are considering implementing similar measures must make sure they are carried out in a nondiscriminatory fashion.

Example 1: A person from the Middle East who is in the United States applies for an apartment. Because the person is from the Middle East, the landlord requires the person to provide additional information and forms of identification, and refuses to rent the apartment to him. Later, a person from Europe who is in the United States applies for an apartment at the same complex. Because the person is from Europe, the landlord does not have him complete additional paperwork, does not verify the information on the application, and rents the apartment. This is disparate treatment on the basis of national origin.

Example 2: A person who is applying for an apartment mentions in the interview that he left his native country to come study in the United States. The landlord, concerned that the student's visa may expire during tenancy, asks the student for documentation to determine how long he is legally allowed to be in the United States. If the landlord requests this information, regardless of the applicant's race or specific national origin, the landlord has not violated the Fair Housing Act.

Conclusion

As of today, properties may screen for the immigration status of their rental applicants, but are not required by any state or federal law to do so unless they are public, tax credit or subsidized housing that have to meet specific federal guidelines. SB 1070 does not change this and screening, simply because of concern that a property may run afoul of SB 1070, is probably unlawful.

If properties do choose to screen for immigration status they must strictly follow federal guidelines by screening every applicant and requiring proof of appropriate documentation whether the applicant was born in Omaha or Oman. Properties that are uncertain as to what the appropriate documentation is, or that want to set up or evaluate their screening programs to ensure that they comply with the current state of the law, should consult legal counsel.

Finally, it is important to recognize that HUD rules and guidance can change and properties should pay close attention to the ever-changing legal and political landscape and review their policies and practices regularly to ensure that they remain compliant with fair housing law.