

MERCERTRIGIANI

REASONABLE ACCOMMODATIONS AND MODIFICATIONS UNDER FAIR HOUSING LAWS

WHAT ARE REASONABLE MODIFICATIONS AND ACCOMMODATIONS?

The federal Fair Housing Act (“FHA”) prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, as well as *disability*. More specifically, the FHA prohibits “housing providers” – which includes community associations, from engaging in prohibited, discriminatory conduct. The Virginia Fair Housing law is substantially equivalent to the FHA.

Among other things, federal and state fair housing laws require housing providers to make *reasonable accommodations* in rules, policies, practices or services as well as make *reasonable modifications* of existing premises that are occupied by disabled individuals if such accommodations or modifications are necessary to afford the disabled individual with an equal opportunity to use and enjoy a dwelling. Housing providers are required to provide a reasonable accommodation or modification only if a reasonable accommodation or modification is requested. Requests for reasonable accommodations or modifications *may* be in writing, but are not required to be, and such requests do not have to refer to the fair housing law specifically.

WHO IS ENTITLED TO AN ACCOMMODATION OR MODIFICATION?

A housing provider is required to provide a reasonable accommodation or modification only to requesting residents who are disabled. Fair housing laws define a person with a disability to include (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment. The term “physical or mental impairment” includes, but is not limited to, diseases and conditions which include orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, drug addiction, and alcoholism.

But the requested accommodation or modification must have an identifiable relationship, or *nexus*, with the individual’s disability. Under fair housing laws, a housing provider can deny a request for a reasonable accommodation or modification if there is no disability-related need for the accommodation or modification. Thus, prior to making a determination to provide an accommodation or modification to a requesting resident, a housing provider should evaluate the necessity of the requested accommodation or modification in relationship to the disability. The housing provider may need to request information from the resident in order to do so.

WHAT INFORMATION CAN A HOUSING PROVIDER REQUEST?

Questions related to fair housing laws relate most often to what, if any, additional information about a disability (or disability-related need) can be required by an association when a request for an accommodation or modification is made. The general rule is that the housing

provider is entitled to obtain information that is necessary to evaluate whether a requested accommodation or modification is necessary because of a disability and disability-related need. However, the housing provider may not ordinarily inquire about the nature or severity of an individual's disability.

- If a person's disability is obvious or otherwise known to the housing provider and the need for the accommodation or modification is readily apparent or known, the association may not request any additional information about the requestor's disability or the disability-related need for the accommodation or modification.
- If the requesting party's disability is known or readily apparent but the need for the accommodation or modification is not readily apparent or known, the housing provider may request only information that is necessary to evaluate the disability-related need for the accommodation/modification (see requests 2 & 3 below).
- If a disability is not obvious or otherwise known to the housing provider, in response to a request for a reasonable accommodation or modification, the housing provider may request reliable disability-related information that:
 1. Is necessary to verify that the person meets the fair housing law definition of disability (has a physical or mental impairment that substantially limits one or more major life activities);
 2. Describes the accommodation or modification needed; and
 3. Shows the relationship between the person's disability and the need for the requested accommodation or modification.

The housing provider is also limited in the type of information that may be requested, even if a disability is not obvious or known. Depending on facts and circumstances, information verifying the requesting party meets the fair housing law definition of disability may be provided by any of the following:

- The *individual* (e.g., proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits or a credible statement by an individual);
- A doctor or other medical professional;
- A peer support group;
- A non-medical service agency; or
- A reliable third party who is in a position to know about the disability.

In almost all cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary and may not, therefore, be requested.

WHAT IS REASONABLE?

Fair housing laws permit the housing provider to deny accommodation or modification requests which are not *reasonable*. What constitutes a “reasonable accommodation” or “reasonable modification” is determined by a facts and circumstances test which takes into consideration various factors, such as the cost of the requested accommodation or modification, the financial resources of the provider, the benefits that the accommodation or modification would provide to the requester, and the availability of alternative accommodations or modifications that would effectively meet the requester's disability-related needs.

Courts have generally held that an accommodation or modification is “reasonable” if the accommodation or modification would not impose an undue hardship or burden upon the housing provider or it would fundamentally alter the nature of the provider's operations. A “fundamental alteration” is a modification that alters the essential nature of a provider’s operations.

When the housing provider denies a request because the request is not reasonable, the provider should discuss with the requester whether an alternative accommodation or modification would effectively address the requester’s disability-related needs without imposing an undue financial and administration burden or fundamentally alter the provider’s operations.

WHO PAYS?

As a general rule, the housing provider is responsible for the costs to make reasonable *accommodations*. Courts have ruled that the FHA may require a housing provider to grant a reasonable accommodation that involves costs – again, so long as the reasonable accommodation does not pose an undue financial and administrative burden and the requested accommodation does not constitute a fundamental alteration of the provider’s operations.

Conversely, the resident is responsible for paying the cost of *modifications*. The resident is responsible for the upkeep and maintenance of a modification that is used exclusively by that resident. If the modification is made to common area or common elements that is normally maintained by the housing provider, then the housing provider is responsible for the upkeep and maintenance of the modification.

Legislation adopted in 2021 requires community associations to treat all requests for handicap accessible parking as a request for reasonable accommodation. Advocated as necessary to conform the Virginia Fair Housing Law to federal fair housing law, common interest communities must accommodate accessible parking requests if there is a disability-related request that is reasonable and does not impose an undue financial or administrative burden on or a fundamental alteration to the operations of the association. As a request for reasonable accommodation, the costs for accommodating the request must be borne by the association.

Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation or modification, nor may housing providers condition approval of a reasonable modification on the requester obtaining special liability insurance.

FAILURE TO COMPLY WITH FAIR HOUSING LAWS

Courts consider discrimination cases very seriously and penalties for violations can be severe. The provisions of the FHA may be enforced by the Department of Housing and Urban Development (“HUD”) and in Virginia, by the Virginia Fair Housing Board because Virginia law has been determined to be substantially equivalent to the federal statutes. A person who alleges discrimination may file a complaint with HUD or with the Virginia Fair Housing Office. If HUD believes the claim has merit, the matter will be referred to an administrative law judge for a hearing. The judge is empowered to award actual damages, injunctive or other equitable relief, and attorneys' fees to the prevailing party. The judge also may assess civil penalties against the violators, which can range from \$10,000 to more than \$50,000. The judge may not award punitive damages. Or a complaint may be filed with, or referred for investigation to, a locality's human rights commission or similar agency.

Also, the Attorney General may file a civil lawsuit when there is evidence of a pattern or practice by the alleged violator that extends beyond one or two victims. When the Attorney General prevails in these types of lawsuits, the FHA allows the award of injunctive relief and monetary and punitive damages to the aggrieved party. In addition, the court may assess attorneys' fees to the aggrieved party and additional civil penalties against the violator up to \$100,000.

If the complaint is referred to the Virginia Fair Housing Office, the matter will be investigated by the staff of the Virginia Department of Professional Occupation Regulation and the parties invited to conciliate the complaint. Conciliation is a dispute resolution process very similar to mediation. A trained conciliator works with the parties to find a resolution.

If the parties decline to conciliate or conciliation is not successful, the Virginia Attorney General's office can prosecute after a determination of probable cause. The complaining party can initiate a civil lawsuit in state or federal court against the alleged violator of the fair housing law. Damages available under the Virginia Fair Housing Law include actual damages, punitive damages, injunctive relief and attorneys' fees and costs.

For these reasons, actions should be taken to respond promptly to fair housing-related requests and inquiries. Communities are well advised to have developed and implemented a policy that details procedures for review of requests for reasonable accommodations and modifications to ensure timely and consistent consideration.