



DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING



WESTERN CENTER
ON LAW & POVERTY



HOUSING RIGHTS CENTER

WORKING FOR JUSTICE AND EQUALITY IN HOUSING

FEHA FAIR HOUSING REGULATIONS

Article 7: Discriminatory Effect

April 8, 2020



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GENERAL ISSUES

Send questions to: Shalineehunter@dfeh.ca.gov

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Regulations are on DFEH website:

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Citation example: 2 C.C.R. section 12005 (2020)





POLL #1

How much experience do you have with fair housing?

- A. Expert
- B. Some knowledge
- C. New to fair housing





POLL #2

Which of the following describes you/your interest in this presentation?

- A. Tenant lawyer/advocate;
- B. Landlord lawyer/advocate;
- C. Tenant;
- D. Landlord;
- E. Fair Housing Counselor;
- F. Condo Owner/Attorney;
- G. State or Local Government; or
- H. Other





WHAT ARE DISCRIMINATORY EFFECTS?

- Forms of Housing Discrimination defined
 - Disparate treatment
 - Discriminatory Statements*
 - Discriminatory Effects
 - Disparate Impact
 - Perpetuation of segregation





TEXT OF THE REGULATION: § 12060. PRACTICES WITH A DISCRIMINATORY EFFECT (1 OF 4)

(a) The Act imposes liability for practices that are not motivated by discriminatory intent when the practices have a discriminatory effect, as defined in paragraph (b) of this section. Practices that have a discriminatory effect may still be lawful if supported by a legally sufficient justification, as defined in section 12062.





TEXT OF THE REGULATION: § 12060. PRACTICES WITH A DISCRIMINATORY EFFECT (2 OF 4)

(b) A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of individuals, or creates, increases, reinforces, or perpetuates segregated housing patterns, based on membership in a protected class. A practice predictably results in a disparate impact when there is evidence that the practice will result in a disparate impact even though the practice has not yet been implemented.





TEXT OF THE REGULATION: § 12060. PRACTICES WITH A DISCRIMINATORY EFFECT (3 OF 4)

A single person may pursue a claim based upon a practice that has disparate impact on a group of individuals if that person has been injured by the practice. A practice that is proven under Section 12061 to create, increase, reinforce, or perpetuate segregated housing patterns is a violation of the Act independently of the extent to which it produces a disparate effect on protected classes.





TEXT OF THE REGULATION: § 12060. PRACTICES WITH A DISCRIMINATORY EFFECT (4 OF 4)

Note: Authority cited: Section 12935(a),
Government Code. Reference: Sections 12920,
12921, 12926, 12927, 12955, 12955.6 and
12955.8, Government Code.





TEXT OF THE REGULATION: § 12100. FINANCIAL ASSISTANCE PRACTICES WITH DISCRIMINATORY EFFECT (1 OF 8)

(a) Financial assistance practices may have a discriminatory effect. A financial assistance practice that has a discriminatory effect is prohibited unless there is a legally sufficient justification for the practice. Financial assistance practices that are prohibited absent a legally sufficient justification include





TEXT OF THE REGULATION: § 12100. FINANCIAL ASSISTANCE PRACTICES WITH DISCRIMINATORY EFFECT (2 OF 8)

- (1) Making available, making unavailable, or discouraging the provision of financial assistance in a manner that results in a discriminatory effect based on membership in a protected class;
- (2) Establishing the terms or conditions of financial assistance in a manner that results in a discriminatory effect based on membership in a protected class;





TEXT OF THE REGULATION: § 12100. FINANCIAL ASSISTANCE PRACTICES WITH DISCRIMINATORY EFFECT (3 OF 8)

(3) Failing or refusing to provide information regarding the availability of financial assistance, or failing or refusing to provide information regarding application requirements, procedures or standards for the review and approval of financial assistance, or providing information which is inaccurate or different from that provided others, in a manner that results in a discriminatory effect based on membership in a protected class;





TEXT OF THE REGULATION: § 12100. FINANCIAL ASSISTANCE PRACTICES WITH DISCRIMINATORY EFFECT (4 OF 8)

(4) Imposing different terms or conditions on the availability of financial assistance in a manner that results in a discriminatory effect based on membership in a protected class;





TEXT OF THE REGULATION: § 12100. FINANCIAL ASSISTANCE PRACTICES WITH DISCRIMINATORY EFFECT (5 OF 8)

(5) Determining the type of financial assistance to be provided or fixing the amount, interest rate, cost, duration, or other terms or conditions for financial assistance in a manner that result in a discriminatory effect based on membership in a protected class;





TEXT OF THE REGULATION: § 12100. FINANCIAL ASSISTANCE PRACTICES WITH DISCRIMINATORY EFFECT (6 OF 8)

(6) Servicing of financial assistance, or providing such servicing with different terms or conditions, in a manner that results in a discriminatory effect based on membership in a protected class;





TEXT OF THE REGULATION: § 12100. FINANCIAL ASSISTANCE PRACTICES WITH DISCRIMINATORY EFFECT (7 OF 8)

(7) Subjecting a person to harassment in a manner that has the effect of imposing different terms or conditions for the availability of financial assistance that results in a discriminatory effect based on membership in a protected class; and





TEXT OF THE REGULATION: § 12100. FINANCIAL ASSISTANCE PRACTICES WITH DISCRIMINATORY EFFECT (8 OF 8)

(8) Conditioning the availability of financial assistance, or the terms or conditions thereof, on a person's response to harassment in a manner that results in a discriminatory effect based on membership in a protected class.

(b) Financial assistance practices are also prohibited if they intentionally discriminate on the basis of membership in a protected class.





DISPARATE IMPACT CASES (1 OF 3)

- Greater New Orleans Fair Housing Action Center v. St. Bernard Parish, 641 F.Supp.2d 563 (E.D. La. 2009)
 - Moratorium on multi-family housing, “blood relative” restriction on single-family rentals
- Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2521 (2015)
 - SCOTUS decides that disparate impact claims remain cognizable under FHA





DISPARATE IMPACT CASES (2 OF 3)

- Ave. 6E Investments, LLC v. City of Yuma, Ariz., 818 F.3d 493, 502 (9th Cir. 2016)
 - City's denial of a rezoning application to multi-family affordable housing development was both intentional and also disproportionately deprived Hispanic residents of housing opportunities and perpetuated segregation





DISPARATE IMPACT CASES (3 OF 3)

Sisemore v. Master Financial, 151 Cal.App.4th 1386 (2007).

- Home day care operator's allegations that lender denied purchase money loan for house to be used as day care center stated housing discrimination claim of disparate impact on women and families with children because those two protected classes comprised a much higher percentage of day care home operators in county than the percentages of those groups found generally in the county.





PERPETUATION OF SEGREGATION CASES (1 OF 2)

- Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1998).
 - A town’s “refusal to amend the restrictive zoning ordinance to permit privately-built multifamily housing outside the [majority minority] area significantly perpetuated segregation in the Town.” *Id.* at 938.





PERPETUATION OF SEGREGATION CASES (2 OF 2)

- Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly (3d Cir. 2011)
 - Finding a housing policy had a disparate impact on minorities because "22.54% [x%] of African-American households and 32.31 % [x%] of Hispanic households in Mount Holly will be affected by the [housing policy]. The same is true for only 2.73% [y%] of White households [x is significantly greater than y]"





OVERVIEW (1 OF 2)

	Description	Burden
1	Complainant/Plaintiff's Prima Facie Case: Complainant/Plaintiff has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.	Complainant/ Plaintiff
2	Respondent/Defendant's Rebuttal Burden: Burden shifts to Respondent/Defendant to show that the practice is justified despite the discriminatory effect. Rebuttal Burden includes showing that there is no less discriminatory alternative	Respondent/ Defendant





OVERVIEW (2 OF 2)

- Showing of discriminatory intent not necessary when the practices have a discriminatory effect
- Practices that have a discriminatory effect may still be lawful if supported by a **legally sufficient justification**

2 CCR § 12060(a)





STEP 1: COMPLAINANT/PLAINTIFF'S PRIMA FACIE CASE (1 OF 4)

- A practice has a discriminatory effect where it **actually or predictably** results in a disparate impact on a group of individuals, or **creates, increases, reinforces, or perpetuates segregated housing patterns**, based on membership in a protected class
- Complainant/Plaintiff has the **burden of proof**
- Can be rebutted by Respondent/Defendant

2 CCR §§ 12060 & 12161





STEP 1: COMPLAINANT/PLAINTIFF'S PRIMA FACIE CASE (2 OF 4)

- A practice **predictably** results even if the practice has not yet been implemented
- A **single injured person** can bring a disparate impact claim if the practice has a disparate impact on a group of individuals
- **Perpetuation of segregation** and disparate impact are separate theories

2 CCR § 12060(b)





STEP 1: COMPLAINANT/PLAINTIFF'S PRIMA FACIE CASE (3 OF 4)

- Usually proven or rebutted through statistics
- Types of statistical evidence include:
 - National, state, and local statistics;
 - Applicant files or data;
 - Tenant/resident files or data;
 - Conviction statistics;
 - Demographic or census data;
 - Local agency data or records;





STEP 1: COMPLAINANT/PLAINTIFF'S PRIMA FACIE CASE (4 OF 4)

- Police records and court records, including eviction data; or
- Survey data

2 CCR § 12061(d)





STEP 2: RESPONDENT/DEFENDANT'S REBUTTAL BURDEN – LEGALLY SUFFICIENT JUSTIFICATION

- If Complainant/Plaintiff shows that the practice has a discriminatory effect, burden shifts to the respondent to prove that the challenged practice meets all of the elements of a legally sufficient justification
- Rebuttal burden includes showing that there is no less discriminatory alternative
- Complainant/Plaintiff may rebut

2 CCR §§ 12061(b) & (c) and 12062





TEXT OF THE REGULATION: § 12062. LEGALLY SUFFICIENT JUSTIFICATION (1 OF 6)

(a) A business establishment can show that there is no violation of the Act if there is a legally sufficient justification for a practice that has a discriminatory effect. To show that a legally sufficient justification exists, the business establishment must establish the following elements:





TEXT OF THE REGULATION: § 12062. LEGALLY SUFFICIENT JUSTIFICATION (2 OF 6)

- (1) The practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory business interests;
- (2) The practice effectively carries out the identified business interest; and
- (3) There is no feasible alternative practice that would equally or better accomplish the identified business interest with a less discriminatory effect.





TEXT OF THE REGULATION: § 12062. LEGALLY SUFFICIENT JUSTIFICATION (3 OF 6)

(b) In cases that do not involve a business establishment, the person whose practice has a discriminatory effect can show that there is no violation of the Act if there is a legally sufficient justification for the practice. To show that a legally sufficient justification exists, the person must establish the following elements:

- (1) The practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory purposes of the non-business establishment;





TEXT OF THE REGULATION: § 12062. LEGALLY SUFFICIENT JUSTIFICATION (4 OF 6)

(2) The practice effectively carries out the identified purpose;

(3) The identified purpose is sufficiently compelling to override the discriminatory effect; and

(4) There is no feasible alternative practice that would equally or better accomplish the identified purpose with a less discriminatory effect.





TEXT OF THE REGULATION: § 12062. LEGALLY SUFFICIENT JUSTIFICATION (5 OF 6)

(c) A respondent's justification for a practice with a discriminatory effect will not be legally sufficient if it is not supported by evidence, meaning that the justification is hypothetical or speculative.

(d) In a legal proceeding, the determination of whether an interest or purpose is substantial, legitimate, and nondiscriminatory requires a case-specific, fact-based inquiry.





TEXT OF THE REGULATION: § 12062. LEGALLY SUFFICIENT JUSTIFICATION (6 OF 6)

Note: Authority cited: Section 12935(a),
Government Code. Reference: Sections 12920,
12921, 12926, 12927, 12955, 12955.6 and
12955.8, Government Code.





TEXT OF THE REGULATION: § 12063. NO LEGALLY SUFFICIENT JUSTIFICATION FOR INTENTIONAL DISCRIMINATION.

A demonstration that a practice is supported by a legally sufficient justification, as defined in section 12062, may not be used as a defense against a claim of intentional discrimination under section 12955.8(a) of the Act.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6 and 12955.8, Government Code.





SPECIFIC APPLICATIONS OF DISCRIMINATORY EFFECT (1 OF 2)

Criminal History

- Seeking information about, consideration of, or use of criminal history information is unlawful if it has a discriminatory effect
- Specific regulations apply to legally sufficient justification

2 CCR § 12265 & 12266





SPECIFIC APPLICATIONS OF DISCRIMINATORY EFFECT (2 OF 2)

Land Use

- Unlawful for any person to engage in any public or private land use practice that has a discriminatory effect
- Identifies specific discriminatory land use practices

2 CCR §§ 12161 & 12162





SPECIFIC APPLICATIONS OF DISCRIMINATORY EFFECT: FINANCIAL ASSISTANCE PRACTICES (1 OF 2)

- “Financial assistance” is broadly defined to include mortgages, reverse mortgages, insurance, home equity loans, loan modifications and foreclosures
- Prohibits financial assistance policies that have a discriminatory effect





SPECIFIC APPLICATIONS OF DISCRIMINATORY EFFECT: FINANCIAL ASSISTANCE PRACTICES (2 OF 2)

- Identifies financial assistance policies that may have a discriminatory effect unless justified such as determining the type of financial assistance provided or servicing of a loan

2 CCR §§ 12005(n) & 12110





SPECIFIC APPLICATIONS OF DISCRIMINATORY EFFECT: RESIDENTIAL REAL ESTATE-RELATED TRANSACTIONS (1 OF 2)

- Includes providing financial assistance or buying, selling, brokering or appraising of residential real estate
- Prohibits residential real estate-related practices that have a discriminatory effect





SPECIFIC APPLICATIONS OF DISCRIMINATORY EFFECT: RESIDENTIAL REAL ESTATE-RELATED TRANSACTIONS (2 OF 2)

- Identifies residential real estate-related transactions that may have a discriminatory effect unless justified such as appraisals

2 CCR §§ 12005(cc) & 12110





EXAMPLE 1 (1 OF 3)

Fred Family lives in a one-bedroom apartment in an apartment complex. He later got married to Fiona and Fred and Fiona later had a child.

The apartment complex has an occupancy policy that limits occupancy to no more than two persons per bedroom in each dwelling unit. As a result of Fred and Fiona's family expanding to three people, the apartment complex enforced its occupancy policy against the family and asked them to move.





EXAMPLE 1 (2 OF 3)

Fred and Fiona present evidence that 30% of three person households with children in the city are affected by the occupancy policy, while only 10% of three person households without children are affected. The apartment complex argues that it needs to maintain the occupancy limitation to keep the common areas in good repair and reduce maintenance costs. But the apartment complex has not considered alternatives such detailed maintenance requirements, more frequent inspections, higher security deposits for all tenants, or more careful tenant screening.





EXAMPLE 1 (3 OF 3)

Have Fred and Fiona proven prima facie case of discrimination under the FEHA housing regulations? Has the apartment complex proven a legally sufficient justification?





EXAMPLE 2 (1 OF 4)

A City amended its zoning code to offer developers incentives to build housing for first-time homebuyers with incomes between 80% and 120% of the median City income. In exchange for building affordable housing units, developers would be permitted to build more units. The City hired a local affordable housing organization to administer and implement the program.





EXAMPLE 2 (2 OF 4)

As administered, the program gives first priority to City residents and their children. The City's stated purpose of the residency preference is to benefit young families who have ties to the City. The first development under the program was built and a lottery was held for the affordable housing units. All of the units were awarded to City residents.





EXAMPLE 2 (3 OF 4)

Latinos constitute less than 1 percent of the families living in the City who were income eligible to purchase housing through the program. White families made up as much as 90 percent of the pool of eligible applicants.

The population of income eligible persons in the two counties surrounding the City is approximately 10 percent Latino and between 70 and 75 percent white. Also, the income eligible population in the metropolitan area was approximately 20 percent Latino and 48 percent white.





EXAMPLE 2 (4 OF 4)

Latino and white residents of the City file an administrative complaint challenging the residency preference.

1. Can the residents meet their burden of proof?
2. Can the City show that it has a legally sufficient justification?





THANK YOU!

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