

**2022**

# LEGAL UPDATE

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# JULY

**FREE MONTHLY**

Legal Hotline

**Monday-Friday**

**9:00a.m.-4:00p.m.**

**518-436-9727**

# Welcome!!!

- NYSAR's free monthly Legal Update CE
- May take once every license renewal period for 1 credit under legal update category
- Recorded and livestreamed for non-credit

## 2022 Dates

August 16

September 20

October 26

November 21

December 12

# NEW PROTECTED CLASS UNDER NYS HUMAN RIGHTS LAW

## Executive Law §296(5)

*(a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:*

*(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, **status as a victim of domestic violence**, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.*

## Executive Law §296(5)

*(a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:*

*(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, status as a victim of domestic violence, lawful source of income or familial status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.*

## Executive Law §296(5)

*(a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:*

*(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, status as a victim of domestic violence, lawful source of income or familial status, or any intent to make any such limitation, specification or discrimination.*



## Definition Real Property Law §227-d

*“such person is or has been, or is a parent accompanied by a minor child or children who is or has been, in a situation in which such person or child is a victim of an act that would constitute a violent felony offense as enumerated in section 70.02 of the penal law, or a family offense as enumerated in subdivision one of section eight hundred twelve of the family court act, and such act is alleged to have been committed by a member of the same family or household, as defined in subdivision one of section eight hundred twelve of the family court act.”*

## A 9601-B / S 8417-B Memo

*Domestic violence remains a pervasive issue in our society which can show up in a variety of forms and across a variety of different types of relationships. The Centers for Disease Control and Prevention reports that 1 in 4 women and 1 in 7 men will experience severe physical violence by an intimate partner in their lifetime.*

*Domestic violence affects many New Yorkers, and further, has a disproportionate impact on marginalized communities, including people of color and LGBTQIA+ individuals.*

# NYS Protected Classes

Race

Color

Sexual orientation

Military status

Age

Marital status

Familial status

Creed

National origin

Gender identity or expression

Sex

Disability

Lawful source of income

Status as a victim of domestic violence

# Federally Protected Classes

Race

Color

National Origin

Religion

Familial Status

Disability

Sex (including gender identity and sexual orientation)

# Federal Disparate Impact

Federal law also protects limited English proficiency and criminal background under the disparate impact theory.

# Federal Disparate Impact

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.

# Federal Disparate Impact

Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification.

# Federal Disparate Impact

Thus, where a policy or practice that restricts access to housing on the basis of limited English proficiency or criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, **or if such interest could be served by another practice that has a less discriminatory effect.**



# NEW CE REQUIREMENT

# CE

For all individuals whose real estate license expires on or after September 21, 2022, there are new requirements for continuing education that must be met. Please take note that the DOS is using the date the license actually expires, not the date on which the renewal is made. Licensees are now required to take 2 hours of implicit bias training and 2 hours of cultural competency training every 2 years as part of the 22 ½ hours of continuing education. Licensees will now be required to complete: 3 hours of fair housing and/or discrimination in the sale or rental of real property or an interest in real property; 2 ½ hours of ethical business practices; 1 hour of instruction pertaining to recent legal matters governing the practice of real estate brokers and salespersons in New York which may include statutes, laws, regulations, rules, codes, department of state opinions and decisions, and court decisions; 1 hour of instruction pertaining to the law of agency except in the case of the initial two-year licensing term for real estate salespersons, two hours of agency related instruction must be completed.

# CE

Under the new format, licensees now have 11 1/2 hours of required subjects and 11 hours of elective subjects per 2 year renewal cycle. As a reminder, all licensees are now required to take 22 ½ hours of continuing education to renew their license. There are no longer any exemptions for brokers regardless of how long the broker has been licensed or if they have been exempted from CE in the past.

# CE

NYSAR has scheduled a number of CE courses for implicit bias and cultural competency. To see the schedule of courses please click here: <https://www.nysar.com/education/nysar-course-schedule/>

For more information of Fair Housing related matters, please visit NYSAR's Fair Housing webpage at: <https://www.nysar.com/fair-housing/>

# REASONABLE MODIFICATION AND ACCOMMODATION NOTICE

## Executive Law §296

*“Every owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right of ownership of or possession of or the right to rent or lease housing accommodations shall disclose to all tenants and prospective tenants of their right to request reasonable modifications and accommodations if they have a disability pursuant to subdivision eighteen of this section. Such disclosure shall be made in writing in such form and manner as the division may by regulation prescribe and provided to all current tenants within thirty days of the beginning of their tenancy, or thirty days from the effective date of this subdivision for current tenants. Such disclosure shall also be conspicuously posted in such form and manner as the division may by regulation prescribe on every vacant housing accommodation that is available for rent.”*

## 9 NYCRR 466.15

The NYS Division of Human Rights published final regulations on May 18, 2022 adding 9 NYCRR 466.15 that provides guidance for compliance with the law for licensees and landlords. The regulations include definitions, examples of reasonable modifications and accommodations as well as a sample copy of the notice.

# Requirements

- Real estate licensees must provide a notice that sets forth the rights a disabled individual has to request reasonable modifications or accommodations to or in the “housing accommodation”.
- The notice must be provided at “first substantive contact” with a prospective tenant (Note: The same as the Agency Disclosure Form and the Housing and Anti-Discrimination Disclosure Form.)
- If known to the licensee, the notice must include contact information for the individual responsible for granting reasonable modification and accommodations
- When this information is not known by the licensee, the notice may read “To request a reasonable accommodation, you should contact your property manager.”
- NYSAR has developed two notices where the contact information is known and where the contact information is unknown.



## 9 NYCRR §466.15(d)(2)

A real estate broker shall be responsible to ensure that each individual licensed pursuant to Article 12-A of the New York Real Property Law and associated with such broker provides notice with regard to available housing accommodations, as provided for in this Regulation, to all prospective tenants in the following manner:

(i) Upon first substantive contact.

(ii) In writing, and in 12-point font or larger, or other easily legible font.

(iii) By email, text, electronic messaging system, facsimile, or hardcopy. An electronic communication containing a link to the notice required pursuant to this regulation shall be permissible, provided the communication also contains text to inform the prospective tenant that the link contains information regarding tenants' rights to reasonable accommodations for persons with disabilities. The notice must be available for printing and downloading.

## 9 NYCRR §466.15(d)(2) continued

A real estate broker shall be responsible to ensure that each individual licensed pursuant to Article 12-A of the New York Real Property Law and associated with such broker provides notice with regard to available housing accommodations, as provided for in this Regulation, to all prospective tenants in the following manner:

- (iv) Where such communication is in paper form, the notice must be included within such communication, or by providing the notice in an accompanying document.
- (v) Oral disclosure does not satisfy the requirements imposed by this section.
- (vi) “Posting” of the notice pursuant to paragraph (d)(3) of this subdivision, either on paper, on a bulletin board, or on an electronic bulletin board or notice area, does not satisfy the requirements imposed by this section.

## 9 NYCRR §466.15(d)(3)

In addition to the delivery of notice in paragraphs (d)(1) and (d)(2) of this subdivision, all housing providers shall post the notice in the following manner:

- (i) As required by 9 NYCRR 466.3; and
- (ii) all websites created and maintained by housing providers shall prominently and conspicuously display on the homepage of such website a link to the Division's notice as required this regulation which shall be made available by the Division. (DHR has provided a sample notice and is not providing a link)

## 9 NYCRR §466.3(c)

Notices at real estate offices.

(1) Every person being a real estate broker or real estate salesman who has an office or office space in which he conducts his real estate transactions shall display and maintain at such office or in such office space notices furnished by the Division of Human Rights, indicating the substantive provisions of the Human Rights Law relative to housing accommodations and commercial space, the place where complaints may be filed and such other information as the Division of Human Rights deems pertinent.

(2) Such notices must be posted conspicuously at the real estate offices in easily accessible and well-lighted places, where the notices may be readily observed by those seeking housing accommodations or commercial space\*.

# FAIR HOUSING: LAWFUL SOURCE OF INCOME

# Lawful Source of Income

- Effective April 12, 2019
- Protected class in NY
- “Lawful source of income”
- Executive Law §292 and §296

# What is Lawful Source of Income

- "lawful source of income" shall include, but not be limited to
  - child support
  - Alimony
  - foster care subsidies
  - income derived from social security
  - any form of federal, state, or local public assistance
  - housing assistance including, but not limited to, section 8 vouchers
  - any other form of housing assistance payment or credit whether or not such income or credit is paid or attributed directly to a landlord, and any other forms of lawful income.

# What is Lawful Source of Income

- The provisions of this subdivision shall not be construed to prohibit the use of criteria or qualifications of eligibility for the sale, rental, leasing or occupancy of **publicly-assisted housing accommodations** where such criteria or qualifications are required to comply with federal or state law, or are necessary to obtain the benefits of a federal or state program. A publicly assisted housing accommodation may include eligibility criteria in statements, advertisements, publications or applications, and may make inquiry or request information to the extent necessary to determine eligibility.



# Exemptions from the Law

- If a licensee is involved, there are no exemptions or carve outs for:
  - Owner-occupants
  - Dwellings with 1 or 2 units
  - Commercial property
  - Vacant land
  - Anything else a landlord may try to justify

# Criteria or Qualifications

- Only permitted for publicly assisted housing as defined in Executive Law §296(11)
- Usually used to qualify individual for public housing

# Criteria or Qualifications

- Landlords may not require credit checks for tenants receiving housing assistance through programs
- Programs screen individuals in order to qualify for the program
- Program determines how much individual can afford

# Criteria or Qualifications

- There are no justifications for requiring a credit score from an individual with a housing assistance program
- The following are not justifications:
  - How do I know they can afford a percentage of the rent
  - I need credit score to see if they can pay utilities etc.
  - I need to know if the program drops them if they can afford the rent

# Criteria or Qualifications

- No longer permitted to advertise anything that expresses, directly or indirectly, any limitation, specification or discrimination as to lawful source of income such as:
  - No Section 8
  - No Programs

# That's what my client wants

If a landlord tells you not to present any applications from tenants receiving section 8 or any other type of housing assistance, you would need to advise the owner you are unable to follow their directive as it is unlawful. If they refuse to comply you must withdraw from the agreement

# That's what my client wants

Any licensee receiving a directive from the owner, landlord, property manager, rental agent or other licensee to discriminate against individuals because of their lawful source of income should advise the individual that such actions are unlawful and you are unable to follow their directive. If they refuse to comply you must withdraw from the agreement

# That's what my client wants

- If you know the landlord will accept an application from a section 8 tenant but will never approve the application, the licensee should terminate their involvement with the discriminating individual or entity.
- Document the discriminatory actions of the individual or entity and your termination of any relationship in the event any action is taken by the person(s) being discriminated against.



# What we do know

It is not unlawful to ask about income, only to discriminate based on lawful sources of income. Housing providers may ask about income, and about the source of income, and require documentation, in order to determine a person's ability to pay for the housing accommodation, but must accept all lawful sources of income equally

# Security Deposits

- Landlord must accept a voucher from a program in lieu of a security deposit
- Any landlord or licensee acting on behalf of a landlord that refuses to accept a voucher would be acting in a discriminatory manner

# Inspections

- Landlords must permit programs to inspect the property
- Landlords may not claim the property is not inspected by the program and are unable to accept individuals

# Repairs

- Landlord is prohibited from refusing to make repairs identified in program inspection
- “Financial hardship” defense may not be successful

# Repairs

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# Resources

<https://dhr.ny.gov/journey-fair-housing>

# REAL ESTATE BROKER STANDARD OPERATING PROCEDURES

## Real Property Law 442-h(4)

- (a) Each real estate broker shall institute standardized operating procedures for the prerequisites prospective homebuyers must meet prior to receiving any services. Such standardized operating procedures shall include but not be limited to the following:
- (i) whether prospective clients shall show identification;
  - (ii) whether an exclusive broker agreement is required;
  - (iii) whether pre-approval for a mortgage loan is required; and
  - (iv) any other such standardized operating procedures as the secretary of state shall determine by regulation and upon notice and public hearing.



## Real Property Law 442-h(4)

(b) Real estate brokers shall date stamp, notarize and post such standardized operating procedures on any publicly available website and mobile device application they maintain, shall make a copy of such procedures available to the public upon request at their office locations, and shall maintain a file of such standardized operating procedures while the broker's license is active. Any website or mobile device application maintained by a team or a real estate salesperson should also have the brokers' policies posted or have a direct link from such website or mobile device application to the brokers' website or mobile device application. If any alterations are made to the standardized operating procedures subsequent to such posting, real estate brokers shall date stamp, notarize and post such new standard operating procedures on any publicly available website or mobile device application they maintain within thirty days, and archive such alterations. Any broker or salesperson operating under a brokerage license that fails to adhere to such operating procedures shall be subject to the penalties imposed by section four hundred forty-one-c of this article.

(c) Any time a real estate broker is required to renew their license they must affirm to the department of state that they are in compliance with the requirements of this subdivision related to standardized operating procedures.

# SOP

- Impacts:
  - Brokers
  - Associated Licensees
  - Teams

## SOP

- All brokerages are impacted and must comply. There are no exemptions or carve outs for any type of brokerage. The DOS does not differentiate between brokers that practice exclusively in residential, commercial, leasing, referral or property management. As such, all brokers, associate brokers, salespersons and teams must be in compliance.

## SOP

- (1) whether prospective clients shall show identification,
- (2) whether an exclusive broker agreement is required, and
- (3) whether pre-approval for a mortgage loan is required

# SOP

- The law uses “prospective homebuyer” and “prospective clients”
- These terms should be defined the same referring to consumers that are buying a home:

# SOP

- Every associated licensee and team must follow the broker SOP
- Associated licensees and teams are prohibited from having their own procedure

# SOP

- Example:
  - Broker A SOP does not require an exclusive buyer broker agreement.
  - Salesperson Z with Broker A will not work with a buyer unless they have an exclusive buyer broker agreement
  - Salesperson Z is prohibited from:
    - requiring an exclusive buyer broker agreement
    - Refusing to work with a buyer that does not enter into an exclusive buyer broker agreement

## SOP

- A broker may still offer an exclusive buyer broker agreement as an option but not a requirement.
- A broker may still suggest the benefits of a mortgage pre-approval but not require it



## SOP

- If a broker requires one or more items and a prospective homebuyer refuses to provide the item(s) the broker may continue to provide services
- This must be consistent for all prospective homebuyers

## SOP

- A seller may require a buyer to produce identification and mortgage pre-approval as a condition
- Brokers should notify clients that such items may be required

# SOP

- Requires every brokerage to have a SOP
  - Date Stamped
  - Notarized
  - Hardcopy at office provide upon consumer request

# SOP

- If amended must:
  - date stamp and notarize
  - replace hardcopy at office
  - post within 30 days
- Retain copies of all versions forever
- Broker required to affirm SOP upon license renewal

# SOP

- Requires “clear and conspicuous” posting on all broker, associated licensee and team:
  - Websites
  - Applications
  - Social Media

## Posting on Websites, Apps, Social Media

- The date stamped and notarized copy of the SOP's does not have to be posted to websites, apps and social media
- You may “cut and paste” the text of the SOP

# Posting on Websites, Apps, Social Media

## STANDARDIZED OPERATING PROCEDURE FOR PURCHASERS OF REAL ESTATE PURSUANT TO REAL PROPERTY LAW §442-H

**[REDACTED]** (the “Broker”) is making this Standardized Operating Procedure available on any publicly available website and mobile device application maintained by the Broker and any of its licensees and teams. Broker has copies of these Standardized Operating Procedures available to the public upon request at Broker’s office location.

Please be advised that Broker:

- |  |   |   |
|--|---|---|
| <input checked="" type="checkbox"/> Requires | <input type="checkbox"/> Does not require | 1. Prospective buyer clients to show identification*  |
| <input checked="" type="checkbox"/> Requires | <input type="checkbox"/> Does not require | 2. Exclusive buyer broker agreements                  |
| <input checked="" type="checkbox"/> Requires | <input type="checkbox"/> Does not require | 3. Pre-approval for a mortgage loan / proof of funds* |

\*Although Broker may not require such information, a seller of real estate may require this information prior to showing the property and/or as part of any purchase offer.

## Posting to Social Media

- If traditional posting is not possible:
  - “Pinning” as first post with all required disclosures
    - Advertising regulations
    - Housing and Anti-Discrimination Notice
    - Broker SOP’s



## SOP

- “As an alternative, the Department would permit...a clear, conspicuous and unambiguous link...to a separate page where all the required disclosures are made. For a link to be acceptable, it must clearly and conspicuously disclose the link’s purpose and cannot simply state “click here for more information”.

## Open Houses

- As the listing agent, you must act in the best interest of your seller and owe them fiduciary duties. Those fiduciary duties require the listing agent to get the seller's permission before requiring any item from prospective homebuyers.

## SOP-Best Practice For Brokers

- As a best practice, brokers may want to consider creating a webpage with all required disclosures that associated licensees and teams can use for compliance

## SOP-Best Practice For Brokers

- Create a “script” for licensees to follow
- Bullet points/talking points
- Educate associated licensees/employees

# SOP-Best Practice For Brokers

- Establish timelines for required items
  - Scheduled meetings
  - Showings
  - “Walk ins”
  - Electronic communications
  - “No later than...”