

**2022**

# LEGAL UPDATE

By Anthony Gatto, Esq.



**SEPTEMBER**

**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

October 26

November 21

December 12

ARE COLD CALLS STILL PROHIBITED

Are cold calls still prohibited?

**YES**

# When Will the State of Emergency Expire?

- NO COLD CALLS
- The law is not industry specific and is triggered statutorily by **any** SoE
- Currently SoE in effect for Polio, Gun Violence, Healthcare Staffing etc.
- Only when all SoE is lifted will cold calling be permitted

## General Business Law §399-z(5-a)

“It shall be unlawful for any telemarketer doing business in this state to knowingly make an unsolicited telemarketing sales call to any person in a county, city, town or village under a declared state of emergency or disaster emergency as described in sections twenty-four or twenty-eight of the executive law.”



## General Business Law §399-z(1)

- h. “Telemarketer” means any person who, for financial profit or commercial purposes in connection with telemarketing, makes telemarketing sales calls to a customer when the customer is in this state or any person who directly controls or supervises the conduct of a telemarketer. For the purposes of this section, “commercial purposes” shall mean the **sale or offer for sale of goods or services**;
- j. “Telemarketing sales call” means a **telephone call made by a telemarketer** or by any outbound telephone calling technology that delivers a prerecorded message **to a customer or to a customer's voicemail or answering machine service for the purpose of inducing payment or the exchange of any other consideration for any goods or services**;

# 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.*

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*(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 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. 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.

# 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

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

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: statutes, laws, regulations, rules, codes, department of state opinions and decisions, and court decisions;

1 hour of instruction pertaining to the law of AGENCY

2 hours of implicit bias training

2 hours of cultural competency training

# 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

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# Resources

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

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