

Podcast

Avoiding Unlawful Housing Discrimination in New York State: Part 2

By Diane Krebs

January 4, 2024

Meet the Authors



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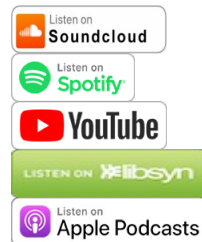
Details

January 6, 2025

Guest Speaker: Chelsea L. John, Director of Fair Housing Investigations at NYS Division of Human Rights

Landlords, property managers, realtors, and others in residential real estate strive to avoid inadvertently discriminating against individuals renting or leasing residential properties. Despite best intentions, discrimination can occur against protected classes covered under the New York State Human Rights Law.

Jackson Lewis P.C. · Avoiding Unlawful Housing Discrimination in New York State: Part 2



Transcript

Alitia Faccone:

Welcome to Jackson Lewis's podcast, We get work™, focused solely on workplace issues. It is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace, and its continuing evolution and helps answer the question on every employer's mind. How will my business be impacted?

Alitia Faccone:

In part two of this three-part episode of We get work™, we continue our discussion with the New York State Division of Human Rights about their priorities for 2024 and the rise in claims based on lawful sources of income in the real estate sector.

Our hosts today are Diane Krebs, principal in Jackson Lewis' Long Island office and member of the Real Estate Industry group, and special guest Chelsea L. John, Director of Housing Investigations with the New York State Division of Human Rights.

With experience in housing, civil rights, labor, and employment discrimination matters, Diane provides comprehensive counseling, advice, and litigation defense to employers and real estate professionals.

Chelsea, whose prior experience includes positions at the New York City Commission on Human Rights and New York City nonprofit organizations, is well-versed in employment law, public accommodations, and housing discrimination, as well as bias-based policing.

Diane and Chelsea, the question on everyone's mind today is, what are some key issues regarding discriminating against individuals based on lawful sources of income, and how do they impact my business?

Diane Krebs:

Now we're going to try and just start delving in a little deeper, like a little bit more pointed issues. In the real estate world when renting out an apartment, most landlords will typically do either a credit check and or a source of income check. And I look at those two differently just because source of income is just checking on their job. Credit check is a little bit more globally as to their overall financial wherewithals.

So most, if not all landlords typically do one or both of those kind of checks on an applicant because they want to make sure that they have the resources to pay the rent on a going forward basis. So what if a voucher recipient applies for an apartment with a landlord, but the voucher amount is less than the total amount per month for the rent? Can a landlord under those circumstances do any one of those kinds of checks with respect to checking whether the recipient can cover the portion that isn't covered by the voucher?

Chelsea John:

Yeah, so I want to give a little bit of background for our listeners who might not be so savvy with rental subsidies. So rental subsidies have a voucher payment standard and applicants may apply to apartments within that standard. So overall, the voucher will say that this voucher covers this much and the rent has to be within that amount. Tenants then will typically pay 30% of their income. The government pays the rest. For some tenants, that means they have no portion of rent to pay. So that's where the voucher agency pays 100% of the rent. Consideration of negative credit history would be unreasonable, which is not what you're asking, but just to kind of give that context.

Diane Krebs:

No and I appreciate that because I think that for some of our listeners, they may not even be aware of all the ins and outs of how the system works. So I appreciate the background. Please keep going.

Chelsea John:

So this question's really about the tenants who do have a portion. So each individual situation's going to be different. So I would encourage housing providers to focus on an individual on a case-by-case basis. So housing providers may run a credit check, but they should consider the tenant suitability overall. And so that case-by-case is really important because if we receive a complaint of discrimination, we're also looking into would that tenant have the ability to pay, essentially.

So credit scores and credit history reports, something I want to highlight, is that they

may not be valid indicators of whether a person will pay the rent. We kind of know that just being in the real estate world. So keep in mind that many applicants that are coming from shelter, without credit cards or loan history, they're going to be totally credit invisible. So considering other forms of tenant suitability might look like, I don't know, a letter of recommendation from a former landlord showing on-time rent payments or some kind of bills that shows on-time ability to pay and that this person has a history of paying, but maybe they might not have credit to align with those bills and utilities.

So the determination of a tenant with a subsidy ability to pay their portion of rent, that's already been made by the vouchering agency. And I want to highlight guidance that the state division of human rights has put out.

So if everyone goes to our website, we have a guidance on protections for lawful source of income, which is kind of our agency's position when the law came out that they established on how we would enforce the law. So I think it's a really important document to look at, and that guidance provides that if the housing provider found the person unqualified based on the same information obtained by the vouchering agency, this would essentially have the effect of negating the law. Overall, the important piece to keep in mind for listeners is that a housing provider cannot have a facially neutral income or wealth requirement that's equally applied, but it has the effect of excluding populations with rental subsidies, which is essentially what these checks might do.

Diane Krebs:

And I understand that for those of our listeners that might not be as familiar with the two different kinds of discrimination cases that can be brought, there's disparate treatment and disparate impact. And so disparate treatment is when somebody is specifically targeted because of a protected characteristic and a disparate impact, which is what you were just talking about, is where they're not targeting anybody in particular. They have a policy that is applied across the board to everybody, but when that policy is put into effect, it has the result of cutting out from consideration a large portion of a protected group, such as someone who is protected by because of source of income.

Chelsea John:

Yep, that's right.

Diane Krebs:

And so am I to understand what you're saying that if a landlord has a regular policy that people have to meet up to a certain level of income in order for them to consider them qualified and a safe risk for them, if that policy ends up cutting out a significant percentage of individuals protected under source of income as opposed to those that are not covered by source of income, it could still be considered unlawful and discriminatory by the division. Is that right?

Chelsea John:

That's right.

Diane Krebs:

Okay. On that issue, when you were saying that the voucher has a range, for those who have never seen a form like that before, are you saying that there are two numbers on there, one number, which is the percentage, what they're going to get in voucher, and then another number that says what they've determined that this person can afford overall between voucher and non-voucher?

Chelsea John:

You're going to hate this answer, but it depends.

Diane Krebs:

By the way, Chelsea spoken like a lawyer, it depends.

Chelsea John:

It depends. It depends on the voucher. So unfortunately, not all vouchers are created equal in the way that they're put out into the world. They don't all have the same minimum income requirement. They don't all calculate tenants' portions exactly the same. Some agencies allow 40% of income versus 30.

So most vouchers will at least state that the person qualifies for a certain bedroom size. So one that's really common in New York City is NYCHA, the New York City Housing Authority, they administer section eight vouchers. So landlords are very used to that subsidy and that subsidy when it's handed to the landlord, will just have a number of bedrooms. NYCHA separately will update. It's been actually fairly frequently in recent years, what the voucher payment standard is for that bedroom size that they put out into the world via the internet. So a landlord can just Google NYCHA voucher payment standards and know a two bedroom apartment will be this much money under the voucher payment standard. And then the tenant, no matter what, will be paying 30% of their income, and they can provide additional information either themselves or through their case manager, that will show this is what my portion is.

And applicants always know whether they have a portion or not because they're told by the agency when they receive that subsidy to go out into the world, whether it's a transfer voucher or a new one.

So it depends, but I would encourage housing providers to use Google for some of these vouchers that might not be so familiar to them, but also just speak to the applicant about their type of voucher and what certain language means.

Diane Krebs:

Great. Excellent advice. Now, another issue in source of income is deposits. So sometimes landlords have various kinds of deposits that they require from tenants. What is a landlord's ability to require such a deposit from a voucher recipient and does it depend on the kind of deposit that we're talking about?

Chelsea John:

Yeah, so this question really brings up two issues that I see in our work, and that's security deposits or hold fees. So security deposit vouchers are really common, especially in New York City. Most administrative agencies now have them and court cases have a firm that landlords must accept them. So if an applicant is coming with a voucher and has a security deposit voucher, the landlord must accept it.

Diane Krebs:

Are you saying that certain voucher providers will actually have a separate standalone voucher that they will pay up to a certain amount for a security deposit?

Chelsea John:

That's right.

Diane Krebs:

Okay and what if the agency has not issued such a voucher for a security deposit?

Chelsea John:

So if they haven't, then the tenant themselves would pay that deposit. What I see in a lot of smaller agencies, maybe more upstate, is that typically agencies are working together with local nonprofits to ensure that the tenant would have the ability to pay those upfront fees. So it's usually not a bar that I see in this work. They're usually able to produce the money either through voucher or through a one-shot kind of payment from a nonprofit or their local organization.

Diane Krebs:

But regardless of whether or not the agency has issued a voucher for them, a security deposit is one of those things that a landlord is allowed to require. Is that what you're saying?

Chelsea John:

Yes, they can.

Diane Krebs:

Okay. So then you were moving on to a second kind, which was?

Chelsea John:

Hold fees. They're really common in New York City. A little less common outside of the city, but we're seeing them more and more and I want to again, direct listeners to our guidance. So a housing provider cannot, again, have a facially neutral income or wealth requirement. Again, equally applied, but has the effect of excluding populations with rental subsidies and hold fees have that risk.

So we bring those claims very often. If there is a \$200 hold fee, for example, in order for someone to get the apartment, but the complainant can show and through an investigation is demonstrated they were the first one to apply and they otherwise qualified but couldn't move forward because of that hold fee, then we are likely to find probable cause in a case like that. Any application or deposit or requirement that

creates a barrier to a vouchered applicant obtaining housing may expose a housing provider to liability under the law. So it's always a risk.

Just as a reminder for folks, location fees are limited by state law to \$20 or the actual cost of a credit or background check, whichever is less, and this law came into effect in 2019. Deposits essentially cannot be required before the time for the tenant to move in. That's how we would treat the law under the human rights law.

Diane Krebs:

And when you're referring to a hold fee, are you just talking about in order to some sort of deposit in order to secure that person's right to move forward with the process to get the apartment?

Chelsea John:

Yes.

Diane Krebs:

Okay.

Alitia Faccone:

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