

REAL ESTATE

Employment Questions on Rental Applications – A Housing Discrimination No-No

By **Andrew Lieb**

In January 2015, a new Human Rights law went into effect in Suffolk County, to wit: Local Law No. 25-2014. While the Suffolk County Human Rights Law (hereinafter “SCHRL”) is similar to the Federal Fair Housing Act and the New York State’s Human Rights Law, the SCHRL now adds the protected class of “lawful source of income” to prohibited housing discrimination throughout the county; a protected class that does not exist in either the federal or state law.

The SCHRL defines “lawful source of income” as “[i]nclud[ing], but [...] not limited to, income derived from Social Security, or any form of federal, state or local public assistance or housing assistance including the Housing Choice Voucher Program” at §528-6 of the Code. Incident thereto, §528-9(7) of the Code, prohibits the “use [of] any form of application for the purchase, rental, or lease of any housing accommodation, land or commercial space ..., which expressly, directly or indirectly, any limitation, specification, or discrimination ... because of the lawful source of income of such individu-

als or individuals.” As a result, can a rental application lawfully ask questions about the employment status of prospective tenants?

Before tackling this question, it is noted that “lawful source of income” has been a protected class in Nassau County, Westchester County and throughout New York City for quite some time. In addition, the State Legislature has a pending bill to amend the New York State Human Rights Law to add lawful source of income as a protected class throughout the state, to wit: S187-2013 and A5437-2013.

Now, turning to the practice of rental applications including employment related questions within Suffolk County, it is initially noted that the definition of lawful source of income does not expressly include income derived from gainful employment therein and as a consequence, a mere cursory review of the SCHRL may result in the mistaken belief that such questions about employment status are permitted within the county. Nonetheless, the operative language of the definition includes the catchall phrase “but is not limited to,” which expressly opens up



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the definition to a broad judicial interpretation that includes income derived from gainful employment as part of the protected class of lawful source of income. To illustrate the Legislature’s language choice within the SCHRL’s definition of lawful source of income, it can be contrasted with the preexist-

ing New York City Human Rights Law’s definition of lawful source of income, which is defined by §8-102(25) of the New York City Administrative Code as follows: “shall include income derived from social security, or any form of federal, state or local public assistance or housing assistance including section 8 vouchers.” New York City’s definition is limited to the express terms of the definition and as such it does not open the door to a broad case law interpretation whereas the SCHRL is not so curtailed and has no restriction on judicial activism.

Moreover, the SCHRL’s restriction on discriminating in rental applications also is broadly set forth in the code. Specifically, §528-9(7) of the SCHRL does not simply preclude express con-

duct, but utilizes the broad terms “directly or indirectly” therein when setting forth what is prohibited to be included within a rental application. This statutory language is similar to that which New York City utilizes in restricting discriminating in rental applications at §8-107(5)(c)(2) of its Administrative Code. In both codes the inclusion of the term “indirectly” causes great exposure to an allegation by a complainant that the act of asking about employment somehow effects public housing assistance programs as a secondary or tertiary effect. New York City’s code goes further with respect to indirect discrimination by expressly applying disparate impact discrimination within its code at §8-107(17). Such discrimination refers to actions that have a disproportionate adverse impact on persons that are in a protected class while not directly treating those persons differently. The SCHRL does not expressly include disparate impact within its code, but neither does The Fair Housing Act and the United States Supreme Court is about to rule on whether disparate impact discrimination is impliedly included in the Federal Housing Discrimination Law within the case of *Texas Department of Housing*

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and Community Affairs v. The Inclusive Communities Project, Inc. The result of this United States Supreme Court ruling should shed light on whether disparate impact discrimination is intended to be protected by the SCHRL regardless of whether such protection is expressly set forth within the code.

Another dimension of exposure realized by asking employment related questions on rental applications is that of real estate brokers who ask about employment status on behalf of their clients. Specifically the SCHRL, at §528-9(B), expressly prohibits real estate brokers from utilizing rental applications that “directly or indirectly” discriminate based upon the “lawful source of income” of the applicant. Still further, the SCHRL prohibits aiding and abetting, at §528-12 of its Code. As a result, and assuming, *in arguendo*, that questions about employment status are somehow permitted under the SCHRL, the practice nonetheless creates exposure to real estate brokers because they do not

know and they do not control how the landlord will use the information that they obtain on behalf of such landlord. Consequently, by marshaling the information about employment, real estate brokers may be aiding and abetting their landlord clients in a discriminatory practice that is prohibited at §528-9(A)(1) of the code; namely, refusing to rent, refusing to negotiate or otherwise making the housing unavailable to the tenant because of the tenant’s lawful source of income.

In all, asking employment questions on rental applications is very dangerous and should be avoided in order to mitigate exposure to claims of housing discrimination in Suffolk County.

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