

Fair Housing Initiatives Launched on the Federal and State Levels

By Andrew Lieb

April was National Fair Housing Month for 2016. As Fair Housing Month comes to an end, it's a good time to review the many new regulations, initiatives and enforcement activities that have already occurred this calendar year on both the federal and state levels. As attorneys, we need to study these activities so that we can both diligently advise our clients who work in the real estate industry and also tailor compliance protocols for these clients so that they can adjust their business practices to changing times. Landlords, property managers, real estate brokers, loan originators, and other such clients need our support in educating them as to what protocols are required in order to operate compliantly during 2016. Failing to provide this requisite support will result in mounting litigation costs for our clients, which will likely drive them from the real estate industry entirely and consequently, out of our respective books of business in the coming years.

On the federal level, to kick off Fair

Housing Month the U.S. Department of Housing and Urban Development (HUD) launched "a new national media campaign that helps the public to envision what communities with shared opportunity for all might look like,"ⁱ as part of HUD's Affirmatively Furthering Fair Housing (AFFH) initiative that was implemented last July by Final Rule. This initiative is designed to "equip communities that receive HUD funding with the data and tools that will help them to meet long-standing fair housing obligations in their use of HUD funds." Such data includes "patterns of integration and segregation, racially and ethnically concentrated areas of poverty, disproportionate housing needs, and disparities in access to opportunity."ⁱⁱ As a result, governments that receive HUD funds are now being supported with quantitative data that is needed to meet such governments' long-standing fair housing obligations, including "taking meaningful actions, in addition to com-



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bating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics."ⁱⁱⁱ

In New York State, Governor Cuomo has hit the ground running in affirmatively furthering fair housing.

Since the start of 2016, the governor has undertaken four important measures to secure New York State's status as the leader in the area of Fair Housing. After all, New York should be the leader in this area because we are a melting pot, which thrives based upon our diverse population.

Initially, on January 20, 2016, Governor Cuomo caused New York to become the first state in the country to protect transgender individuals from discrimination when he "issued statewide regulations to prohibit harassment and discrimination on the basis of gender identity, transgender status or gender dysphoria."^{iv} The regulation, 9 NYCRR 466.13, defines dis-

crimination on the basis of one's gender identity or transgender status as constituting sex discrimination whereas it defines discrimination on the basis of gender dysphoria as constituting disability discrimination. In such, Article 15 of the New York State Human Rights Law remains intact, by retaining the same protected classes, but the definitions of the existing protected classes have evolved to protect more individuals through meaningful regulations.

Next, on February 14, 2016, Governor Cuomo announced an initiative to strengthen the state's anti-discrimination efforts, which is called the Fair Housing Enforcement Program. Specifically, the Fair Housing Enforcement Program is "a groundbreaking initiative to uncover discrimination in rental and home sale transactions."^v According to the governor's press release, "[u]nder this new program, the Division of Homes and Community Renewal will work to safeguard the rights of all New Yorkers using trained fair housing 'testers' with

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diverse racial, gender, and economic backgrounds, who also represent parents, and persons with disabilities.”^{vi} Testers “are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful [discrimination] practices.”^{vii} The United States Supreme Court, in *Havens Realty Corp. v. Coleman*, has held that such testers have standing to sue in enforcing discrimination laws regardless that they were not seeking to rent or purchase in actuality. In fact, the governor’s press release makes reference to the Fair Housing Enforcement Program’s aim at prosecuting discriminatory “real estate agents, owners and landlords” who are caught by testers.^{viii} The Fair Housing Enforcement Program’s investigatory and enforcement components are only the first half of the governor’s strong undertaking to affirmatively further fair housing.

Governor Cuomo announced two other components of the Fair Housing

Enforcement Program on February 25, 2016, including a proposed regulation for the real estate brokerage industry and another proposed regulation to again expand who is included in the definitions of our statutory protected classes under the New York State Human Rights Law. With respect to the brokerage regulation, “the New York Department of State will seek sanctions, including license revocation and fines, against real estate brokers and salespeople who are found to have engaged in any discriminatory practices in the course of their licensed real estate activities.” With respect to the expanded protected classes, the New York State Human Rights Law will preclude “discriminat[ion] against individuals because of their relationship or association with members of a protected class.”^{ix} In fact, the regulation makes clear that those accompanying individuals who are denied rights because of discrimination will also have experienced discrimination and have standing to sue for recourse. Public comment for

both proposed regulations ended on April 23, 2016 as the regulations make their way through the rule making process into becoming law.

On both the federal and state levels the legal tides are certainly bringing fair housing into the forefront of issues faced by our real estate clients. Landlords, property managers, real estate brokers, loan originators, and other such clients are not only expected to pay attention to these important developments, but they are, in fact, legally charged with the duty to immediately and affirmatively change their business practices in order to make housing become “free from barriers that restrict access to opportunity based on protected characteristics.”^x As competent attorneys it is our job to have solutions ready for these clients before they even realize that they have a need.

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¹ http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2016/HUDNo_16-041

² https://www.huduser.gov/portal/sites/default/files/pdf/AFFH_Final_Rule_Executive_Summary.pdf

³ 80 FR 42271

⁴ <https://www.governor.ny.gov/news/governor-cuomo-announces-new-regulations-protecting-transgender-new-yorkers-discrimination-take>

⁵ <https://www.governor.ny.gov/news/governor-cuomo-announces-initiative-strengthen-states-anti-discrimination-efforts>

⁶ *Id.*

⁷ *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)

⁸ <https://www.governor.ny.gov/news/governor-cuomo-announces-initiative-strengthen-states-anti-discrimination-efforts>

⁹ <https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-state-real-estate-board-approval-regulations-strengthen-fair>; See also <http://blog.liebatlaw.com/2016/03/real-estate-brokerage-regulatory.html>

¹⁰ 80 FR 42271