

Guidance for Fair Housing Compliance During the COVID-19 Pandemic

May 5, 2020

During the COVID-19 pandemic, REALTORS® continue to play an important role in assisting people to find homes. On March 4, NAR published [Coronavirus: A Guide for REALTORS®](#), which is continually updated based on evolving guidance from the World Health Organization, the Centers for Disease Control and Prevention (CDC) and the White House, among others. These frequently asked questions about complying with the Fair Housing Act during the COVID-19 pandemic supplement our previous guidance.

What anti-discrimination laws apply to housing during the COVID-19 pandemic?

Federal and state fair housing laws remain intact during the COVID-19 pandemic. Those laws make it unlawful to discriminate on several protected bases, including disability and national origin. The pandemic provides a unique set of circumstances for navigating federal antidiscrimination provisions. First, each real estate professional must determine whether they will provide services during this time. To the extent they continue to make services available, the Fair Housing Act applies. Such services should be provided on an equal basis while recognizing that no one is required to engage in any transactions that put their health or safety, or the health and safety of others, at risk. If reasonable accommodations can be made to provide housing or services to individuals with COVID-19, without threatening the health or safety of others, the federal Fair Housing Act calls for such accommodations to be made.

Are individuals who have COVID-19 covered under the national origin protections of the federal Fair Housing Act?

Yes. When an infectious disease, such as COVID-19, is associated with a specific population or nationality, fear and anxiety may lead to social stigma and discrimination. REALTORS® may not discriminate against individuals on the basis of their national origin, even if they are from other countries that have also been hit particularly hard by the COVID-19 pandemic.

Are individuals who have COVID-19 covered under the disability protections of the federal Fair Housing Act?

This is a novel question that may ultimately be resolved by a court. Based on information currently available, COVID-19 can have severe symptoms for some people and therefore may ultimately be interpreted as a disability for purposes of fair housing law. Therefore, while it has not been conclusively determined whether COVID-19 constitutes a “disability” under the Fair Housing Act, it is advisable to treat individuals who have COVID-19 as being covered by federal disability protections.

Can I ask someone if they have been diagnosed with COVID-19 or if they have had known or potential exposures to the virus before providing services to them?

While anti-discrimination laws would generally prohibit certain questions about a person's disability, in light of the fact that COVID-19 is widespread, highly contagious, and potentially very dangerous, some federal agencies have issued guidance relaxing this prohibition. For example, the EEOC and CDC, have each issued guidance to employers and homeless shelters, respectively, permitting symptom-related questions to be asked upon entry to a facility. This guidance suggests that it is permissible for real estate professionals to ask someone to self-disclose any symptoms or known or potential exposures to the virus. While such questions may permit REALTORS® to take necessary safety precautions, remember that many individuals with COVID-19 are asymptomatic, so reasonable precautions should be taken regardless of whether someone knows that they have the virus or is exhibiting symptoms. Although it is permissible to ask that an individual self-disclose their exposure to or symptoms related to COVID-19, the COVID-19 crisis does not provide a basis to ask someone non-COVID-19-related health or medical questions.

May I require an individual complete a COVID-19 screening questionnaire before working with an individual?

You may request that an individual self-disclose information about their COVID-19 status either verbally or in writing. A uniform practice in how this information is collected is advisable, and whether to request this information verbally or in writing is a business judgment. On the one hand, written documentation may prove useful in litigation should a future plaintiff make an argument about whether they were asked to disclose their illness, or whether the health questions had been asked in a selective or particular manner. On the other hand, collecting and maintaining health data about individuals creates a risk that this sensitive data could be revealed, for example, through a data breach or subpoena. Making a verbal inquiry may achieve the same or a similar benefit as a written inquiry, and it may obviate the risk of such disclosure.

If you are considering collecting this information in writing, be sure to consult state law requirements regarding the preservation and maintenance of data.

Am I obligated to assist or show or provide housing to someone who has or may have COVID-19?

REALTORS® who choose to continue providing services during this time, have an obligation to make reasonable accommodations to assist or provide housing to individuals who have COVID-19 when able to do so *without posing a threat to the health and safety to themselves or others*. The federal fair housing law makes an exception to the general anti-discrimination obligations where providing assistance or housing to someone would pose a direct threat to the health and safety of others. For example, when showing housing to such individuals would pose a direct threat to the broker's or others' health and safety, and when a reasonable accommodation to mitigate that threat is not possible, then the broker may decline to show the housing to the infected individual.

When determining whether a reasonable accommodation exists to mitigate the threat, it is important to make an individualized assessment about the risks posed by each individual and the extent to which a reasonable accommodation may be made for these individuals. For example, to the extent it is possible to assist or show or provide housing to an individual who has COVID-19 without threatening the broker's health or the health and safety of others, such measures should be undertaken.

What constitutes a “reasonable accommodation”?

The federal Fair Housing Act requires, to the extent possible, an assessment of whether a “reasonable accommodation” can be made to provide equal access to housing and services to individuals who have a disability. During the COVID-19 pandemic, homeowners may be quarantining in properties and clients, buyers, agents and other professionals may be seeking to enter occupied properties. Thus, the “reasonable accommodation” analysis must evaluate the need to provide housing or services to individuals who have the COVID-19 virus while also protecting the health of all parties to a transaction. This analysis should specifically take into account the fact that the virus is highly contagious and potentially very dangerous if contracted, and each circumstance should be analyzed individually in order to make the accommodation that is most suitable for the situation. Some examples of reasonable accommodations for which sound public health rationales may be advanced, may include offering virtual showings of properties; requiring that the individual requesting the accommodation send a proxy to view the property rather than view it themselves; or providing addendum options such as a Sight Unseen Rider or a contingency that the contract is subject to a later in-person visit at a specified later date in time.

REALTORS® should consider reasonable accommodations, like the examples above, to mitigate health risks while continuing to serve clients and ensuring compliance with all state and federal anti-discrimination laws. However, to the extent that accommodations for individuals who have the COVID-19 virus still present a risk to anyone’s health and safety, impose undue financial and administrative burdens, or fundamentally alter your services, the Fair Housing Act does not require the provision of such accommodations.

What should I do if my proposed reasonable accommodation is rejected?

The reasonable accommodation framework is an interactive one. If the individual requesting the accommodation offers an alternative solution that is reasonable in light of known circumstances, and mitigates the direct threat of harm, then real estate professionals must consider that option. However, if the proposed accommodation does not adequately mitigate the direct threat of harm, the Fair Housing Act would not require provision of the accommodation. Consult local legal counsel when evaluating requests for reasonable accommodation.

What general safety precautions should I take when providing services?

Consider implementing safety precautions that protect not only against those persons known to have contracted the virus but also the many individuals who may be asymptomatic carriers of COVID-19. The widespread numbers of persons who may be asymptomatic carriers suggests REALTORS® should take safety precautions in every real estate transaction, regardless of whether any party is known to have or been exposed to COVID-19. If these measures are applied consistently, a REALTOR® can avoid the potential fair housing liability of selectively applying mitigation practices to only certain consumers believed to be of greater health and safety threat based on an unlawful purpose, such as the consumer’s national origin.

The CDC has published safety guidance that includes recommendations to keep a distance from others and avoid close contact with people who may be sick. And most states have taken various measures to protect against the spread of the virus, including stay-at-home orders and requiring all non-essential businesses to close. Based on these measures, below is a non-exhaustive list of measures you may institute to mitigate health risks and the spread of the virus:

- requiring all people involved in a transaction to wear face masks or available face coverings, consistent with the CDC recommendation to that effect;

- declining to show occupied apartments and houses;
- asking individuals to view apartments and houses one at a time;
- asking individuals to maintain six feet from others and not to touch surfaces;
- ensuring that surfaces are cleaned often and thoroughly;
- using personal protective coverings;
- offering virtual showings of properties; and
- providing addendum options such as a Sight Unseen Rider or a contingency that the contract is subject to a later in-person visit at a specified later date in time.