AAGW APARTMENT ASSOCIATION OF GREATER WICHITA

Legislative News

Laws and Regulations on Occupancy Limits

For years, the widely accepted industry rule for occupancy limits in a rental unit has been informally referred to as the two-heads-per-bedroom rule. If you had a two bedroom to rent, the maximum number of occupants who could live there was firmly set at four. But is it really that cut and dry? Which laws apply when this rule is challenged by residents?

The U.S. Department of Housing & Urban Development (HUD) published a notice on December 22, 1998 announcing the adoption of the Memorandum of General Counsel Frank Keating ("Keating Memo"), written on March 20, 1991, for purposes of creating a policy on occupancy standards. The International Property Maintenance Code ("IPMC") dictates more specific occupancy standards that must be followed to avoid any discrimination under the Fair Housing Act that the Keating Memo lacks. Such regulations are only implemented when state and local laws do not provide individual regulations that supersede the laws above due to being considered governmental requirements that act as "special circumstances."

Familial Status became a part of the protected classes in the Fair Housing Act (FHA) in 1988, hence, occupancy limits must be reasonable to avoid discrimination under this Act. General Counsel Frank Keating pointed out confusion regarding occupancy limit laws and provided guidance towards occupancy restriction in the Keating Memo that was later adopted by HUD. This memo serves the purpose of describing "reasonable" occupancy limits, it does not specify the exact occupancy limits. Thus, while this memo is a good starting point to avoid violation of FHA, it does not provide definitive guidelines.

The Keating Memo suggests a two-persons per bedroom policy to be reasonable considering other circumstances do not allow for more individuals to reside in a unit. Thus, the number of bedrooms acts as a foundation to occupancy limits set by individual managers, landlords, or owners. However, circumstances such as the size of the bedroom are examined as well. For example, a family of 5 may reside in a unit with only two bedrooms if the bedrooms are large enough according to the IPMC or local/state rules. On the other hand, a two-bedroom mobile home may only be restricted to only two occupants if one of the bedrooms is too small. Also, if a unit has a study room or any additional room that is habitable and can be used for sleeping purposes, it becomes reasonable to increase the two-persons per bedroom limit.

Besides physical factors, limiting considerations such as "capacity of septic, sewer or other building systems" help determine the occupancy limits for each unit and the building in its entirety. For example, certain septic and sewer disposable systems are of smaller scale in certain residential buildings, making it reasonable to create an occupancy limit based on these considerations. These special circumstances must be very well documented and assumed correct.

A challenging area of occupancy limits not specified in the Keating Memo or IPMC is evaluating the age of children that are counted as an occupant. The only regulation towards this is that it must be "reasonable." For example, it is considered "reasonable" if two adults and an infant reside in a one bedroom unit. This restriction is set by individual companies and ranges from six months to five years. Seeing that there is an explanation for the age set by the company that makes it a reasonable age, no violations of discrimination will occur. For example, an age restriction of three years old could be set with an explanation that no major wear and tear is created by the child or the septic system is not affected by the child prior to this age.

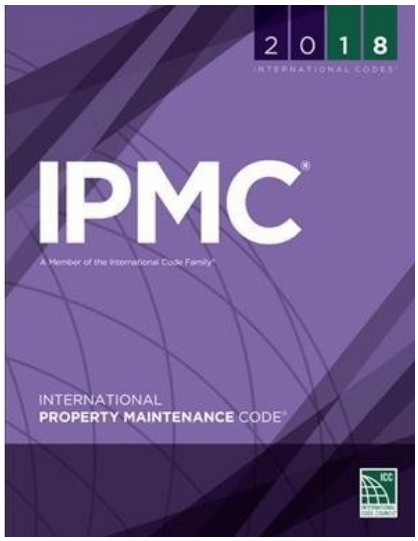
Laws and Regulations on Occupancy Limits (Cont'd)

Unlike the Keating Memo, this International Property Maintenance Code provides more specific information that ties individual unit square footage with occupancy limitations. Section 108.1.4 states that any structure that is "occupied by more persons than permitted under this code" is an "unlawful structure." Thus, the following crucial rules must be followed to prevent becoming an unlawful structure:

- Every bedroom occupied by one person shall contain at least 70 square feet floor area.
- Every bedroom occupied by more than one person shall contain not less than 50 square feet floor area for each occupant thereof.
- Kitchens and non-habitable spaces shall not be used for sleeping purposes.
- Dwelling units shall not be occupied by more occupants than permitted by the minimum area requirements of Table 404.5.

TABLE 404.5
MINIMUM AREA REQUIREMENTS

SPACE	MINIMUM AREA IN SQUARE FEET		
	1-2 occupants	3-5 occupants	6 or more occupants
Living room[a, b]	120	120	150
Dining room[a, b]	No requirement	80	100



To avoid violating the Fair Housing Act on the terms of discrimination for familial status, the following are recommended:

- Critically evaluate all aspects of a unit when deciding the occupancy limit.
- Maintain a consistent limit of all identical units, no exceptions for any reason.
- Do not follow the same occupancy limit for units that differ in any way.
- Create an age limit for when a child is counted as an occupant and stick to it.
- Do not consider pregnant women as more than one occupant.
- Train your staff not to ask age of individuals, instead, state the occupancy policy to all potential residents, not just ones with children.
- Do not publish occupancy policies on the internet.
- Policies should not violate state and local law.
- Take fire codes, building codes, and zoning requirements into consideration when creating occupancy limits.

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‘Section 8 Need Not Apply’ States and Cities Outlaw Housing Discrimination

By Mattie Quinn, Governing

Landlords often reject applicants who use public assistance to help pay their rent. Washington state is the latest jurisdiction to pass a law to protect low-income renters from housing discrimination.

House Bill 2578, which will go into effect at the end of September, makes it illegal for landlords to reject applicants based on their use of public assistance, including Section 8, Social Security or veterans benefits.

"We have a housing crisis in Washington. In Seattle, the market is so tight that I would hear about tenants getting [evicted] just because they were using public assistance. There were some property owners that weren’t even accepting veterans," says Democratic state Rep. Marcus Riccelli, who introduced the legislation.

If a landlord or property company is found in violation of the law, they could be fined "up to four and one-half times the monthly rent of the real property at issue, as well as court costs and reasonable attorneys' fees," according to the bill.

When looking at apartment ads, Riccelli says it isn’t uncommon to see "Section 8 need not apply."

"That was already illegal [in three counties] before this law was passed, but now we’re making it extremely clear what you can and cannot do," he says.

Currently 15 states, now including Washington, ban housing discrimination based on a person's source of income; four others use tax and other incentives to persuade landlords to accept public assistance tenants, according to the Poverty and Race Research Action Council (PRRAC). However, California and Wisconsin’s bans don’t extend to Section 8 and other housing vouchers, and Minnesota’s was recently weakened by the courts. At the local level, 71 counties and cities across 16 states have a similar ban. San Diego approved a housing discrimination ordinance this month, and Denver is currently considering one.

"Cities and counties and towns are asking what can we do to improve our profile in terms of segregation and access to opportunity," says Philip Tegeler, president and executive director of PRRAC. "There was a lot of movement under the Obama administration to open up opportunity for voucher families, and that has trickled down to state and local government."

Of the millions of people who qualify for housing vouchers, only about one in eight families receive one, according to the National Law Center on Poverty and Homelessness. But getting a voucher is no guarantee of finding a place that will accept it. Source-of-income discrimination bans make it a little easier: A family is 12 percent more likely to find housing in areas with such laws in place.

‘Section 8 Need Not Apply’ States and Cities Outlaw Housing Discrimination (Cont’d)

When someone uses a housing voucher, the federal government pays the balance of their rent that exceeds 30 percent of their monthly income. Qualifying for housing assistance is different based on where you live because it’s administered through local housing authorities. In Seattle, a single person making $33,600 a year is eligible, though preference is given to people making $20,200 or less. In Miami, a person can't make above $27,550 a year to qualify, and priority is given to those who make $16,550 or less.

Landlords say accepting people who use some form of public assistance to help pay their rent just isn't good business. It means there can be delays in payments, and security deposits are not always covered.

"There are a number of administrative and contractual requirements that are not part of a standard leasing process," says Greg Brown, senior vice president of government affairs for the National Apartment Association, which represents landlords. "It’s not about the individual who’s carrying the voucher. It’s all about what comes with the voucher. Some of that is a local public housing authority, and some of that is about the federal government."

As this policy becomes more popular, it's prompting preemption battles between some state and local governments. In Texas, GOP Gov. Greg Abbott signed a bill into law in 2015 that bans cities from passing source-of-income discrimination bans, blocking ordinances in Austin and Dallas. Fair housing advocates sued the state in 2017, and the case is pending.

The bill in Washington, meanwhile, is meant to be a compromise between the landlords' association and affordable housing advocates, says Rep. Riccelli. For instance, the bill sets up a "mitigation fund" to help landlords with extra costs that might be associated with tenants using public assistance.

"Some of the landlords said these tenants would often cause excessive damage to the apartments. While I might not necessarily agree with that," says Riccelli, "we wanted to create this mitigation fund for them."

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