

How is Fair Housing Different for LIHTC Properties?

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You know that your property can lose tax credits for not complying with the Fair Housing Act. You've probably noticed that the 8823 form and the Guide for Completing Form 8823 both contain references to Fair Housing. You may even be aware that there is a Memorandum of Understanding among the departments of Treasury, Housing and Urban Development, and Justice related to Fair Housing at LIHTC properties. Does this all mean that the Fair Housing Act applies differently to LIHTC properties?

The short answer to that question is no. The Fair Housing rules are not different for LIHTC properties. The Fair Housing Act applies to LIHTC properties just as it applies to any other type of housing. Everyone who works at an LIHTC property — whether it's the leasing staff, property manager, service coordinator, maintenance staff, even vendors or subcontractors — needs to understand and comply with the Fair Housing Act. All the protections based on race, color, religion, national origin, sex, disability and familial status apply to an LIHTC property just as they would apply to any other housing. The provisions allowing people with disabilities to request Reasonable Accommodations and Reasonable Modifications also apply to LIHTC properties. One of the best things owners can do to ensure compliance with the Fair Housing Act is to make sure ALL their staff members get Fair Housing training. Anyone who comes into contact with tenants or applicants must have training. And it's considered a best practice for Fair Housing training to be a mandatory *annual* requirement for all staff members. So if you haven't attended Fair Housing training recently, get thee to a Fair Housing training!

In addition to being subject to the Fair Housing Act, the property may also be subject to the Americans with Disabilities Act (ADA) and/or Section 504 of the Rehabilitation Act of 1973, depending on other funding sources used at your property. In general, the ADA will apply to the public areas of your property, such as your rental office, or any commercial space your property might have. An LIHTC property that includes public housing units will also be subject to the ADA. If your property receives federal financial assistance, it will also be subject to the requirements of Section 504. If you aren't familiar with these requirements — again, get thee to a Fair Housing training that will also address the ADA and Section 504.

However, there are a few additional twists to consider that relate to Fair Housing and LIHTC properties. Item 11h on the 8609 form says “Project not available to the general public.” Chapter 12 of the Guide for Completing Form 8823 addresses this concept. Generally, the concept of a project being available to the general public means the property complies with the Fair Housing Act. This means that fair housing violations would be reported to the IRS using Item 11h on the 8823 form. (Again, get thee to a Fair Housing training!) However, there are also a couple of additional requirements for LIHTC properties to follow in order for the property to be considered available to the general public. Units would NOT be considered available to the general public if they were:

- Provided only for a member of a social organization, or provided by an employer for its employees
- Part of a hospital, nursing home, sanitarium, life care facility, retirement home providing significant services other than housing, dormitory, trailer park or intermediate care facility for the mentally and physically disabled

Note that this doesn’t mean a property can’t limit occupancy to, or have preferences for, tenants with special needs. Special-needs populations can be served as long as the special-needs tenants are members of a specified group under a federal or state program or policy that supports housing for such a specified group. The LIHTC program even allows owners to limit occupancy to or provide preferences to people who are involved in artistic or literary activities.

On the other hand, because your property can’t be part of a “hospital, nursing home...retirement home providing significant services other than housing,” etc., does this mean that your property can’t offer services? This is a topic that is beyond the scope of this article, but in general, your property may offer services as long as participation in services is not a requirement for leasing a unit. The provision of services at an LIHTC property needs to be structured carefully, so owners will want to consult with tax professionals on the best way to do this.

What about the Memorandum of Understanding (MOU) among the departments of Treasury, Housing and Urban Development (HUD), and Justice (DOJ)? How does that affect LIHTC properties? This MOU, executed back in 2000, doesn’t affect how the law applies to LIHTC properties. The MOU provides for information-sharing among these three departments. As part of being available to the general public, LIHTC properties may not commit fair housing violations and still be considered in compliance. And if fair housing violations do occur, the Housing Finance Agency should report these violations to the IRS on line 11h of the 8823 form. However,

Housing Finance Agencies are not charged with monitoring and enforcing the Fair Housing Act and wouldn't necessarily know if a violation had taken place. The agencies responsible for enforcing the Fair Housing Act are HUD and DOJ. So the MOU simply calls for HUD and DOJ to share information when they are aware of fair housing violations. The information is provided to the Housing Finance Agency, which is then able to complete the 8823 form and submit it to the IRS.

There *is* one way in which Fair Housing is a little different for LIHTC properties. But it's not in the way the law applies to LIHTC properties. It has more to do with the penalties or "incentives" to LIHTC properties to avoid fair housing violations. You already know that fair housing violations can be expensive. In addition to your time and the legal fees to defend yourself against an accusation, judgements of five or even six figures are not that unusual. That's expensive! But in addition to the monetary impact of an adverse judgement, your property could also be found out of compliance with the LIHTC program and lose tax credits. Under the MOU mentioned above, HUD and DOJ will identify low-income housing tax credit properties and submit the information to Housing Finance Agencies, for which there is:

- 1) A charge by the secretary of HUD for a violation of the act;
- 2) A probable cause finding under a substantially equivalent fair housing state law or local ordinance by a substantially equivalent state or local agency;
- 3) A lawsuit under the act filed by DOJ; or
- 4) A settlement agreement or consent decree entered into between HUD or DOJ and the owner of a low-income housing tax credit property.

Once the Housing Finance Agency receives this notification, it will issue an 8823 form to the IRS notifying the IRS of the non-compliance. So the bottom line is this: The one way in which fair housing differs for LIHTC properties is that LIHTC properties have even *more* incentive to comply with fair housing law. And if the property does receive a fair housing complaint, it has even more incentive to conciliate and remedy the issue as soon as possible in order to limit any potential credit loss.