

OPIOID USE, ADDICTION AND FAIR HOUSING

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What We Will Focus On

- Federal Law Prohibiting the use, possession.... of illegal drugs and the federal government's current position on enforcement.
- The right of subsidized housing owner/agent (O/A) to restrict illegal drug use on their properties.
 - HUD Housing Rules
 - Fair Housing/Reasonable Accommodation Considerations
 - Lease Violations/Eviction

Relevant Federal Law

- Opioids are prohibited controlled substances under the Federal Controlled Substances Act (21 U.S.C. §801 et seq.).
 - ▣ They are classified as “Schedule 1” drugs: very high potential for abuse and no accepted medical use under federal law.
 - ▣ It prohibits the manufacture, distribution, dispensation and possession of Opioids.

Obama Administration's Position

- Can't simply arrest our way out of the drug problem.
- Requires multi-dimensional approach: **Enforcement is only one piece**
 - ▣ See FACT SHEET: OPIOID ABUSE IN THE UNITED STATES, February 11, 2014

Government's Current Enforcement Position: Opioids

- See DOJ Justice News, March 10, 2014
 - ▣ Justice Department to combat the epidemic through a mix of enforcement and treatment efforts: **enforcement alone won't solve the problem.**
 - ▣ Nationwide, DOJ is supporting “more than 2,600 specialty courts that connect over 120,000 people convicted of drug-related offenses with the services they need to avoid future drug use and rejoin their communities.”

HUD's Admission Standards For HUD Multi-Family Housing



Admission standards must address and exclude:

- ❑ individuals who have engaged in specific drug-related criminal behavior, although the provider is permitted to consider specific exceptions;
- ❑ Individuals who currently engage in illegal use of a controlled substance; and
- ❑ individuals whose abuse or pattern of abuse of alcohol interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

Residents

- The model lease(s) includes language permitting the O/A to terminate the lease for drug-related activity and criminal activity.
- Housing providers have the discretion to evict or refrain from evicting a **current resident** who is currently illegally using a controlled substance or whose use or pattern of illegal use of a controlled substance is determined to interfere with the health, safety or quiet enjoyment of the premises by other residents.

Eviction: The Practical Reality

□ **Q:** If I try to evict someone for illegal drug use will the court judges rule in my favour?

A: It will be based on:

- Evidence of a lease violation
- Evidence of interference with other people's quiet enjoyment;
- If you are federally subsidized, the Court's interpretation of Federal requirements and guidance, housing policy in general and the site's policies.
 - Remember you are allowed to evict; you aren't mandated by any HUD rule to do so.
 - The 4350.3 provides guidance on factors to consider
- Whether the resident is "currently using", or is in Rehab, and if in Rehab how long, the likelihood of recidivism

Your Goal/Housing Policy

- No one is discouraging lease enforcement; make sure you know your “goal.”
- HUD Handbook 4350.3 suggests the following considerations:
 - ▣ the seriousness of the offending action;
 - ▣ the effect on the community of terminating or not terminating tenancy;
 - ▣ the extent of the tenant’s participation in the offending action; the effect of termination of tenancy on household members not involved in the offending action;
 - ▣ the demand for assisted housing by families who will adhere to lease responsibilities;
 - ▣ the extent to which the tenant has shown personal responsibility and taken all reasonable steps to prevent or mitigate the offending action; and
 - ▣ the effect of the O/A’s action on the integrity of the program.

Evicting When Someone Is Seeking Treatment of Post Treatment

- What is your goal?
 - Handbook provides factors an O/A may consider when determining whether to terminate tenancy for illegal use of drugs by a household member who is no longer engaged in such behavior.
 - These include whether the member:
 - is participating in or has successfully completed a supervised drug or alcohol rehabilitation program; or
 - has otherwise been rehabilitated successfully.
 - The Handbook provides no guidance how to approach someone who is seeking treatment but still currently using.

Reasonable Accommodation

- The Fair Housing Act, Section 504, and the ADA prohibit discrimination against persons with disabilities in public housing and other federally assisted housing.
 - ▣ Remember, the Fair Housing Act also applies to multi-unit market housing, with some exceptions.
- One type of discrimination prohibited by all three statutes is the refusal to make a reasonable accommodation in rules, policies, and practices when such accommodations are necessary to provide persons with disabilities the full opportunity to enjoy a dwelling, service, activity, or program.

Discrimination For Failure To Accommodate: What A Plaintiff Must Establish

- **The plaintiff meets the statute's definition of "disability" or "handicap."**
 - ▣ "A physical or mental impairment which substantially limits a major life activity...."
- The accommodation is necessary to afford him or her an equal opportunity to use and enjoy the dwelling (Fair Housing Act) or necessary to avoid discrimination in a public service, activity, or program (Section 504 and ADA).
- The plaintiff requests an accommodation.
 - ▣ Remember it can be oral or in writing.
- **The accommodation is reasonable.**
- The defendant refuses to provide the accommodation.

Section 504 and the ADA

(PHAs and Assisted Housing Providers)

- Current illegal drug users are excluded from the definition of “individual with a disability” when a provider acts on the basis of illegal drug use.
- ▣ Section 504 and the ADA determine whether a drug is “illegal” by looking exclusively at the Controlled Substance Act.

Section 504 and the ADA cont'd

- In Section 504 and the ADA, the exclusion of “current illegal drug users” applies to Opioid users only when O/A is acting on the basis of that current use.
- ▣ If a housing provider evicts a tenant based on their illegal drug activity violating their drug-free policy, the tenant is not “disabled” under Section 504 or the ADA, even though they may have a disability that otherwise would be classified as a disability, such as cancer or multiple sclerosis.

Fair Housing Act

(PHAs, Assisted Housing and Market)

- Unlike Section 504 and the ADA, the Fair Housing Act does not categorically exclude Opioid users from the definition of “handicap.”
- It prevents current illegal drug users from asserting that the drug use is itself the basis for claiming that he or she is disabled under the Fair Housing Act. **But**, a person who is otherwise disabled (cancer, multiple sclerosis, etc.) is not disqualified from the definition of “handicap” merely because the person is also an opioid user.
- **Therefore, under the Fair Housing Act, the analysis turns on whether accommodating such use is reasonable.**

Denial of A Reasonable Accommodation

- An accommodation may be denied as not reasonable if granting the accommodation would:
 - ▣ Require a fundamental alteration in the nature of the housing provider's operations; *or*
 - ▣ Pose an undue financial and administrative burden on the housing provider.

Fundamental Change

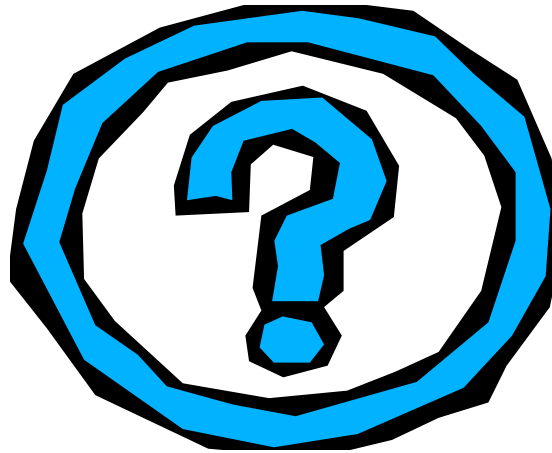
- Accommodations that allow the use of Opioids would sanction violations of federal criminal law and thus constitute a fundamental alteration in the nature of the housing operation.
- Also notes that although O/A is “not charged with enforcing federal criminal laws, requiring them to condone violation of those laws would undermine an O/A’s operations.”
 - ▣ The same argument applies to any housing provider, regardless of receipt of federal dollars.

Residents In Treatment

- Individuals who have a “history” of illegal drug use (which includes people who are currently in a rehab or have otherwise been rehabbed) are protected by civil rights laws.
- This relates to eviction while in treatment or post treatment.
 - ▣ Remember, you can hold people responsible for the illegal drug activity, but remember what’s your goal, and the factors to consider.

Summary: Assisted Housing Providers

- Must deny admission to applicant households with persons, at the time of consideration for admission, illegally using Opioids
- May not grant reasonable accommodations that would allow tenants to **illegally** use Opioids (this doesn't include anyone who is in a rehab program and legally using a controlled substance).
- In re to current residents, you have statutorily-authorized discretion with respect to evicting or refraining from evicting residents on account of their use of Opioids.
 - If you decide to allow a current resident using Opioids to remain an occupant, you must do so as an exercise of your discretion, recognizing the conflict with the Controlled Substance Act, not as a reasonable accommodation.
 - See HUD Memo on Reasonable Accommodation and Medical Marijuana Use in Federal Public and Assisted Housing for guidance on illegal drug use.



QUESTIONS ???

