

ALERT

April 2020

Housing Discrimination & COVID-19

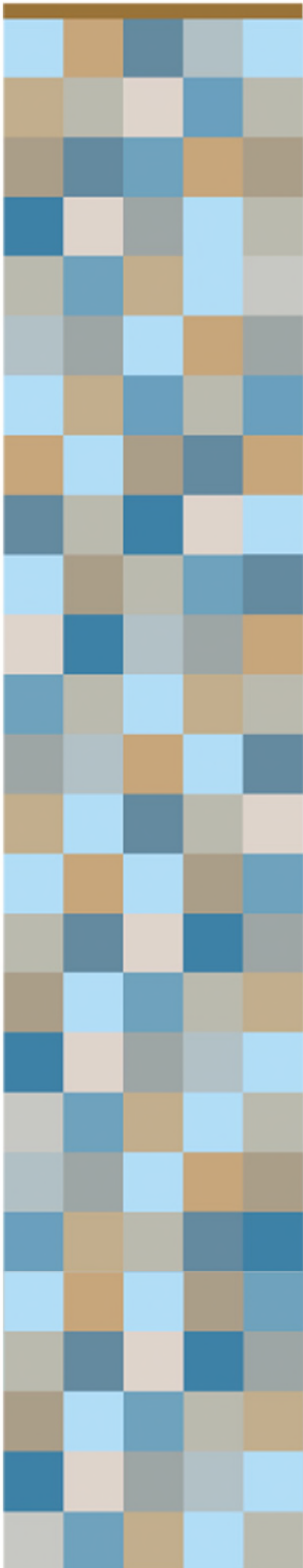
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Robert L. Schonfeld, Seth P. Stein & Peter B. Zlotnick**

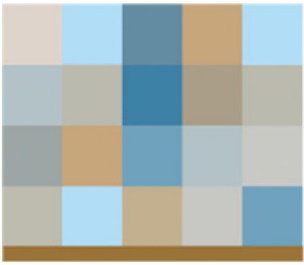
Over the next few months, landlords, real estate brokers, condominiums, and co-operatives (referred to as “housing providers” in this Alert) will likely face many issues and questions concerning their rights with respect to individuals directly or indirectly affected by Covid-19. We expect that, given the current landscape, state and federal courts will entertain emergency applications by tenants and residents based upon claims of Covid-19-related discrimination.

Currently, there are no known reported decisions addressing housing discrimination on the basis of Covid-19. Our review of existing anti-discrimination statutes, regulations and case law, including the Federal Fair Housing Act and the Federal regulations promulgated pursuant to that law, the Americans with Disabilities Act (which applies to government operated housing), the New York State Executive Law, and the New York City Administrative Code leads us to the following conclusions and assumptions. Further, many counties in New York State, such as Nassau County and Suffolk County, have their own anti-discrimination laws, and there is nothing precluding any government entity from amending its laws and regulations to more explicitly cover housing issues relating to Covid-19.

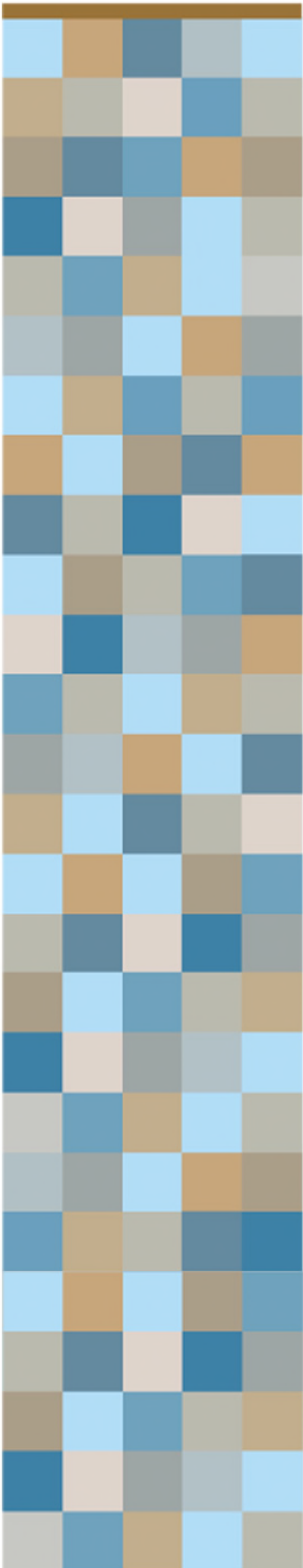
Using a “question and answer format,” this Alert draws on the existing laws and MHH’s experience to address some of the discrimination and Covid-19 related issues that housing providers may encounter in the near term, and covers several aspects of housing, including rental applications, condominiums and cooperative applications, evictions (when evictions are permitted again), and the terms and conditions of housing use.

There are two general principles that apply to all of these issues. They are (a) the anti-discrimination laws do not stop a housing provider from protecting the safety of its residents and staff and (b) any exclusions or rules must be based on evidence and not stereotypes or assumptions or conclusions without an evidentiary basis. A housing provider should also be aware that if it is found to be in violation of the anti-discrimination laws, it may be liable for the victorious party’s attorney’s fees.





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Although this can change, we assume that the courts, which are generally closed, will entertain emergency applications based upon Covid-19.

Q. Can a housing provider exclude a physician, nurse, health care aide, police officer, firefighter, first responder, or grocery employee from housing because of a fear that they might be more likely than others to have Covid-19?

A. With the exception of the New York State and New York City laws prohibiting discrimination against persons in the military, housing discrimination based on occupation is not prohibited. However, an argument can be made under a Federal regulation that since these people are associated with people with disabilities (assuming that someone with Covid-19 is a person with a “disability” under the anti-discrimination laws), and an exclusion would be based on such association, that exclusion would violate that Federal regulation. Additionally, it is possible that municipalities may amend their laws to prohibit discrimination against certain occupations.

Q. What about the case in the New York Times where a co-operative board refused to permit a tenant to allow his brother--an out-of-state physician who wanted to help Covid-19 patients in New York City--to live in the tenant’s apartment?

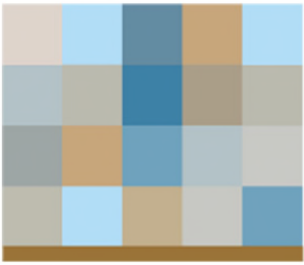
A. A co-operative or condominium’s “occupancy” or “guest” rules would still be applicable and would not be discriminatory if applied in such a case if they are applied equally to everyone.

However, if the housing provider generally does not apply such rules, application in this circumstance may be deemed discriminatory, assuming again that people with Covid-19 are people with a “disability” covered under the anti-discrimination laws. In any event, a court may deem enforcement of such a co-operative rule to be against public policy under the circumstances and not enforce such rule.

Q. Is Covid-19 a “disability” covered under the anti-discrimination laws?

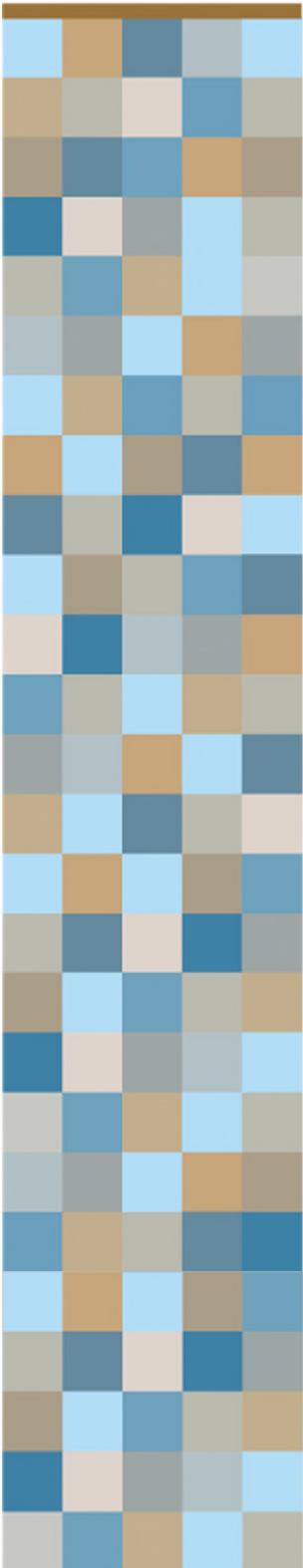
A. This is a more difficult question. The various anti-discrimination laws have different definitions of “disability.” In general, the laws would require proof that a person with Covid-19 has a major life activity that is significantly impacted by the virus. If such evidence is presented, the person would be deemed to be a person with a “disability” covered by the anti-discrimination laws.

At the moment, people with Covid-19 can principally be placed into three categories: (a) people who currently have Covid-19 and that the virus significantly impacts a major life activity, (b) people who have recovered from Covid-19 and have no recurring issues thereafter and (c) people who have had Covid-19 and suffer from



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some psychiatric or psychological trauma their recovery and that trauma significantly impacts a major life activity.

Most likely, people in the first and third categories would be deemed persons with a “disability” covered by the anti-discrimination laws. As for the middle category, if such a person is regarded by a housing provider as a person with a “disability,” that person may also be deemed to be covered by the Federal Fair Housing Act. Those cases will be considered by courts on a case-by-case basis.

Q. Can a housing provider require someone who tests positive for Covid-19 to report their condition to the housing provider and quarantine themselves from the other residents and staff?

A. Likely yes. Again, regardless of whether or not Covid-19 is considered to be a “disability” under the anti-discrimination laws, the anti-discrimination laws do not require a building to permit a dangerous condition. More than likely, such a reporting requirement and quarantine would be permissible.

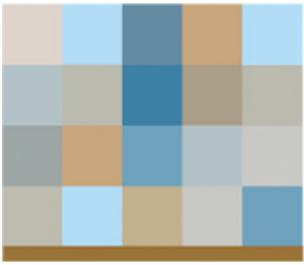
Q. Can a housing provider close various common areas to everyone because of Covid-19, such as an exercise room or a lounge?

A. Likely yes. Again, regardless of whether or not Covid-19 is considered to be a “disability” under the anti-discrimination laws, the anti-discrimination laws do not require a building to permit a dangerous condition. More than likely, such a closure would be permitted.

While Governor Cuomo’s executive order closing gyms and fitness centers does not specifically apply to private building facilities, a housing provider would be prudent to assume that the order does apply.

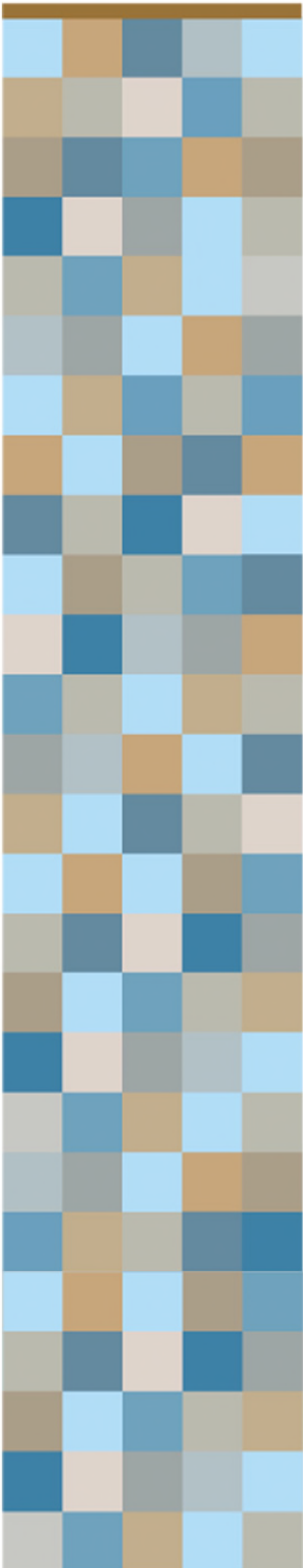
Q. After recoveries from Covid-19, can a housing provider exclude a person from various common areas, such as an exercise room or a lounge, or require such person to use a different staircase or entrance or exit?

A. If a housing provider excludes someone who has recovered from Covid-19 from certain areas of the building, the housing provider, in effect, is regarding that person as a person with a “disability.” Therefore, such exclusion may be a violation of the Federal Fair Housing Act, although each case will be considered by courts on a case-by-case basis. This is especially true for some portion of a building that is connected to another disability, such as a ramp or a lift. Even if someone has recovered from Covid-19, such a person still has a right to a reasonable accommodation for another disability and therefore cannot be deprived of that right because of having had Covid-19.



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Q. What about deliveries and visitors to a building, can a housing provider prevent outsiders from coming into the building? Similarly, can a building prohibit move-ins or move-outs during the crisis?

A. Generally, yes. In general, assuming such a rule applies to everyone, there is nothing discriminatory about limiting deliveries and visitors to a building, or prohibiting move-ins or move-outs during the crisis. However, if a resident needs a delivery or a visitor because of a disability (including a resident who has or had Covid-19 and is deemed to be “disabled” under the anti-discrimination laws), the housing provider must make a reasonable accommodation to allow such delivery or visitor to the resident.

Q. There have been an increase in dog adoptions from shelters, and, on the other hand, people may have to move because of their changed physical or financial conditions. Many buildings have “no dog” rules. Does Covid-19 change any of those rules?

A. Probably not. If someone can demonstrate a sufficient medical need to have a dog, a housing provider must make a reasonable accommodation to allow any person with a disability including Covid-19 to have a dog.

Q. If someone who has Covid-19 is deemed to be a person with a disability under the anti-discrimination laws, do the anti-discrimination laws apply to that person’s partner or medical professionals visiting that person?

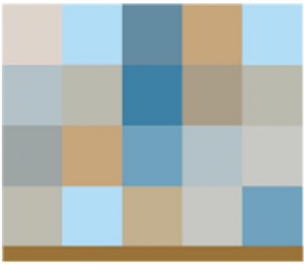
A. Yes. The anti-discrimination laws apply to both persons with disabilities as well as persons associated with them, such as a spouse or an aide or a medical professional. Those persons cannot be excluded from being with a person with a disability.

Q. Can a housing provider require everyone to wear masks while on the premises of the building or its grounds?

A. As long as that rule applies to everyone, it would not be discriminatory.

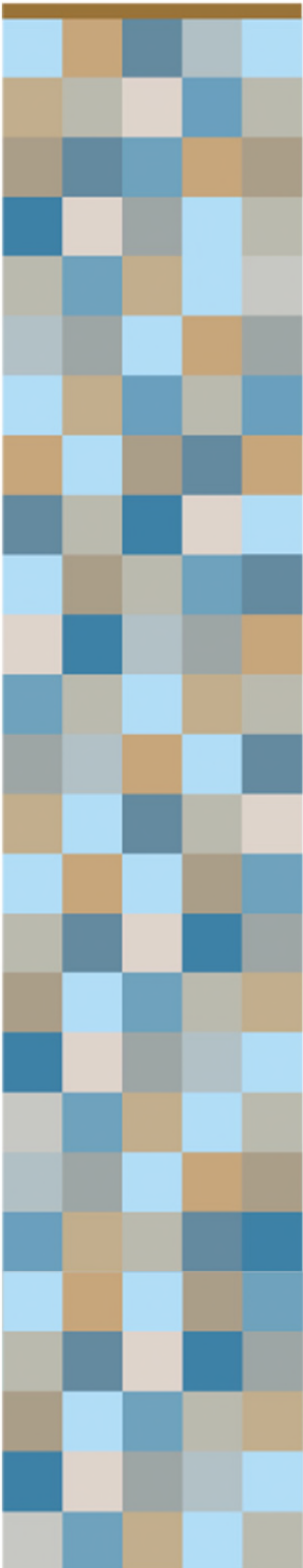
Q. Can a housing provider ask an applicant whether the applicant has or has had Covid-19?

A. Very difficult question. For safety reasons, a housing provider will likely be permitted to ask applicants if they currently have Covid-19, assuming it asks that question of all applicants. Questioning whether someone has had Covid-19 and has recovered may run afoul of the anti-discrimination laws even if it is asked of all applicants.



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Q. If a resident tests positive for Covid-19, may a housing provider disclose the identity of that resident to the other residents or staff in the building?

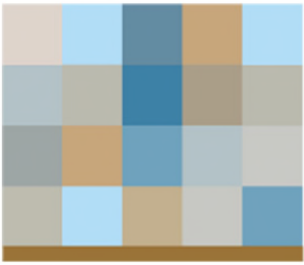
A. Unless a housing provider has obtained written consent from the resident who may have the virus, a housing provider who learns or has reason to believe that a resident has contracted or tested positive for the Covid-19 virus (or is even exhibiting symptoms), should take active measures to protect the privacy of the resident and should not disclose his or her name publicly. Notwithstanding the need to guard individual privacy, a housing provider may take general precautionary measures to protect the safety and well-being of other residents and staff in the building. In particular, the housing provider should keep the name and identity of the potentially infected individual private until a written consent to disclose that information can be obtained. *The housing provider should consult with counsel* concerning the nature and substance of the written consent form, but generally, the form should include language authorizing the housing provider to release information about the infected individual to other residents and staff at the building.

Upon obtaining the resident's written consent to disclose specific information about his or her infectious status, the housing provider should then provide clear directions to staff and residents when interaction with the suspected individual is unavoidable. For instance, under the foregoing circumstances, the housing provider may devise rules or procedures concerning how to interact with a person suspected of having the virus, including how to enter or exit rooms in which the suspected individual is located, how deliveries should be conducted to the presumptively infected person's apartment, and how individuals (especially those who believe they may be infected) should sanitize rooms that they occupy or what kind of protective equipment they should wear. When in doubt, housing providers should refer residents and staff to the recommended rules, procedures, or protocols that have been enacted by the CDC and/or pursuant to the New York City Department of Health Coronavirus Disease General Disinfection Guidance for Commercial or Residential Buildings dated April 4, 2020. [View Guide Here](#) If any questions still exist, *housing providers should consult with counsel* concerning the rights of privacy of individuals who contract the virus and work at or reside within their buildings and what rules or procedures they may implement to protect the rights and welfare of everyone in the building.

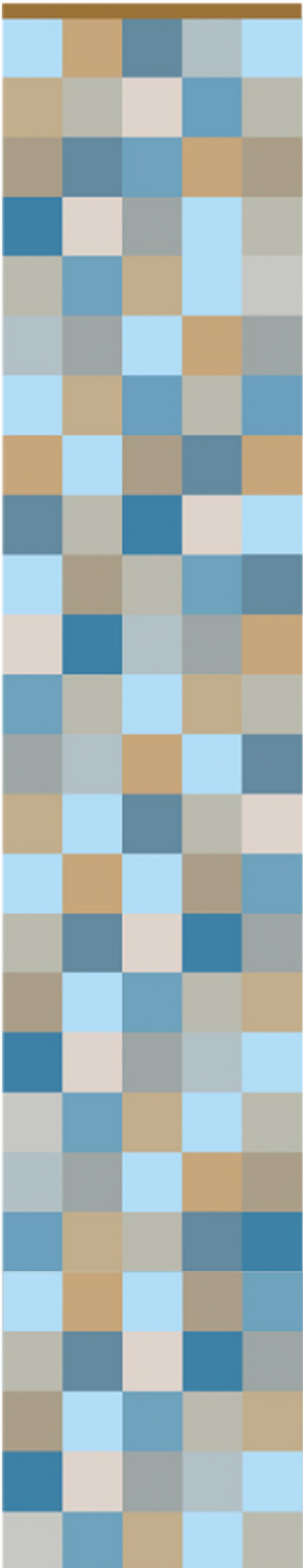
None of the above will likely be considered to be discriminatory by a court.

Q. What about boards of housing authorities. Can they still meet while restrictions are in place for social gatherings?

A. Boards in New York are not required to meet in person, but they can still meet. Section 708(c) of the Business Corporation Law generally allows Boards to meet by conference call or similar means of communication, provided that all participants in



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the meeting can hear each other at the same time. There would be nothing discriminatory if a Board meets remotely.

Q. When the housing courts permit evictions again, can someone be evicted for having had Covid-19?

A. If someone with Covid-19 has violated a material rule of the housing provider (failure to notify or quarantine, using common areas inappropriately), there is little question that an eviction may be allowed when the courts are fully operational. If someone who has Covid-19 or has recovered from Covid-19 has followed appropriate rules, an eviction proceeding against those persons will likely be barred by the anti-discrimination laws.

Q. What about someone with Covid-19 who violates material rules of the building prior to the full operation of the courts? Can that person be evicted now?

A. If someone with Covid-19 deliberately attempts to affect portions of a building before the courts are fully operational, a housing provider may resort to calling the police. It is not clear that courts will entertain matters that a marshal or sheriff would be available to enforce an eviction order in any event.

Q. Can persons who have recovered from Covid-19 be segregated into a particular area of a housing provider?

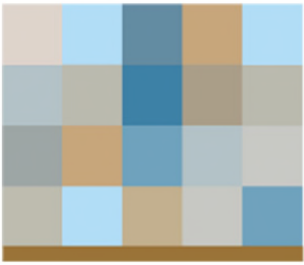
A. Probably not, if they are regarded by the housing provider as a “person with a disability.” That would be no different from segregation by race, religion, or national origin which is clearly prohibited by the anti-discrimination laws.

Q. It is presumed that Covid-19 originated in China. Does that give a housing provider the right to refuse to rent an apartment to or approve a condo or co-operative application for someone of Asian heritage?

A. Absolutely not. Discrimination on the basis of national origin is totally prohibited by all existing anti-discrimination laws. This does not mean, however, that a housing provider cannot exclude a person of Asian heritage who is a danger to others, but a housing provider may not exclude individuals solely on the basis of their Asian heritage or descent.

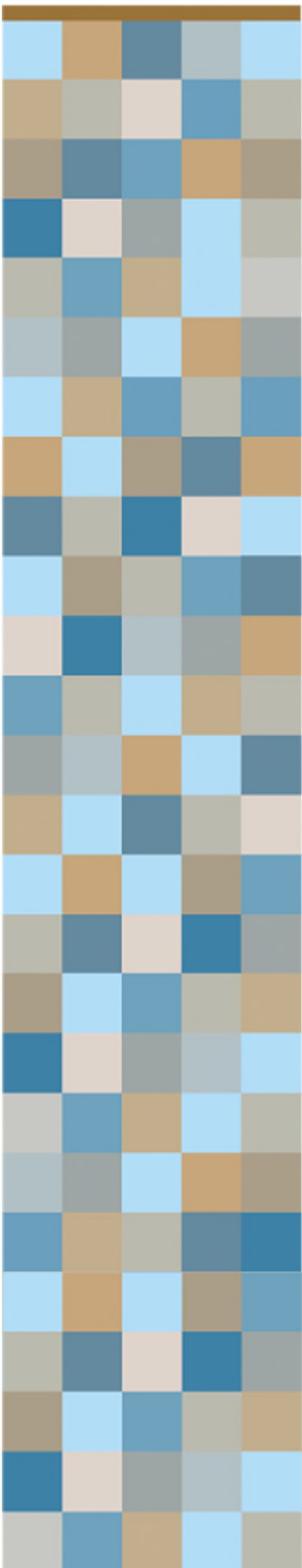
Q. A housing provider maintains that it has no animus towards people from Asia or of Asian descent, but that the residents have asked it to ban Asians. Is that a defense?

A. Absolutely not, a housing provider can be held liable for responding to the prejudices of its residents. Moreover, if a housing provider is aware that a resident or staff member is harassing a person of Asian heritage and does nothing, the housing provider may also be liable for its inaction.



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Q. As New York City has more Covid-19 cases than any other region, can a landlord refuse to rent to someone from New York City?

A. Even assuming that Covid-19 is a disability covered by the anti-discrimination laws, it is not clear that discrimination based on a vast geographic area like New York City would violate the anti-discrimination laws. “National origin” discrimination would not apply to a city like New York City, and because New York City has many racial, ethnic and religious groups, it is not clear that a “disparate impact” argument based on a policy’s disproportionate impact on a particular race, religion, or national origin would work in a case where New York City residents are excluded. However, as there are many ethnic groups that are highly concentrated in particular boroughs of New York City (often Queens), and nowhere else in the region, it is possible that a “disparate impact” argument might succeed with such a group.

Q. What about a resident from a neighborhood that is primarily associated with a particular religious group such as Borough Park in Brooklyn (Orthodox and Ultra Orthodox Jews) and has a disproportionate number of Covid-19 cases. Can a landlord have a policy refusing to rent from anyone from Borough Park?

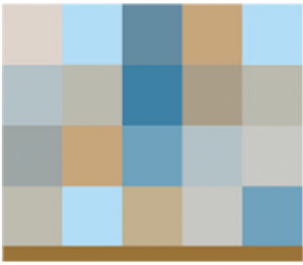
A. This is a tougher case than excluding people from New York City. Excluding people merely because they come from Borough Park would have a disproportionate impact on Jewish people—and more specifically Orthodox and Ultra Orthodox Jewish (Hasidic) communities and thus may be discriminatory. Even if the landlord rents to individuals of Jewish heritage who come from other neighborhoods, excluding all people from Borough Park would likely be deemed discriminatory because it would have a disparate impact on people because of their religion.

Q. There is some evidence that Covid-19 is disproportionately affecting African-Americans. Can that be used as a ground to exclude African-Americans from housing?

A. Assuming there is sufficient evidence to establish this conclusion, excluding a person merely because of membership in a group that has been disproportionately affected by Covid-19 would likely be considered disparate impact discrimination in violation of the anti-discrimination laws.

Q. Can a housing provider exclude someone because their source of income is unemployment checks?

A. New York State and New York City law prohibit “source of income” discrimination, so housing providers cannot exclude someone solely because that person’s income comes from unemployment checks. Housing providers can still require employment references and income checks and can decline an application



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based on insufficient income. But they cannot exclude an applicant based on their source of income.

One should realize that just as the current situation is fluid, the laws may change in response to anticipated issues. Nonetheless, these are the best answers under the present circumstances. Counsel should be consulted when confronting these issues as a "Best Practice" under the current circumstances.

We remain open and fully operational to assist you with these complex issues and your other legal needs during these unprecedented times. We can be reached at the following.

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