Fair Housing

2nd Edition

First 15 pages only.

3 D.R.E. Approved Credit Hours
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Publisher

45HoursOnline
4228 Lobos Road
Woodland Hills, CA  91364
(818) 716-1028 Voice
(213) 477-2095 Fax
45HoursOnline@pobox.com
www.45HoursOnline.com

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PREFACE:

This is the textbook for our course, *Fair Housing, 2nd Edition*. It is one of the five, three-hour courses required by the California Department of Real Estate (DRE) for licensees renewing their license for the first time:

1. **Ethics:** Describes the real estate license law enforced by the DRE and the *Code of Ethics and Professional Conduct* as practiced by members of the National Association of REALTORS®

2. **Agency:** Explains the common law of agency as applied to California real estate brokerage.

3. **Trust Funds:** Details the fiduciary responsibilities of brokers when acting as escrows for their clients' real estate transactions.

4. **Fair Housing:** Describes the federal and California fair housing and lending laws.

5. **Risk Management:** Provides licensees with the knowledge needed to avoid costly disputes with their clients arising from professional errors and omissions in the performance of their duties.

The DRE requires each licensee to take the Five Mandatory Courses before renewing their licenses for the **first time**. When renewing for the **first time**, salespersons who received their original (i.e., first) license between October 1st, 2001 and September 30th, 2007 need only these five courses to fulfill their entire continuing education requirement while all other licensees renewing for the **first time** (brokers, corporations, officers, and salespersons who were awarded their first license on or after October 1st, 2007) need these five courses and an additional 30 hours of CE. Any licensee renewing **after the first time**, may take any or all of the Five Mandatory Courses again and receive full credit towards their 45-hour CE requirement.

To save space and make the text more readable, we use the following abbreviations and terms:

- **BPC** The *Business and Professional Code* of California.
- **CC** The *Civil Code* of California

You can find the complete California codes at [www.leginfo.ca.gov/calaw.html](http://www.leginfo.ca.gov/calaw.html). Unless otherwise stated, all cases are California cases. In citing cases, we specify only the names of the litigants and the year of the decision.

The forms cited in this course are from the California Association of REALTORS®. We are aware that not all brokerage firms use these forms but we believe they are representative of the forms used in the industry.

We also follow a few typographic conventions.

We use margin notes to provide definitions and short footnotes. We use the symbol ☢ to direct your attention to an adjacent margin note.

**Side bars like this one are used for long notes. Content in the margin notes, side bars, and in the appendices is not tested in the final exam.**
First 15 pages only.
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1 INTRODUCTION

Federal and state laws prohibit discrimination in the sale, rental, and financing of real estate when based on legally-prohibited considerations called "protected classes". The laws which prohibit discrimination are called the "fair housing and lending laws".

Also covered in this course are the laws which provide the disabled with access to public accommodations and facilities. The disability laws are relevant to licensees who run brokerages or manage commercial properties; whereas the fair housing and lending laws are relevant to all practicing residential brokers and salespersons.

1.1 OVERVIEW

The remainder of this section summarizes the laws covered in this course, defines the “protected classes”, and describes the relationship between federal and state law.

Section 2 describes the fair housing and the disability laws.

Section 3 describes both federal and state fair lending laws.

Section 4 describes actions you may take to assure compliance with the fair housing laws.

1.2 TERMINOLOGY

When we do not qualify the term “discrimination”, we mean “discrimination on a prohibited basis”; that is any action taken for or against an individual based on the individual’s “protected class”.

For example, consider the protected class of religion. If you define a religion as a set of beliefs and practices concerning a “higher power”; then there are enumerable ways in which individuals can be categorized based on religion. The best known way is to categorize individuals based on the book they regard as holy: Christians, the Old and New Testaments; Jews, the Pentateuch; Mormons, The Book of Mormon; and so on.

You could also categorize individuals by their belief in God: theists, agnostics, and atheists. You could categorize people based on their conception of God; monotheists, polytheists, animists, deists. You could categorize people according to whether they believed or disbelieved in astrology, reincarnation, angels, alien visitations, and so on.

Of course it is illegal to discriminate in real property transactions against Muslims, but it is also just as illegal to show a preference for Muslims, or even to make any reference to Islam or Muslims in advertising. It is also illegal to discriminate against or show a preference for atheists, witches,
numerologists, or psychics. All groups which can be categorized based on religion are legally protected from discrimination in housing and lending.

The term “protected class” has several variants used both in the laws and the literature about the laws, all of which are equivalent; these include “protected classifications”, “protected categories”, “protected groups”, and the term, “discrimination on a prohibited basis”.

We refer to two sets of protected classes: one federal, the other state. There are seven federally protected classes (race, color, religion, sex, national origin, familial status, and disability) and five additional state protected classes (sexual orientation, marital status, ancestry, source of income, and age). Rather than enumerate the protected classes each time we need to refer to them, we choose to refer to them as “federally protected classes” and “State protected classes”.

### 1.3 Laws

The fair housing law is comprised of federal/state/local statutes; regulations, and case law. In this course, we cover only the federal and state fair housing laws. Depending on where you sell real estate, however, the fair housing law may include municipal statutes that expand the State fair housing laws to include additional protected classes. For example, in the County of San Francisco, municipal statutes append to the State protected classes those of gender identity, weight, height, and place of birth (i.e., United States birth). The laws covered in this course are summarized below:

<table>
<thead>
<tr>
<th>Federal Law</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1866</strong> Civil Rights Act of 1866 42 USC §1982</td>
<td>All citizens regardless of race have equal property rights. Commonly regarded as the original fair housing law. It prohibits discrimination based on race.</td>
</tr>
<tr>
<td><strong>1968</strong> Fair Housing Act (FHA) 42 USC §3601 et seq</td>
<td>Discrimination in housing and lending is prohibited. The most important fair housing law. Includes three statutes 1) Title VI of the Civil Rights Act, 1968, 2) Fair Housing Amendments Act, 1988, 3) Housing for Older Persons Act of 1995</td>
</tr>
<tr>
<td><strong>1975</strong> Equal Credit Opportunity Act 15 USC §1691 et seq</td>
<td>Financial institutions may not discriminate in lending. An important law for mortgage brokers and other licensees when acting as “arrangers of credit”.</td>
</tr>
<tr>
<td><strong>1975</strong> Home Mortgage Disclosure Act 12 USC §2861 et seq</td>
<td>Residential lenders licensed by the state must report the outcome of each loan application by protected class.</td>
</tr>
<tr>
<td><strong>1990</strong> Americans with Disabilities Act (ADA) 42 USC §12101-12213</td>
<td>Title I: Employers may not discriminate against the disabled. Title III: Public accommodations must be accessible to the disabled. Applies to any business or reception area open to the public.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>State Law</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1959</strong> Unruh Civil Rights Act CC §51–51.3</td>
<td>Businesses may not discriminate. Provides protections for the disabled. Incorporates by reference the ADA. This law and the next two have been certified by HUD as “substantially equivalent” to the FHA.</td>
</tr>
<tr>
<td><strong>1963</strong> Fair Employment &amp; Housing Act Government §12900-12906</td>
<td>Real estate licensees may not discriminate. This is California’s primary fair housing law. The most relevant portion is §12955-12956.1 (“Housing Discrimination”) aka, the “Rumford Act”</td>
</tr>
<tr>
<td>Disabled Persons Act</td>
<td>It is almost entirely redundant with disability protections in the Unruh Civil Rights Act and, like that act, incorporates by reference the ADA. This law is similar to the ADA.</td>
</tr>
<tr>
<td>---------------------</td>
<td>--------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>CC §54-55.1</td>
<td>This article details thirty discriminatory activities that if performed by a licensee may lead to the suspension or revocation of his license.</td>
</tr>
<tr>
<td>Commissioner’s Article 10: “Discrimination and Panic Selling”</td>
<td>Prohibits discriminatory practices by financial institutions, especially redlining. Very similar to the federal Equal Credit Opportunity Act.</td>
</tr>
<tr>
<td>CFR §2780</td>
<td></td>
</tr>
<tr>
<td>1977</td>
<td></td>
</tr>
<tr>
<td>Housing Financial Discrimination Act (Holden Act)</td>
<td></td>
</tr>
<tr>
<td>Health &amp; Safety §35800-35803</td>
<td></td>
</tr>
</tbody>
</table>

### 1.4 PROTECTED CLASSES

**Discrimination:** Treatment or consideration based on class or category rather than individual merit.

Federal law recognizes seven protected classes; state law, twelve. The **federally protected classes** are race, color, religion, sex, national origin, familial status, and disability. The **State protected classes** include the seven federally protected classes with five additional classes: sexual orientation, marital status, ancestry, source of income, and age.

A “non-protected” class does not refer to a non-minority such as a white/male. White/males belong to two protected classes: race and sex. A “non-protected” class is a classification of people not in any federal or state protected class. Examples of non-protected classes are “trumpet players”, “cigar smokers”, and “people with poor credit”.

The federal fair housing laws define only seven protected classes. These classes and remarks about their legal definitions follow:

**Gender/Sex:** These terms are synonymous. “Sex” is the term used in federal fair housing law; “gender” in the California law. Sexual harassment is considered a form of gender discrimination.

**Familial Status:** Families with children including fetuses.

The Fair Housing Act (FHA), with some exceptions, prohibits discrimination in housing against families with children under 18. In addition to prohibiting an outright denial of housing to families with children, the Act also prevents housing providers from imposing any special requirements or conditions on tenants with custody of children. For example, landlords may not locate families with children in any single portion of a complex, place an unreasonable restriction on the total number of persons who may reside in a dwelling, or limit their access to recreational services.

**Disability:** This protected class, called “handicap” in federal law, is the most complicated protected class.

As defined by federal law, a handicap is a physical or mental impairment which substantially (California law omits “substantially”) limits one or more of a person’s major life activities, or a record of having such an impairment, or one regarded as having such an impairment. Excepted from this definition are those disabled by illegal drugs or as a result of any other illicit activity.
The California definition is stricter than the federal definition referring to any physical and mental impairments that are “disabling, potentially disabling, or mistakenly perceived as disabling or potentially disabling” (Government §12926). The California definition also includes “medical condition”.

The term mental or physical impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness. The term major life activity may include seeing, hearing, walking, breathing, performing manual tasks, self-care, learning, speaking, or working. The FHA also protects persons who have a record of having an impairment (e.g., recovering alcoholics), or are regarded as having such an impairment.

National Origin/Ancestry: California law enumerates “national origin” and “ancestry” as separate protected classes while federal law refers only to “national origin”. But the Department of Justice defines national origin to include “either the country of an individual’s birth [national origin] or where his or her ancestors originated [ancestry]”. Therefore the federal term, “national origin” includes the California classes of national origin and ancestry.

Age: Age is not a federally protected class but is a State protected class except for legally designated senior communities (CC §51.2) (more later).

Source of Income: When State legislators included this class they had in mind individuals receiving federal or state relief such as AFDC or SSI. This class is now considered to include any lawful source of income or even a mysterious but verifiable source of income.

Illegal Immigrants

Effective January 2008, immigrants and foreign citizens acquired limited protections against housing discrimination. Specifically landlords may not discriminate based on either immigration or citizenship status. Landlords are prohibited from making any inquiry into immigration or citizenship status or requiring any prospective tenant to make a statement about immigration or citizenship status.

The new law permits landlords to request social security numbers and other documentation needed to verify credit worthiness.

Liability Realities

Although it is illegal to discriminate for or against any group based on the protected classes (e.g., atheists based on religion, abortionists based on source-of-income, alcoholics based on disability); the vast majority of fair housing complaints are based on just two protected classes. According to a HUD news release dated April 3, 2007:

For the second year in a row, race and disability were virtually tied as the most common bases of housing discrimination reported to HUD and state and local government agencies funded through its Fair Housing Assistance Program. Of the more than 10,000

AB 976, the bill which created these protections, was signed October 10, 2007. The law (CC §1940.3) also prohibits any California city and/or county from requiring landlords to make such inquiries or to provide or report information about the immigration or citizenship status of their tenants.
complaints filed, 40 percent alleged racial discrimination while nearly the same percentage alleged discrimination against persons with disabilities.

1.5 FEDERAL VS. STATE LAW

For the most part, federal fair housing laws are a subset of State fair housing laws; in-other-words, State law is more restrictive than federal law. For example, as has already been pointed out, State law has twelve protected classes while federal law has just seven. Then why, may you ask, do we need to know both sets of laws? There are two reasons.

First, because violators of both federal and State fair housing laws can be sanctioned by either federal or State authorities, victims may sue violators in either a federal or State court, and both federal and State regulators can compel you to adhere to their mandates.

Second, under the judicial doctrine of “preemption”, federal legislation trumps state legislation of the same subject matter. This means that where federal and State fair housing laws conflict, federal law takes precedence. Fortunately, these two bodies of law do not conflict in any important way.

Since federal fair housing violations are de facto state fair housing violations with comparable enforcement procedures and remedies, HUD subsidizes the California Department of Fair Employment and Housing (DFEH) to enforce its fair housing laws. Consequently, it is rare that HUD adjudicates the federal laws in California.

An important, albeit rare exception, are “pattern and practice” cases filed by HUD and prosecuted by the Department of Justice. These cases involve major investigations against prominent offenders and are often prosecuted to set a legal precedent.

In this course, we discuss the federal fair housing laws in detail. Only those aspects of the State laws which augment the federal laws are described.

2 FAIR HOUSING

This chapter describes the federal and state fair housing laws in detail. It is organized into four sections.

This section gives an overview of the fair housing laws. It defines “fair housing”, details impediments to fair housing, and describes the agencies which enforce the fair housing laws.

The second section describes the three major federal fair housing laws: 1) the Civil Rights Act of 1866, and 2) the Fair Housing Act (FHA), and 3) The American with Disabilities Act (ADA).

The third and last section describes the major state fair housing laws:

- Unruh Civil Rights Act
2.1 Enforcement Agencies

At the state level, there is one agency charged with enforcing the fair housing laws, the Department of Employment and Fair Housing (DFEH). At the federal level, there are two agencies: 1) HUD's Office of Fair Housing and Equal Opportunity and 2) the Department of Justice (DOJ).

The DOJ plays a small but important role in the enforcement of the federal fair housing laws. Its primary role is to conduct investigations using testers to seek evidence of fair housing violations for subsequent prosecution.

In California, HUD has delegated its enforcement of the fair housing laws to the DFEH (California's fair housing laws are substantially equivalent to the federal fair housing laws).

DFEH's mandate is to protect the people of California from discrimination in employment, housing and public accommodations pursuant to the California Fair Employment and Housing Act, the Unruh Civil Rights Act, and the Ralph Civil Rights Act (which concerns victims of hate crimes).

DFEH has jurisdiction over both private and public entities operating within the State, including corporations and private sector contracts granted by the State and all State departments and local governments.

DFEH receives and investigates discrimination complaints in its fifteen district offices throughout the State. Eleven offices handle employment, public accommodations, and hate violence cases and two offices handle housing cases. In addition, there are two legal offices which litigate cases and provide legal support to the district offices.

The California Supreme Court affirmed that DFEH hearing officers, although not part of the legal system, have the right to award monetary damages for emotional distress (Konig v. FEHC, 2002).

2.2 Forms of Discrimination

With important exceptions to be presented later, the fair housing laws compel you to be blind to your client's protected attributes. These laws require that you not discriminate positively or negatively, directly or indirectly, overtly or covertly, individually or systematically – not in anyway on the basis of any protected attribute.
2.2.1 TRADITIONAL CONCEPT OF NEIGHBORHOOD

The discriminatory practices of the real estate industry before 1970 were institutional. These practices stemmed from a traditional concept of neighborhood; that is, the belief that the ideal neighborhood was culturally homogenous and, inasmuch, its members shared the same ancestry, religion, history, and value system.

In support of buyers, real estate and lending professionals, in cooperation with government, worked together to keep neighborhoods ethnically homogenous. This led to the discriminatory practices discussed in this section: steering, racial zoning, redlining, and restrictive covenants. From the perspective of the real estate industry at that time, these discriminatory practices were good because they increased home values.

2.2.2 OVERT DISCRIMINATION

The overt discriminatory acts of racial zoning, discriminatory covenants, and blockbusting discussed in the following sub-sections are illegal and, today, rare. Generations ago, their use was commonplace and to a large extent these overt forms of discriminatory acts account for the patterns of de facto segregation which still exist today.

2.2.2.1 RACIAL ZONING

Racial zoning was used to separate the races through the turn of the century and well into the 1900’s. The following 1912 Virginia statute was typical for the time:

> The map so prepared and certified and corrected shall be prima facie evidence of the boundaries and racial designation of such districts.... Nothing contained herein shall preclude persons of either race employed as servants by person of the other race from residing upon the premises of which said employer is the owner or occupier.

Racial zoning laws were declared unconstitutional in 1917 (Buchanan v. Warley) when the U.S. Supreme Court decided these laws interfered with the rights of owners to dispose of their property to whomever they pleased.

After the 1917 decision, other means of perpetuating racial zoning were found. Real estate boards and commissions adopted policies, some written but most un-written, of refusing to rent or sell to non-Christians in Christian neighborhoods or to non-Caucasians in Caucasian neighborhoods. Here, is an example of a written discriminatory policy from the 1948 Code of Ethics of the Real Estate Board of Washington, D.C.:

> No property in a white section should ever be sold, rented, advertised, or offered to colored people.

Examples of unwritten discriminatory policies designed to continue racial zoning, include zoning techniques which, without mentioning race, were
designed to reinforce the separate racial patterns. Most prevalent among these was the use of higher density zoning (e.g., multi-family) within areas formerly designated as “Negro”, and the use of very low density and otherwise restrictive zoning where blacks were not wanted (exclusionary zoning). These discriminatory policies, made illegal decades ago, established segregated neighborhoods that largely exist today.

2.2.2.2 DISCRIMINATORY RESTRICTIVE COVENANTS

Restrictive covenants, which were private, court-enforceable discriminatory conditions included in housing titles, were very effective in depriving minorities of free choice in housing. The FHA and VA required participating lending institutions, builders, and real estate brokers to maintain segregated housing patterns. The FHA furnished builders with a model restrictive covenant with space left blank for the builder to fill in the prohibited races and religions.

Here is a typical racially restrictive covenant from a 1925 abstract of title for a home in Lake County, Illinois (http://www.public.asu.edu/~wplotkin/DeedsWeb/)

That said premises shall not at any time hereafter be sold, leased, or transferred to any colored person or persons or to any person or persons of the Ethiopian or Semitic Race or to any descendant of either of said races and said premises shall not be used or occupied by any such person or persons at any time as a residence or otherwise and these presents are made upon the express condition that upon the sale, lease or transfer of title to any colored person or persons of the Ethiopian or Semitic Race, or to any descendant of either of said races, then the estate hereunder shall become immediately forfeited and all right, title, and interest therein shall thereupon revert to the grantors, their heirs, executors, administrators or assigns.

Illegal restrictive covenants as they may still be recorded in existing property documents (grant deeds, declarations of covenants, CC&Rs, etc.) are, of course, void and unenforceable. But buyers reading such legacy documents may not know this and become alarmed. To make their illegality clear to new buyers, Sacramento passed a law (Government §12956.1(b)(1)) which requires anyone who provides any property document must provide a notice informing the recipient that any restrictive covenant based on any prohibited consideration is void and that property owners have the right to have such language removed. To remove such covenants, property owners apply to DFEH. If the DFEH determines that the restrictive covenant is unlawful, the applicant may strike it and cause the modified document to be recorded.

2.2.2.3 BLOCKBUSTING

Blockbusting, also called “panic selling”, is a strategy for reducing a neighborhood’s home values. It generally is/was implemented in these steps: 1) find an ethnically homogenous neighborhood, 2) move into that neighborhood members of another race, 3) circulate the claim that because members of the other race have moved in, property values will decrease
and crime increase, 4) when property values drop, buy as many of the properties in the neighborhood as possible, 5) move the neighbors of the other race out of the neighborhood, 6) when property values increase, sell the properties for a big profit. The strategy was sometimes employed by the “members of the other race” to make big profit from bigotry.

2.2.3 COVERT DISCRIMINATION

The discriminatory actions described in this section are often performed innocently and may even be well intentioned.

2.2.3.1 STEERING

Steering is the discriminatory practice of directing a client to a particular community, neighborhood, or development based on the client’s protected class. For example, should an agent show a Farsi-speaking Persian buyer only properties in Persian neighborhoods, then that agent would be guilty of illegal steering. He would be guilty even if the Persian buyer requested he be shown only properties in Farsi-speaking neighborhoods (more later). Remember, with only certain narrow exceptions, you are supposed to be blind to the protected attributes even if your client is not.

The motivation for steering may be racist, helpful, or innocent. Regardless of the motive, steering based on protected class is prohibited by the fair housing laws. These laws seek “to ensure that individuals of similar income have a like range of choices available in the housing market regardless of their protected class.”

Provision of School and Demographic Information

The National Fair Housing Alliance (NFHA) has charged that provision of unsubstantiated opinions from brokers about schools and school districts is racial steering. In testing financed by HUD, NFHA found many instances in which brokers told White buyers that the schools in certain neighborhoods were bad while not mentioning the same fact to their Black buyers.

Minneapolis real estate attorney Brian Larson suggests four ways to provide buyers with school, crime, and other demographic information without breaking fair housing laws: Brokers should …

1. … ask all buyers the same questions; e.g., “are you interested in the quality of schools?”.
2. … collect and distribute objective information.
3. … encourage buyers to visit schools and do their own research.
4. … collect information on all neighborhoods they serve.

Buyer’s Agent Issue

What should be your response if your client asks you to show only properties in neighborhoods defined on the basis of a protected class? For example, what should you do if a Mexican-American couple requests to only see properties in predominantly Spanish-speaking neighborhoods?

Or what should be your response should a prospective buyer ask you for information about the ethnic mix or some other prohibited consideration of a