

Seattle Office for Civil Rights Enforcement Guidance

The Use of Preferred Employer Programs in Rental Housing Under the Seattle Open Housing Ordinance (SMC 14.08)

I. Subject

Guidance on Preferred Employer Programs for any parties that lease, sublease, rent, operate, or manage real property within the city of Seattle.

II. Summary

Preferred employer programs that provide discounts or other terms and conditions in rental housing to certain groups over others, may, in some instances, constitute discrimination under the Seattle Open Housing Ordinance (SMC 14.08).

III. Background

The Seattle Office for Civil Rights is the City department responsible for enforcing civil rights laws related to employment, housing, public places and contracting. Our mandate includes investigating complaints of discrimination and providing assistance to employers and landlords to ensure they remain in compliance with the law. As an Executive department, we also make policy recommendations to the Mayor's Office and City Council on issues relating to civil rights.

Housing providers in Seattle are obligated to comply with fair housing laws designed to ensure equal opportunity in housing. Fair housing laws address historical and present day practices that have the intention or the effect of excluding and harming groups of people. Fair housing laws ensure availability and accessibility to all regardless of a person's race, gender, national origin, disability and other protected classes. In addition, fair housing laws and related rules and guidance outline practices that are prohibited, and provide information on when facially neutral practices may have the effect of negatively impacting a protected class, which could result in a violation of the law.

In 2015 it came to SOCR's attention that there were instances of landlords and property management companies offering discounts on deposits and other move-in fees to rental applicants who worked for particular employers. These discounts were reportedly not offered to other applicants. Community members and the media raised concerns that the employers selected as "preferred" were primarily, if not solely, limited to the technology sector. Data has shown workforce gaps exist in the tech sector based on gender and race¹, which negatively impacts certain populations who are currently underrepresented in this workforce. Those groups would not receive the discounts, which may amount to an overall lower cost of housing.

¹ The National Center for Women in Information and Technology reports that in 2014, women held only 26% of computing occupations, African American women held 3% of these positions and Latinas held only 1%.
<https://www.ncwit.org/>

These preferred employer programs present a potential fair housing issue if they provide different terms and conditions to some rental applicants and not others, and in doing so, result in a discriminatory effect on one or more protected classes. Given Seattle's high rents and increasing unaffordability, practices that provide greater incentives and opportunity to certain groups over others may perpetuate existing racial, gender and other social inequities. More than 35% of African American renters in Seattle pay over half of their income on rent² in Seattle and only 27% of Latino families in Seattle own the home they live in³. The majority of Seattle's African American and Latino families are renters who face existing barriers to housing due to documented racial bias in housing applicant selection⁴ and income inequities. Combining race and gender data compounds these inequities.

IV. Purpose

The Seattle Office for Civil Rights is issuing this guidance to provide greater clarity for owners and lessors of real property covered under SMC 14.08, who elect to use a preferred employer program. It also provides information to tenants on whether a specific preferred employer program complies with fair housing laws, and the process by which a case brought to the Seattle Office for Civil Rights would be investigated.

V. Relevant Fair Housing Laws and Requirements

The following laws and regulations provide the foundation for this guidance:

- Title VIII of Civil Rights Act of 1968 (Fair Housing Act)
- HUD's Implementation of the Fair Housing Act's Discriminatory Effects Standard; Final Rule (24 CFR Part 100)
- Seattle Open Housing Ordinance (SMC 14.08)

Title VIII of Civil Rights Act (Fair Housing Act)

Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status, and disability. Under the law, it is prohibited to set different terms, conditions or privileges for sale or rental of a dwelling. In addition, it is prohibited to advertise or make any statement that indicates a limitation or preference based on race, color, national origin, religion, sex, familial status, or disability. This prohibition against discriminatory advertising applies to single-family and owner-occupied housing that is otherwise exempt from the Fair Housing Act.

HUD's Implementation of the Fair Housing Act's Discriminatory Effects Standard: Final Rule

HUD's Final Rule formalizes that the Fair Housing Act includes discriminatory effects liability. The rule lays out a burden shifting approach to determine liability to be applied uniformly to facially neutral practices that have a discriminatory effect. Under this rule the charging party must first establish its prima facie case of disparate impact or perpetuation of segregation. The burden then shifts to the respondent to prove that the challenged practice is necessary to achieve one or more substantial,

² HUD, CHAS 2006-2010 5-Year American Community Survey, Seattle, <http://murray.seattle.gov/housing/seattle-housing-data/#sthash.vFrd94T8.Bxw9jgNx.dpbs>

³ 2010 US Census

⁴ <http://www.seattle.gov/civilrights/fair-housing/testing>

legitimate nondiscriminatory interests. The charging party may then still establish liability by demonstrating that these interests could be served by a practice that has a less discriminatory effect.

Seattle Open Housing Ordinance (SMC 14.08)

The Seattle Open Housing Ordinance prohibits discrimination, whether a single act or part of a practice, the effect of which is to adversely affect or differentiate between or among individuals or groups of individuals because of race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation, gender identity, political ideology, honorably discharged veteran or military status, participation in a Section 8 program, disability or use of a service animal by a disabled person. Prohibited practices include but are not limited to: denial of rental units; representing that a unit is not available; refusing to list or show a unit; evicting someone or applying different terms and conditions (damage deposits, rental rates); advertising that make preferences or limits an applicant based on a person's protected class.

VI. Different Treatment and Preferred Employer Programs

An owner or lessor of real property covered under the SMC 14.08 is liable for violating the Open Housing Ordinance if a charging party demonstrates that they have been denied housing, provided different terms and conditions or other action covered under SMC 14.08 based on their protected class. The application of preferred employer program discounts could be found to be a violation of the law in this manner, if the discounts are only offered to some employees in the program and not others who are also covered by the program and the different treatment occurs due to the person's protected class (i.e. their race, national origin, gender, disability, etc.).

VII. Facially Neutral Practices May Have a Disparate Impact on Protected Groups

The Federal Fair Housing Act through the HUD Rule on Disparate Impact and the Seattle Open Housing Ordinance make it explicit that practices that have the *effect* of adversely impacting a group of people who are covered under the law may constitute a violation. This includes those practices that result in a discriminatory effect without the intention to discriminate. To determine whether a violation of the law exists under either the Fair Housing Act or the Seattle Open Housing Ordinance, the Seattle Office for Civil Rights will apply the analysis outlined by the HUD Disparate Impact Rule. If people bring preferred employer program complaints to SOCR, the department will analyze them on a case by case basis.

VIII. Disparate Impact Analysis

Per the HUD rule on Disparate Impact, the following burden shifting approach will be used when investigating whether a preferred employer program or other practice is in violation of the Seattle Open Housing Ordinance (SMC 14.08):

1. Charging party must establish its prima facie case of disparate impact or perpetuation of segregation.
2. Respondent must then prove that the challenged practice has a legally sufficient justification in that it is necessary to achieve one or more substantial, legitimate nondiscriminatory interests.
3. The charging party may then still establish liability by demonstrating that these interests could be served by a practice that has a less discriminatory effect.

The charging party must prove a prima facie case by showing that a policy or practice caused, causes or predictably will cause, a discriminatory effect on a group of persons or a community on the basis of the protected classes identified in the Federal Fair Housing Act or the Seattle Open Housing Ordinance (SMC 14.08).

A legally sufficient justification for the policy or practice must be supported by evidence and may not be hypothetical or speculative.

IX. Disparate Impact and Preferred Employer Programs

The owner or lessor of real property covered under the SMC 14.08 is liable for violating the Open Housing Ordinance if a charging party demonstrates that the preferred employer program has a disparate impact on protected groups, the owner or lessor of the real property does not prove that the policy or practice is necessary to achieve one or more substantial, legitimate nondiscriminatory interests and the charging party does not demonstrate that these interests could be served by another practice that has a less discriminatory effect.

If an employer preference program applies to tech sector employers only, the existing racial and gender disparities in this workforce could give rise to complaints alleging a disparate impact.

Example A:

1. Female prospective tenant (charging party) feels discouraged from applying for housing in Apartment Complex A because of employer preference granting security-deposit waivers for three companies, all of which have a male workforce of 70% or higher.
2. Charging party files complaint with Office for Civil Rights alleging A's preference is in violation of fair housing laws that protect from gender discrimination
3. OCR investigator determines if preference causes or predictably will cause statistical disparity favoring male tenants at Complex A.
4. If investigation concludes that preference causes or will cause a discriminatory preference for male tenants, Complex A must do one of the following:
 - a. Challenge the prima facie case: establish that female employees at the companies' local offices are represented proportionately, and that therefore the pool of housing applicants who stand to benefit from Complex A's preference are proportionately female; or that the preference hasn't caused a disparity in tenants (either by providing data that disproves the disparity, or by demonstrating that the disparity is due to a factor other than the Preferred Employer program)
 - b. Prove that the challenged policy is necessary to achieve one or more substantial, legitimate non-discriminatory interests

Example B:

1. African American prospective tenant files complaint alleging that Apartment Complex B's Preferred Employer program discriminated against him on the basis of race. The program provides for discounted fees and security deposits to employees of five companies, which together have a 3% Black workforce.

2. Charging party files complaint with Office for Civil Rights alleging B's preference is in violation of fair housing laws that protect from race discrimination.
3. OCR investigator determines if Complex B's preference program causes or predictably will cause a statistical disparity disfavoring African Americans.
4. If investigation concludes that preference causes or will cause a discriminatory impact on African Americans, Complex B must do one of the following:
 - c. Challenge the prima facie case: establish that African Americans are employed at the companies' local offices in proportion to their share of the population, and that therefore the pool of housing applicants who stand to benefit from Complex B's preference are proportionately African American; or that the preference hasn't caused a disparity in tenants (either by providing data that disproves the disparity, or by demonstrating that the disparity is due to a factor other than the Preferred Employer program).
 - d. Prove that the challenged policy is necessary to achieve one or more substantial, legitimate non-discriminatory interests.

Note that in either example, if the companies covered by the preference program present widely varying statistical data on the protected class in question (race and gender respectively, in examples A and B), it may be difficult to establish a prima facie case.

Data used to analyze disparities may include national, regional, state or local workforce and population data. Respondents also have the opportunity to provide statistical data as evidence to demonstrate that its policy or practice did not cause a disparate impact.

X. Contact information

For more information on this guidance please contact SOCR's Public Information Officer, Elliott Bronstein at (206) 684-4507 or by email at Elliott.Bronstein@seattle.gov. For general information or additional visit the Seattle Office for Civil Rights website at: www.seattle.gov/civilrights.