

DO YOUR POOL RULES COMPLY WITH ANTI-DISCRIMINATION LAWS?

It's summer and that means it's pool time! When we think of pools we think of fun, staying cool, and a place where people can gather to socialize or have parties. However, a homeowner, condominium, or cooperative association ("association") should consider the safety and enjoyment of its owners and guests when they are at the pool. Pool rules should be designed to promote everyone's safety and enjoyment, while also incorporating federal, state and local anti-discrimination laws that apply.

The Fair Housing Act

The Fair Housing Act (FHA) protects individuals from housing discrimination on the basis of race, color, religion, gender, national origin, familial status or disability.¹ The FHA's prohibition of familial discrimination protects families with children under the age of 18, pregnant persons, persons in the process of obtaining legal custody of minor children, and persons with written permission to live with a minor child.² Rules that treat those with children differently than those without, may constitute discrimination under the FHA. In addition, pool rules that specifically single out children may also be considered discriminatory. Some rules that have been held to be discriminatory are those that ban non-toilet trained children from the pool and those that ban minors from using the pool. Rules must have a compelling business necessity and must be the least restrictive means of achieving the business necessity.³ It does not matter that the intent of the pool rule requiring children be toilet trained is to keep the pool sanitary, or that prohibiting minors from using the pool intends to prevent children from getting hurt or from drowning.

When creating pool rules, it is best to avoid rules that specifically target or mention children or minors. Instead, draft rules that are non-age specific and that apply to any person using the pool. For example, instead of a rule stating "children may not use toys in the pool area," consider a rule that applies to all such as "no balls, inflatable items, or water guns are permitted in the pool area."⁴ Similarly, avoid setting swim times for "adults only" or restricting children's use of the pool to specific times. Courts have found that giving preference to adults who may want to use the pool for swimming laps is not a sufficient reason to prohibit children in the pool at the same time. Instead, focus on

how the pool is to be used. A rule allowing lap swimming from 7-8 am is more likely to be acceptable under the FHA and similar state and/or local laws than a rule stating that children are prohibited in the pool for lap swimming from 7-8 am.⁵

The FHA also requires a housing provider to provide reasonable accommodations to individuals with disabilities so that they may enjoy the premises in the same way as one without a disability. A person with a disability is one who suffers from "mental or physical impairments that substantially limit one or more major life activities."⁶ Reasonable accommodations are changes to a rule or modification to a set policy, and may be required unless providing the request would cause an "undue administrative and financial burden"⁷ or "would fundamentally alter the nature of the provider's operations."⁸ Determining what would cause an administrative or financial burden is made on a case by case basis. The cost is taken into consideration as well as whether there are alternative means to provide the accommodation.⁹ Permitting a disabled individual to have an assistance animal (an animal that performs tasks for or provides assistance to one who is disabled) in the pool area where animals are not permitted may be considered a reasonable accommodation under the FHA.¹⁰

At times, there are other needs of a homeowner that an association should consider that is neither an accommodation nor modification request but rather falls under what is considered an accessibility requirement. Whether an association's pool is accessible to one with a disability is one such need that falls under the FHA accessibility requirements.¹¹ If a swimming pool is used by the public and is a community amenity, it must be accessible. The route to the pool should be accessible as should the pool deck directly surrounding the swimming pool. However, the FHA does not require special ramps or lifts to make entry into the pool wheelchair accessible.¹²

The Americans with Disabilities Act

In addition, the Americans With Disabilities Act (ADA) requires that all entities and spaces open to the public provide disabled individuals the same opportunity to enjoy the property as those without disabilities. This may require

making the space accessible to those with disabilities, which may include accommodations or modifications to the property, unless doing so would fundamentally alter the nature of the facility.¹³

Although a pool within the community is usually located on private property and within a private community, an association needs to consider how its pool is being used and who is using it in order to determine whether the ADA applies. Title III of the ADA defines public accommodations as a private entity whose existence has an impact on commerce and includes private entities that in some way service the public.¹⁴ Thus, the ADA may apply to the association's communal spaces, such as a pool, to the extent that they are open to the public. In determining whether the association's pool is a place of "public accommodation," consider such things as whether the association offers access to the public by offering pool memberships to the public, or whether the pool may be rented for use by non-owners, such as clubs or teams, for an event. If there is no payment involved in exchange for use of the pool, it is a more complicated determination of whether the pool will be deemed a public accommodation. Consultation with an attorney to provide guidance should be considered.¹⁵

If your pool is deemed a public space, the ADA will apply.¹⁶ If it is a large pool, which is defined as a pool with a straight wall of over 300 feet, two means of entry must be available.

One point of entry should be either a pool lift that can be operated by the one entering the pool or a sloped entry. The other should be a pool lift, sloped entry, transfer wall, transfer system or stairs. If smaller than 300 feet, only one means of an accessible entry is necessary.¹⁷ It should also be understood that the ADA provides design compliance guidelines that apply not just to pools but also to spas and wading pools and that the guidelines vary for each. Though these guidelines must be followed when installing a new pool, if changes are made to an existing pool, the ADA guidelines may apply and modifications may need to be added to existing pools for them to be in compliance with the ADA.¹⁸ Again, it is best to seek the advice of an attorney to assist you with ADA compliance.

Conclusion

Pool rules are not as simple as you may think. Each rule you create, must be carefully crafted so that it does not conflict with the FHA, ADA and/or similar state or local laws. Consider consulting with a lawyer to assist you in drafting the rules so that they are in compliance with the relevant laws. Take the time now so that problems are less likely to arise later. Now grab your swimsuit and let's have fun!

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¹ The Fair Housing Act, The United States Department of Justice, <https://www.justice.gov/crt/fair-housing-act-1>

² <https://files.hudexchange.info/resources/documents/Fair-Housing-Act-Familial-Status-Protections-Fact-Sheet.pdf>

³ Kevin Herzel, What Community Associations Should Know About the Fair Housing Act and Its Impact on Pool Rules and Regulations, <https://micondolaw.com/2016/07/28/what-community-associations-should-know-about-the-fair-housing-act-and-its-impact-on-pool-rules-and-regulations/>

⁴ Winta Mengisteab, Esq. and Joseph Shannon, Esq., "Everybody in the Pool: FHA Considerations", Quorum Magazine (May 2020), <https://www.caidc.org/everybody-in-the-pool-fha-considerations/>

⁵ POA Splash Law: Private Pools And FHA/ADA Considerations For Texas Property Owner Associations, Daughtry & Farine P.C. blog, <https://www.daughtryfarine.com/blog/2022/02/poa-splash-law-private-pools-and-fha-ada-considerations-for-texas-property-owner-associations/>

⁶ The Fair Housing Act, The United States Department of Justice, <https://www.justice.gov/crt/fair-housing-act-1>

⁷ Information for Housing Providers, Landlords, and Property Managers, U.S. Department of Housing and Urban Development, https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications/information_for_housing_providers_landlords_property_managers#overview-of-reasonable-accommodations-and-reasonable-modifications

⁸ Joint Statement of the Department of Housing and Urban Development And The Department of Justice Reasonable Accommodations Under The Fair Housing Act (May 17, 2004), <https://www.hud.gov/sites/dfiles/FHEO/documents/hudjointstatement.pdf>

⁹ Id.

¹⁰ Assistance Animals, U.S. Department of Housing and Urban Development, https://www.hud.gov/program_offices/fair_housing_equal_opp/assistance_animals

¹¹ More Than Accommodations and Modifications: FHA Accessibility Guidelines, Triangle Apartment Association, (June 14, 2019), <https://www.triangleaptasn.org/blog/more-than-accommodations-and-modifications##>

¹² https://www.hud.gov/program_offices/fair_housing_equal_opp/faq_accessibility_first

¹³ U.S. Department of Housing and Urban Development, Reasonable Accommodations And Modifications, Reasonable Accommodations and Modifications | HUD.gov / U.S. Department of Housing and Urban Development (HUD)

¹⁴ ADA Public Accommodations, Fisher Phillips, https://www.fisherphillips.com/a/web/eJuz7urcC9UdoDqS3NSmK3/2jtwdt/FP_ADA%2520Public%2520Accommodations.pdf

¹⁵ ADA Pool Accessibility Standards, Community Associations Institute, <https://www.caionline.org/Advocacy/LegalArena/FederalLaws/Pages/ADA-Pool-Accessibility-Standards-.aspx>

¹⁶ Id.

¹⁷ Guide to the ADA Accessibility Standards, U.S. Access Board, <https://www.access-board.gov/ada/guides/chapter-10-swimming-pools-wading-pools-and-spas/>

¹⁸ ADA Pool Accessibility Standards, Community Associations Institute, <https://www.caionline.org/Advocacy/LegalArena/FederalLaws/Pages/ADA-Pool-Accessibility-Standards-.aspx>

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