

WHAT'S THE RUSH?



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The economic downturn, the rise in foreclosures, and the inability to locate affordable housing has younger people running for the 55 and older communities. While The Fair Housing Act (FHA) protects all citizens from discrimination on the basis of race, color, national origin, religion, sex, handicap or familial status (families with children under the age of 18 living with parents or legal guardians; pregnant women and people trying to get custody of children under 18), there is an exemption under the Housing for Older Persons Act ("HOPA").

HOPA provides that housing that meets the FHA's definition of "housing for older persons" is exempt from the law's familial status requirements, provided that:

- 1.) It is occupied solely by persons who are 62 or older or
- 2.) It houses at least one person who is 55 or older in at least 80 percent of the occupied units, and adheres to a policy that demonstrates an intent to house persons who are 55 or older.

In order to qualify for an exemption to the familial status laws, a community must satisfy either 1 or 2 above – not both. The

majority of communities that fall within the exemption are 55 or older communities. In addition to the requirement that at least 80% of the units be occupied by a person 55 or older, the community must also publish and adhere to policies and procedures that demonstrate an intent to be a provider of housing for older persons. The community must also comply with rules established by HUD for verification of occupancy, which includes biennial age surveys of occupants.

Although HOPA established a minimum threshold that at least 80% of the units be occupied by a person 55 or older, the community may set forth more stringent requirements. For example, a community can require that at least 80 percent of the units be occupied by at least one person 60 years of age or older, that 100% of the units be occupied by at least one person 55 years of age or older, or that 80% of the units be occupied exclusively by persons aged 55 or older, so long as the additional requirements comply with state and local fair housing laws.

Many people misinterpret HOPA and incorrectly believe that once a community reaches 80% occupancy of units by a person 55 or older, the community must allow people below the age of 55 to occupy the remaining 20%. While Associations generally have the ability to grant "hardship

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exceptions”, the community is under no obligation to do so. In fact, in most cases, communities should adhere to strict enforcement of the 55 and older requirement, reserving the 20% buffer for situations in which a 55 or older spouse dies and an underage spouse will continue to occupy the unit, inheritance or a similar situation. In some cases, an Association’s governing documents do not permit hardship exceptions at all, or in limited situations, only for children under 18.

Due to the downturn in the economy, Associations are faced with an increasing number of underage family members and friends attempting to occupy units in 55 and older communities without someone who is 55 years of age or older. Sometimes, the units are vacation or seasonal units that sit vacant most of the year. The owner allows a friend or family member to take up residence, despite his/her age. In other cases, someone 55 or older purchases the unit and submits an application for occupancy stating that he/she will occupy the unit, when in fact, the unit is being purchased for an underage family member and the owner has no intention of residing in the unit. Whatever the underlying circumstances might be, the Association is faced with enforcing the 55 or older provision.

The unit owners are sent a letter advising them of the violation and requesting compliance. In response, the Association receives virtually the same response – the Association has at least 80% of the units occupied by someone 55 or older and therefore, you have to let my son or daughter reside in the unit or my son or daughter will be 55 in one year, so you should just let him/her stay. In a vacuum, the Association might be able to allow an underage occupant to remain in the



unit, however, from a practical perspective, an Association should reserve the 20% buffer for those situations that are out of their control such as death or inheritance. Granting a hardship exception or allowing the 20% buffer to be occupied by individuals under 55 years of age can lead to selective enforcement issues and in some cases, the loss of the HOPA exemption.

Associations qualifying for the housing for older person exception should be mindful of the mad dash toward these communities by underage occupants. Turning a blind eye today might prevent enforcement in the future.



DID YOU KNOW?

There have been some significant rulings recently as courts take a closer look at lender rights and responsibilities in connection with foreclosures and bankruptcies.

- A bankruptcy court in New York ruled that Mortgage Electronic Registration Systems (MERS) doesn’t necessarily have the right to assign mortgages it services. This is significant since it impacts the determination of whether a lender is a valid secured creditor that can seek relief from the automatic stay imposed when a debtor files for bankruptcy protection.
- A Florida appellate court found a homeowners’ association was entitled to an award of attorney’s fees in connection with a foreclosure action involving one of the homes within its community. Fees are to be payable by both the lender and the lender’s attorney due to mistakes or sloppiness in the foreclosure filing and subsequent litigation.

Becker & Poliakoff attorneys throughout the State have received monetary sanctions from lenders and/or their attorneys, primarily as a result of lack of action in foreclosure cases despite a Court Scheduling Order.

EMPLOYMENT LAW

EMPLOYMENT VERIFICATION: A LIST OF DO'S AND DON'TS



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Everyday thousands of illegal immigrants enter the United States. Immigration officials estimate that over 500,000 people enter the United States illegally each year and further noting that the actual number may be much higher. The number one reason illegal aliens come to this country is to find employment. But is this legal? Quite simply, the answer is “no.”

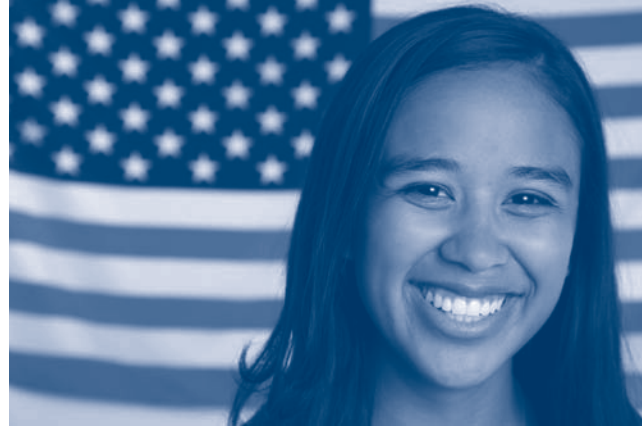
It is unlawful to knowingly hire, recruit, or refer an illegal alien for a fee, who is not authorized to work in the United States. It is also unlawful to continue to employ an illegal immigrant knowing that the person is not authorized to work in the United States.

It is a federal felony to knowingly assist an illegal alien by transporting, providing shelter, or assisting an illegal alien to obtain employment. Penalties upon conviction can include criminal fines, imprisonment, and forfeiture of vehicles and real property used to commit the crime. Anyone who employs or contracts with an illegal alien without verifying his/her work authorization status is guilty of a misdemeanor. To comply with the law, an employer must verify the identity and employment authorization of each person hired, complete and retain a Form I-9 for each employee, and refrain from discriminating against individuals on the basis of national origin or citizenship.

The following is a list of do's and don'ts for an employer to ensure compliance with the law:

Do's

- Do treat all employees equally when recruiting, hiring, and when verifying employment authorization and identity.
- Do have your employees complete a Form I-9, unless they are not required to do so by law.
- Do allow the employee to select which document(s) he/she chooses to substantiate his/her identity and employment authorization.
- Do re-verify an employee's authorization status if the initial document(s) provided by the employee has an expiration date.
- Do retain completed Forms I-9 for all employees for 3 years after the date of hire or 1 year after the date employment is terminated, whichever is later.



- Do ensure that any professional employer organization (“PEO”) that you hire complies with the law by verifying identity and work authorization status. Remember, you can be found liable for their non-compliance.

Don'ts

- Don't request that employees produce more documents than are required by Form I-9 to establish the employee's identity and employment authorization.
- Don't request that an employee produce a particular document such as a “green card” to establish identity and/or employment authorization.
- Don't reject documents that reasonably appear to be genuine and belong to the employee presenting them.
- Don't treat groups of applicants differently when completing Form I-9, such as requesting certain groups of employees who look or sound “foreign” to produce particular documents the employer does not require other employees to produce.
- Don't limit jobs to U.S. citizens unless U.S. Citizenship is required for a specific position by law, regulation, executive order, or federal, state, or local government contract.

**IT IS UNLAWFUL TO KNOWINGLY
HIRE, RECRUIT, OR REFER AN
ILLEGAL ALIEN FOR A FEE, WHO IS
NOT AUTHORIZED TO WORK IN
THE UNITED STATES.**

REVENUE IS DOWN & RESERVES DEPLETED: HOW ABOUT CAPITAL CONTRIBUTIONS FROM NEW PURCHASERS?



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In these tight economic times many community associations are looking for new sources of revenue for operation and maintenance of their communities. In this regard some associations have started to charge a “capital contribution” at resale closings. The contribution is generally equal to several months of regular maintenance fees. Such capital contribution fees are common place in connection with the initial sales by the developer of the community but must be carefully considered with regard to resales. The authority to charge such a fee is not specifically addressed in the Statutes applicable to homeowners associations and therefore must be subject to separate analysis. While such capital contributions may be enforceable in the Homeowners Association context, provisions of the Condominium Act make such a fee problematic.

Specifically Section 718.112(2)(i) of the Florida Condominium Act provides that no charge may be made by the association or any body thereof in connection with the sale, mortgage, lease, sublease or other transfer of a unit unless the association is required to approve such transfer and a fee for such approval is provided for in the declaration, articles or bylaws. These fees are to be used for screening and transfer approval only. In addition, Section 718.110(4) of the Condominium Act provides that no amendment may change the proportion or percentage by which the unit owner shares the common expenses of the condominium unless the record owners of the unit and all record owners of liens on the unit join in the execution of the amendment and unless all record owners of all other units in the same condominium approve the amendment. Further, Section 718.104(4)(g) of the Condominium Act provides that the percentage or fractional share of liability for common expenses of the condominium for all residential units must be the same as the undivided share of ownership in the common elements appurtenant to each unit. Therefore, these provisions of the Condominium

Act may prohibit an amendment to the declaration of condominium to provide for a capital contribution upon resale.

However, the analysis differs with regard to a homeowners association as there are no similar restrictions contained in Chapter 720, Florida Statutes, the Homeowners Association Act. Therefore an amendment to the declaration of covenants or other governing documents to establish a capital contribution fee upon resale may be legally supportable. There are no Florida court decisions that address this issue specifically. However, the implementation of a capital contribution in homeowners associations by amendment to the governing documents has become somewhat common place and accepted in the industry, provided the amount thereof is reasonable.

Section 689.28, Florida Statutes dealing with Conveyances of Land provides that the public policy of this State favors the marketability of real property and further declares that transfer fees violate this public policy. However, there are certain exceptions thereto. Specifically exempt from the definition of a transfer fee prohibited by the statute is a contribution or other amount imposed by a declaration or covenant encumbering parcels in a community as defined in the Homeowners Association Act and payable to a non-profit organization for the purpose of supporting recreational, environmental, conservation or other similar activities benefiting the community. It is therefore arguable that since such a transfer fee is not specifically prohibited by this statute, but rather is specifically exempted, that a capital contribution contained in a properly amended declaration of covenants would be legally enforceable.

Prior to initiating such an amendment however, every association should consider the business as well as the legal implications thereof. If the benefits of increased revenue outweigh the potential restraints on marketability of resales, such an amendment may be a reasonable decision. Should you be in need of assistance in implementing such a capital contribution amendment, you should discuss the specific details with your association attorney.

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