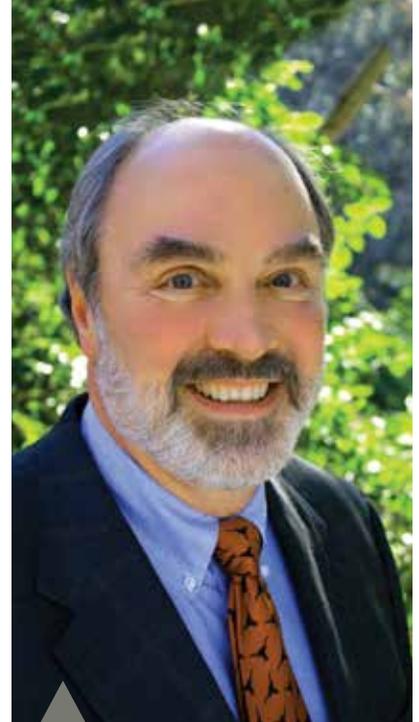


# LAW IN ORDER

## *The Warren Report*

### PREVENTING A “FAILURE TO COMMUNICATE”



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The U.S. Department of Housing and Urban Development (HUD) publishes a guidance preventing LEP discriminatory housing practice.

**F**ailure to communicate can be problematic. Sometimes, the failure is easily cured simply by being a more careful listener. If there is a language barrier, the failure can easily continue until those communicating master essential elements of one another’s languages.

One of the great actor Paul Newman’s most famous movies is *Cool Hand Luke*. Lucas Johnson was a decorated Korean War veteran who, upon discharge from the service, went back to the small town where he grew up. One drunken evening, Luke was cutting the heads off of parking meters in the town square. When asked why, he responded “this is a small town, not much to do in the evening.” Not being persuaded that the deed should go unpunished, the judge sentenced Luke to two years in a Florida chain-gang prison. Luke often, although always unsuccessfully, tried to escape.

In one of the movie’s most famous scenes, the warden appeared in the prison yard with Luke and the other inmates after Luke had been apprehended on an escape attempt. As he was explaining to Luke and the others why Luke would now have to wear chains, and how it was for his own good, Luke commented that he wished the warden would quit being so nice to him.

After doling out some painful punishment, knocking Luke off his feet, the warden offered this explanation: “What we’ve got here is failure to communicate. Some men you just can’t reach.”

Following that cue, the U.S. Department of Housing and Urban Development (HUD) recently published a guidance aimed at preventing a “failure to communicate” from becoming a discriminatory housing practice. On September 15, 2016, the General Counsel for HUD, Helen R. Kanovsky, published an eight-page

paper entitled *Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency*. This HUD guidance is not law. It does, however, conclude that the Fair Housing Act (FHA) prohibits housing providers from using Limited English Proficiency (LEP) in a way that causes an unjustified discriminatory effect.

HUD lays down the rule. Selective application of a language-related policy, or use of the LEP as a pretext for unequal treatment of individuals based on race, national origin, or other protected characteristics, violates the FHA. Because there is a close link between LEP and certain racial or national origin groups, notes Ms. Kanovsky, restrictions on access to housing, based on LEP, disproportionately burden certain protected classes. If not legally justified, such restrictions may violate the FHA under a discriminatory effects theory.

What is LEP? LEP refers to a person’s limited ability to read, write, speak, or understand English. Individuals who are LEP are not a protected class under the FHA. HUD states that there is a close nexus, however, between LEP and national origin.

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Although language discrimination is not necessarily national origin discrimination, national origin discrimination includes discrimination because an individual has the physical, cultural, or linguistic characteristics of persons from a foreign geographic area.

As it did with its April 4, 2016 guidance on the use of criminal records, HUD supports its LEP guidance with statistics. It states, for example, that more than 25 million persons in the United States, which is approximately 9% of the total American population, are LEP. Among LEP persons in America, the U.S. Census Bureau states that approximately 65% (16,350,000) speak Spanish, 7% (1,660,000) speak Chinese, 3% (850,000) speak Vietnamese, 2% (620,000) speak Korean, just under 2% (530,000) speak Tagalog (the basis of a standardized national language of the Philippines), nearly 2% (410,000) speak Russian, and smaller numbers speak dozens of other languages. HUD sets forth even more statistics it deems pertinent. Focusing on place of birth, in the United States 61% of persons born in Latin America and 46% of persons born in Asia are LEP, as compared with 2% of persons born in the United States. Based upon these statistics, HUD concludes that housing decisions that are based on LEP generally relate to race or national origin.

Interestingly, national origin means the geographic area in which a person was born, or from which his ancestors came. That geographic area need not be a country for it to be considered someone's national origin. Rather, that geographic area can be a region within a country, or a region that spans multiple countries. There has been a lot of recent political

discussion about wanting Americans to live in this country as opposed to non-citizens. The national statistics quoted by HUD in its LEP guidance demonstrate an inescapable connection between citizenship and LEP. For the U.S. population 18 years of age and over, 63% of non-citizens are LEP. Only 39% of naturalized citizens and 1% of native-born citizens are LEP.

Once again, limited English proficiency (LEP) is not a protected class. A housing provider, nonetheless, violates the FHA if the provider *uses a person's LEP* to discriminate intentionally because of race, national origin, or another protected characteristic. The key question when discrimination is alleged is whether the complainant suffered an adverse housing action because of their protected class. According to HUD, courts address-

concerns. For example, LEP persons may speak English well enough to conduct essential housing-related matters. They may also have a household member who can provide assistance as needed. Other practices which HUD labels as suspect and likely to be discriminatory include advertisements containing blanket statements such as "all tenants must speak English," or turning away all applicants who are not fluent in English.

According to HUD, because a person's primary language generally derives from his or her national origin, singling out persons for disparate treatment because they speak a certain language is typically national origin discrimination. National origin is one of the seven federal protected classes, even though LEP is not.

If the housing provider, the applicant or the resident can access free or low-cost language assistance services, any cost-based justifications for refusing to deal with LEP persons, says HUD, would be immediately suspect. Ms. Kanovsky goes on to add that the languages residents speak amongst themselves or to their guests do not affect the housing provider or neighbors in any legitimate way. Thus, she states, bans on tenants speaking non-English languages on the property, or statements disparaging tenants for speaking non-English languages,

have no cognizable justification under the Fair Housing Act. Stated another way, absent such justification, HUD is inclined to find discrimination.

HUD General Counsel Kanovsky notes that some try to align LEP issues in the employment context with LEP issues in the housing context. HUD points out that a housing provider's relationship with the resident is quite different from that



ing the connection between language and national origin have often established a nexus between language requirements and national origin discrimination.

What are some examples of LEP discrimination? A blanket refusal, obviously, to deal with LEP persons in the housing context is one. Such a refusal, concludes HUD, is not motivated by genuine communication



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of a supervisor with an employee. Generally, a supervisor in the workplace must instruct and monitor the employee to improve performance. Some employers believe that employees must speak English for effective supervision, a cohesive workforce and to put customers at ease. HUD does not believe the same reasons exist in the housing context. The relationship among neighbors, notes Ms. Kanovsky, also does not resemble that of coworkers because generally neighbors can coexist effectively with minimal communication.

It is not always the inability to speak English which leads to claims of discrimination by LEP persons. HUD notes that a person's accent and his or her national origin are "inextricably intertwined." In its LEP guidance, HUD makes clear it is inconceivable that a housing decision which treats someone differently, because he or she speaks English fluently but with an accent, is anything but intentional discrimination because of national origin and a violation of the FHA.

If you are a housing provider, and are only inclined to take adverse action against those speaking one foreign language rather than all foreign languages, HUD warns that you will still have serious problems. If you have a policy disfavoring LEP persons, notes Ms. Kanovsky, this can have a disparate

impact on persons of multiple national origins. Stated another way, the members of the injured group need not all be of the same national origin. According to a United States District Court case out of Hawaii, "If a policy differently affects individuals from nations where English is the primary language and nations where it is not, then the policy has a disparate impact."

Adverse actions against applicants, residents or occupants in the landlord-tenant context can be avoided. HUD contends in its LEP guidance that English proficiency is not always necessary in the landlord-tenant context, where communications are not particularly complex or frequent. A landlord may employ a management company with multilingual staff, or perhaps can otherwise access language assistance. If you have translated documents readily available, says HUD, provide them to the person in need. Likewise, do not restrict an applicant's or resident's use of an interpreter. Do not require that an English speaker sign as a guarantor on a lease, solely to get someone fluent in English involved in the leasing transaction.

Some housing providers may believe that their language-related policy or practice is necessary to achieve a substantial, legitimate, non-discriminatory interest. If that has been established in the discrimination analysis, HUD will require an

LEP Complainant to prove that the landlord's nondiscriminatory interest could be served by another practice with a less discriminatory effect.

In its LEP guidance, HUD offers tips. First, allow a tenant a reasonable amount of time to take a document, such as a lease, to be translated. Second, consider obtaining written or oral translation services. Third, draw upon the language skills of staff members of the owner or management company. Fourth, if the applicant's or resident's family has a member who speaks English, or brings another person along to interpret, agree to communicate through those English-speaking individuals. Each of these, notes HUD, could be a viable alternative to refusing to deal with anyone who does not speak English.

As a footnote to its LEP guidance, HUD notes that for government assisted housing providers, requiring tenants to rely on family members rather than providing language assistance may not be permissible under Title VI. No further detail concerning this footnote, however, is provided in the LEP guidance.

The movie, *Cool Hand Luke*, teaches two very useful lessons. First, some excuses for bad behavior simply do not work. Luke's explanation that he cut off the heads of local parking meters because he lived in a small town, where there was not much to do in the evening, didn't keep him off of the chain gang. Second, when what we've got here is failure to communicate, those in authority may dole out some pretty harsh punishment.

Perhaps HUD General Counsel Kanovsky saw the movie, *Cool Hand Luke*, and took special note of the chain gang prison warden's comment: "Some men you just can't reach." Her LEP guidance, after all, may not only reach but also shake some sense into those wanting to make housing decisions because of the language one speaks. ☛

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