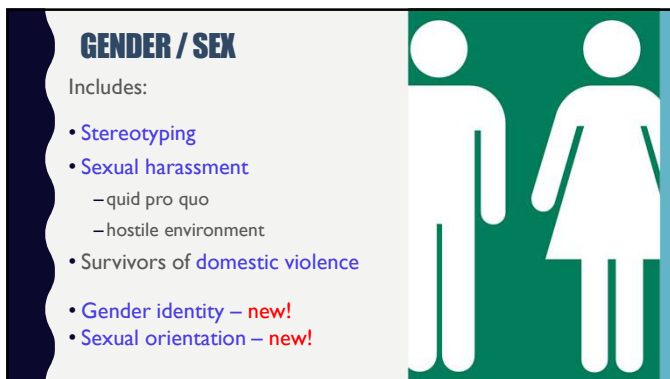




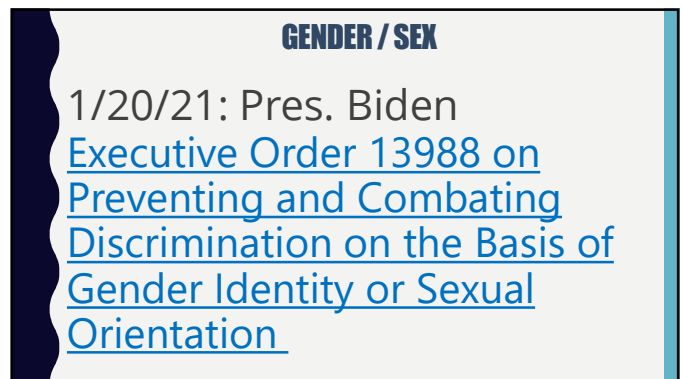
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EXECUTIVE ORDER 13988 ON PREVENTING AND COMBATING DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR SEXUAL ORIENTATION

- It is the policy of my Administration to **prevent and combat discrimination on the basis of gender identity or sexual orientation**, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation.
- It is also the policy of my Administration to address **overlapping forms of discrimination**.
  - For example, transgender Black Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence.

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Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

- The head of each agency shall...
  - review all existing orders, regulations, guidance documents, policies, programs, or other agency actions ("agency actions") for inconsistency w/ the policy of the order
  - consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy of this order.
  - consider whether there are additional actions that the agency should take to ensure that it is fully implementing the policy of this order.
  - within 100 days of the date of this order shall develop a plan to carry out actions that the agency has identified

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**GENDER / SEX**

**HUD TO ENFORCE FH ACT TO PROHIBIT DISCRIMINATION ON BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY**

**HUD Memo, 2/11/21:**  
*Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act,*  
[https://www.hud.gov/sites/dfiles/PA/documents/HUD\\_Memo\\_EO13988.pdf](https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf)



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**2/11/21  
HUD  
MEMO:**

- HUD interprets the FH Act to bar discrimination on basis of sexual orientation and gender identity
- Directs HUD offices and recipients of HUD funds to enforce the Act accordingly.

Housing discrimination studies indicate that same-sex couples and transgender persons across the country experience demonstrably **less favorable treatment** than straight and cisgender counterparts when seeking rental housing.

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## 2/11/21 HUD MEMO:

Relies on legal conclusion that **FH Act's sex discrimination provisions are comparable in text and purpose to Title VII of Civil Rights Act**, which bars sex discrimination in employment.

***Bostock v Clayton County***: US Supreme Court held that workplace prohibitions on sex discrimination include discrimination because of sexual orientation and gender identity.

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WA:  
Immigrant or  
Citizenship Status  
**New!**

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## WA: IMMIGRATION & CITIZENSHIP

- [ESB 5165](#) added "**citizenship or immigrant status**" to WLAD
- Testimony before the Senate Committee on Law & Justice indicated non-citizen immigrants are often discriminated against in housing and work situations, even if they hold valid work or other types of visas.
- **Effective 6/11/20**
- new sec. added to the WLAD and RCW 49.60.020 amended:
  - *"to the extent that distinction or different treatment on the basis of citizenship or immigration status is authorized by federal or state law, regulation, or government contract, it is not an unfair practice."*

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## WA ST. HUMAN RIGHTS COMMISSION, *INTERNAL GUIDANCE ON CITIZENSHIP AND IMMIGRATION STATUS*

- 1 million immigrants in WA
- 1 in every 7 people in WA is an immigrant.
- Immigrants make up a significant part of the state's workforce at approximately 17%.
- There are 17,000 Deferred Action of Childhood Arrival (DACA) recipients in WA
- over 20,000 international college students.
- Some of these individuals are US citizens, many are not. These individuals will represent many different types of immigrations statuses

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## WA: IMMIGRATION & CITIZENSHIP

Neither citizenship nor immigration status is defined in the law.

The Merriam-Webster Dictionary defines

- **Citizenship**: "the status of being a citizen."
- **Citizen**: "a member of a state" and "a **native or naturalized person** who owes allegiance to a government and is entitled to protection from it."
- **Immigration**: "travel into a country for the **purpose of permanent residence** there."

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WSHRC has broadly defined **national origin** as including

- whether someone was **born in the U.S.** (and thus a citizen of the US) **or another country** (and thus either a naturalized citizen or not a citizen)
- whether or not someone was originally from the U.S. or **immigrated here** (either seasonally or with intent to reside here permanently)

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## WA: IMMIGRATION & CITIZENSHIP

Cannot discriminate against a person or give preference to a person because they are:

- native born citizen
- naturalized citizen
- not a citizen
- in process of becoming a citizen
- immigrant
- intend to become citizen or permanent resident
- intend to return to country of origin

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## WA: IMMIGRATION & CITIZENSHIP

**Housing provider cannot (bc of immigration or citizenship status)**

- deny housing to an otherwise qualified tenant (see exceptions below)
- treat a person or family differently
- threaten to call ICE if tenant makes complaint about conditions of dwelling
- refuse to make repairs or delay repairs

**Housing provider must take action if put on notice that a person is being harassed** by another tenant due to citizenship or immigration status

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## WA: IMMIGRATION & CITIZENSHIP

- If prospective tenant cannot provide SS# during screening process, housing provider should **accept alternative ways of screening tenant**
  - includes, but not limited to, foreign passport, citizenship or consulate card, INS form I-864 Sponsorship verification, Certificate of Naturalization, resident card, military card, school ID or DL.
- housing provider **should not require higher sec. deposit or charge more rent if tenant cannot be screened through provider's usual methods.**
- person who may not be a citizen or may be an immigrant **cannot be subject to more rigorous screening** processes than other applicants

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## WA ST. HUMAN RIGHTS COMMISSION, *INTERNAL GUIDANCE ON CITIZENSHIP AND IMMIGRATION STATUS*

**To establish past rental history,** applicant could provide: utility records, info from a former landlord, or a copy of a past lease.

**To show ability to pay,** applicant can provide: bank records, pay stubs, paid utility bills, or a letter from an employer.

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## NEW: WA: RACE INCLUDES HAIR

- WA HB 2602: prohibits racial discrimination based on hair
- **Effective 6/11/20**
- Adds WLAD, RCW 49.60.040(27): “**Race**” is inclusive of **traits historically associated** or **perceived** to be associated with race including, but not limited to, **hair texture** and **protective hairstyles**.
  - “protective hairstyles” includes, but not limited to, such hairstyles as afros, braids, locks, and twists.

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## HUD RULES

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## RULES UNDER REVIEW

April 13, 2021:

Office of Management and Budget posted **2 notices pending regulatory review** related to two HUD fair housing rules rescinded under the Trump administration

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**AFFIRMATIVELY  
FURTHERING  
FAIR HOUSING  
RULE**



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## AFFIRMATIVELY FURTHERING FAIR HOUSING

The Secretary of HUD is required by Sec. 808(c) (5) of the Fair Housing Act to administer HUD's programs in a manner that affirmatively furthers fair housing (AFFH).

Entitlement jurisdictions that receive federal funds to administer HUD's Community Planning and Development (CPD) programs are also required by fed. Regs. to certify they will AFFH and undertake Fair Housing Planning (FHP).

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## 2015 AFFIRMATIVELY FURTHERING FAIR HOUSING RULE

Established fair housing requirements for state and local jurisdictions that receive HUD funding:

- To undertake an **Assessment of Fair Housing (AFH)** to examine racial and other disparities in their communities
- To take **"meaningful actions"** to address at least some of the disparities

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## ASSESSMENT OF FAIR HOUSING (AFH)

- the analysis undertaken pursuant to § 5.154 that includes an analysis of **fair housing data**, an assessment of **fair housing issues and contributing factors**, and an identification of **fair housing priorities and goals**, using an “**Assessment Tool**” provided by HUD, to be submitted to HUD
- On Dec. 31, 2015 and Jan. 13, 2017 HUD published notices in the Federal Register announcing a **Local Government Assessment Tool** designed to aid local governments and consortia required to submit consolidated plans in conducting an AFH.

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**5/23/18  
HUD NOTICE:**

***AFFH:  
RESPONSIBILITY TO  
CONDUCT ANALYSIS  
OF IMPEDIMENTS:***

**WITHDREW LOCAL  
ASSESSMENT TOOL**



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**2020:**

## **“PRESERVING COMMUNITY AND NEIGHBORHOOD CHOICE” RULE**

In 2020 HUD [announced](#) plans to terminate the 2015 version of the AFFH Rule, and proposed a [new final rule](#)

- HUD stated the AFFH rule was, among other things, overly burdensome, costly, and ineffective
- went into effect on Sept. 8, 2020
  - has been criticized as significantly decreasing the fair housing obligations of state and local jurisdictions that receive HUD funding

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## **AFFIRMATIVELY FURTHERING FAIR HOUSING; RESTORING STATUTORY DEFINITIONS AND CERTIFICATIONS (FR-6249)**

- An Interim Final Rule: pending regulatory review with OMB
- Would possibly reinstate the 2015 AFFH rule and rescind the [2020 rule](#)

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## DISPARATE IMPACT RULE

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## HISTORY OF DISPARATE IMPACT & FAIR HOUSING

- 40+ years HUD and the courts have interpreted the Fair Housing Act to prohibit housing policies or practices that have a **discriminatory effect** even if there was no apparent intent to discriminate.
- 11 of 13 U.S. Courts of Appeals have heard and upheld disparate impact cases and applied a burden-shifting standard.\
- There were minor variations in how the courts and HUD applied the concept of discriminatory effects, so HUD issued a proposed rule in 2011 for comment\
- HUD issued a **Final Disparate Impact Rule** on 2/15/13 - established uniform standards for determining when a housing policy or practice with a discriminatory effect violates the Fair Housing Act.

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## THE FINAL DISPARATE IMPACT RULE

2/15/13

An unjustified discriminatory effect is established according to a **3-part burden shifting test**:

- (1) **Plaintiff makes an allegation:** burden of proving that a practice **caused, or predictably will cause, a discriminatory effect**;
- (2) **Defendant offers a rebuttal:** burden of proving the practice is **necessary to achieve a substantial, legitimate, nondiscriminatory interest**; and
- (3) **Plaintiff responds:** if the defendant satisfies its burden, the plaintiff may still prevail by proving that the substantial, legitimate, nondiscriminatory interest supporting the practice **could be served by another practice that has a less discriminatory effect**.

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## TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT, INC., 135 S. CT. 2507 (2015).

- Dallas, TX: housing authorities distributing housing tax credits to build low-income housing, in mostly black areas. Alleged this created disparate impact on access to opportunities.
- Supreme Court:
  - held disparate impact claims are cognizable under the Fair Housing Act
  - **upheld use of disparate impact analysis to establish liability under the FHA, without proof of intentional discrimination**, if an identified business practice has a disproportionate effect on certain groups of individuals and the practice is not grounded in sound business considerations.
- **disparate impact claim cannot be sustained solely by evidence of a statistical disparity**
- emphasized plaintiff's burden to **establish a "robust" causal connection between the challenged practice and the alleged disparate impact on a protected class**

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## SEPTEMBER 2020 FINAL RULE

- Amended HUD's interpretation of the Fair Housing Act's 2013 disparate impact standard.
- Intended to align HUD's 2013 Rule with the Supreme Court's 2015 decision in *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc.*
- Included:
  - a modification of the 3-step burden-shifting framework in its 2013 Rule
  - several new elements that plaintiffs must show to establish that a policy or practice has a "discriminatory effect"
  - specific defenses that defendants can assert to refute disparate impact claims

## COURT INJUNCTION

2020 Rule to be effective Oct. 26, 2020

2020 Rule's effective date was stayed pursuant to a preliminary injunction entered by a Mass. federal district court

Mass. Lawsuit: one of 3 suits challenging the 2020 Rule under the Administrative Procedure Act in federal district court

Mass. court's order, entered Oct. 25, 2020 enjoins HUD from enforcing the 2020 Rule and keeps the 2013 Rule in place until further order of the court.

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## EXECUTIVE ORDER

In a memorandum issued on January 26, 2021, President Biden ordered HUD to "as soon as practicable, take all steps necessary to examine the effects of" the 2020 Final Rule

## REINSTATEMENT OF HUD'S DISCRIMINATORY EFFECTS STANDARD

- A Proposed Rule: Reinstatement of HUD's Discriminatory Effects Standard (FR-6251) – pending regulatory review
- It would possibly:
  - reinstate 2013 Disparate Impact rule and HUD's Discriminatory Effects Standard
  - rescind [2020 Disparate Impact rule](#)

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# QUESTIONS



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**NORTHWEST FAIR  
HOUSING ALLIANCE**

*"Working to Ensure Equal Housing Opportunity for All"*

## THANK YOU!

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## WA 2021 LEGISLATIVE & EVICTIION MORATORIUM UPDATE

**9:30 AM - 10:30 AM**

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### **COLLEEN M. MELODY, CIVIL RIGHTS DIVISION CHIEF, WASHINGTON STATE ATTORNEY GENERAL'S OFFICE**

The Civil Rights Division enforces federal and state laws protecting the rights of vulnerable populations in WVA, with an emphasis on civil rights and anti-discrimination work. Colleen leads a team of attorneys, investigators, and staff on enforcement matters statewide. These include cases in the areas of employment, housing, education, police practices, government agencies, and at businesses that are open to the public. The Civil Rights Division has also taken a lead role in challenging unlawful policies of the federal government, including the Muslim Travel Ban, termination of the Deferred Action for Childhood Arrivals (DACA) program, Transgender Military Service Ban, Family Separation policy, and others. Prior to joining the Attorney General's Office, Colleen served as a trial attorney in the Civil Rights Division of the U.S. Dept. of Justice in Washington, DC. There, she brought enforcement actions to remedy discrimination on the bases of race, color, national origin, sex, religion, and disability. Following law school, she served as a law clerk to Judge Ronald M. Gould of the U.S. Court of Appeals for the Ninth Circuit.

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### **SCOTT CRAIN, ATTORNEY NORTHWEST JUSTICE PROJECT**

Scott Crain is a statewide advocacy counsel for Northwest Justice Project in Seattle, Washington. Currently, Scott's work focuses on the rights of low-income people to live in safe and stable housing, free from discrimination. Prior to working as an advocacy coordinator, Scott helped found NJP's Medical Legal Partnership. With MLP, Scott litigated public benefit issues on behalf of Medicaid-eligible children to prevent statewide reductions in TANF, expand autism services, and enhance EPSDT services for kids with chronic health conditions. Scott also worked as a staff attorney for NJP in rural Washington, and was previously a research fellow for the Institute on Race and Poverty. Scott has a J.D. from the University of Minnesota and a B.S. in Mathematics from Seattle University.