



# FELIZ NAVIDAD

Let's take a look at how HUD's guidance on LEP might affect you.

A jingle, "LEP Issues Will Cause You to Frown"

Composed by Howard M. Bookstaff,  
HAA General Counsel

(To the tune of "Santa Clause Is Coming to Town...")

You better watch out  
You better not cry  
You better not pout  
I'm telling you why  
LEP issues will cause you to frown

If they don't speak clear  
You have to ask twice  
A claim may be out  
And it may not be nice  
LEP issues will cause you to frown

It may bother you when you're sleeping  
You think about it when you're awake  
You don't really think it's bad or good  
But it remains an issue for goodness sake!  
Oh...

You better watch out  
You better not cry  
You better not pout  
I'm telling you why  
LEP issues will cause you to frown

You don't know what LEP is  
So what's it all about?  
You don't want to discriminate  
But this PC makes you shout – No!

You better watch out  
You better not cry  
You better not pout  
I'm telling you why  
LEP issues will cause you to frown

**WE ARE LUCKY** to be living in a country where we are surrounded by a variety of individuals with different backgrounds, nationalities, races, religions and personalities. Indeed, the strength of our country is in the variety of its citizens.

According to the U.S. Census Bureau, over 25 million persons in the United States or approximately 9 percent of the population are "limited English proficiency" or "LEP" meaning, English is not their first language and they have a limited ability to read, speak, write or understand English. Among LEP persons in this country, approximately 65 percent speak Spanish, 7 percent speak Chinese, 3 percent speak Vietnamese, 2 percent speak Korean, 2 percent speak Tagalog, 2 percent speak Russian and fewer speak dozens of other languages.

Early this year we reported on HUD's guidance with respect to how disparate impact liability under the Fair Housing Act relates to the use of criminal history criteria. As we embark on this holiday season, HUD issued a subsequent guidance on the Act's protections for persons with LEP. Released on Sept. 15, the guidance discusses how the Act applies to a housing provider's consideration of a person's limited ability to read, write, speak or understand English.

Let's take a look at how HUD's guidance might affect you.

## Is LEP a protected class?

No. 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 Act. The Act nonetheless prohibits housing providers from using LEP selectively based on a protected class or as a pretext for discrimination because of a protected class.

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HUD says individuals with LEP are considered as such because they do not speak English as their primary language as a result of their or their families' national origin being of non-English speaking countries. In the United States, 34 percent of Asians and 32 percent of Hispanics are LEP as compared with 6 percent of Whites and 2 percent of non-Hispanic Whites.

In our country, 61 percent of persons born in Latin America and 46 percent of persons born in Asia are LEP as compared with 2 percent of persons born in the United States. So HUD concludes that housing decisions based on LEP generally relate to race or national origin.

## Can I require all applicants to speak English?

A housing provider violates the Act if the provider uses a person's LEP to discriminate intentionally because of race, national origin or another protected characteristic. Selectively enforcing a language-related restriction based on a person's protected class violates the Act.

In an LEP case, intentional discrimination can be established through direct or circumstantial evidence. The key question is whether the complainant presents sufficient evidence to entice a reasonable jury to come

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to the conclusion that the person suffered an adverse housing action because of their protected class.

HUD cites court cases that say a lack of English proficiency is used as a proxy for national-origin discrimination. Therefore, courts have held that language-related restrictions are “worthy of close scrutiny,” are subject to “a very searching look” and “should be examined in the most careful possible manner.”

Justifications for language-related restrictions must be closely scrutinized to determine whether the restriction is in fact a proxy or pretext for race or national origin discrimination.

#### What practices are most likely to be challenged?

Practices that would raise suspicion include advertisements containing blanket

statements such as “all residents must speak English,” or turning away all applicants who are not fluent in English. Any cost-based justification would immediately be suspect. So, if the housing provider or resident can access free or low-cost language assistance services and you refuse to deal with renters with LEP, you would be in line for an HUD violation.

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The Act also may be violated by policies or practices that discriminate against persons based on their particular primary language, whether facially or through selective enforcement. For example, if you have a policy that prohibits renting to persons who speak a specific language, but allows you to perform the same transactions with persons who speak other languages, HUD says intentional discrimination is the likely reason.

Courts have recognized that an individual’s primary language skills generally flow from his or her national origin and persons of different nationalities are often distinguished by a foreign language. Persons who have LEP should not be singled out because they speak a certain language or have LEP skills. Take a moment to review your advertisements and make sure they do not suggest any preferences or limitations on persons because they may be LEP.

#### Am I required to provide assistance to a renter with LEP?

If a housing provider is required to provide housing-related language assistant services to LEP persons under federal, state or local law, or by contract, and the housing provider fails to comply with this requirement, this may constitute intentional discrimination. By failing to comply with a requirement to provide language assistance, the housing provider may be denying individuals, based on their national origin, an equal opportunity to enjoy the housing benefits to which that requirement entitles them.

The guidance does not discuss a requirement by a housing provider to provide

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language assistance unless it is required by law (because the housing provider is subject to a special program requiring language assistance) or by contract. However, in order to avoid potential challenges, it may be beneficial for housing providers to be prepared to refer an applicant or resident to a language assistance source.

**Can I be in violation of the Act without an intent to discrimination?**

Yes. The concept of disparate impact discrimination is based on a housing provider's violation of the Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate. A facially-neutral policy or practice that has a discriminatory effect because of race, national origin or another protected class violates the Act if it is not supported by a legally sufficient justification. Where a policy or practice that restricts access to housing on the basis of LEP has a discriminatory effect based on a protected class, the policy or practice violates the Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider or if the interest could be

served by another practice that has a less discriminatory effect.

Similar to a disparate impact analysis with respect to criminal history criteria, if you have a policy that somehow treats persons with LEP different than other persons, you may be accused of discriminating against the person because of their national origin or race, unless you have a substantial legitimate nondiscriminatory interest in having your policy.

**Do I have to provide documents in multiple languages?**

The guidance does not go as far as requiring documents in multiple languages. In fact, if this was the requirement, the requirement could be never-ending since there are countless languages and dialects that applicants and residents could speak.

However, in the guidance HUD does suggest certain accommodations. Allowing a resident a reasonable amount of time to take a document, such as a lease, to be translated, could be a less discriminatory alternative. Other less discriminatory alternatives might include obtaining written or oral translation

services or drawing upon the language skills of staff members. Similarly, if a member of the family speaks English or brings another person along to interpret, agreeing to communicate through these individuals could be an alternative to refusing to deal with anyone who does not speak English.

In some respects, the guidance raises a new concern that Fair Housing advocates and agencies will solicit claims and embark upon testing procedures to catch housing providers in LEP situations. However, in another sense, this is nothing new. It has always been beneficial to do what you can to make someone visiting or living at your property feel as comfortable as possible. Like many other characteristics, language differences should not make a difference with respect to the quality and quantity of services renters receive at your property.

It may be a good idea to review your policies and procedures so that you can accommodate persons with LEP who may visit or reside at your property.

Good luck and Happy Holidays! 

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