

# CO-LIVING DEFINED AND DISSECTED

What it is. What it isn't.  
How it's good for tenants.  
How it's good for landlords.  
And what its limits are.

Summer 2018

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How it's good for tenants. How it's good for landlords.  
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## **I. CO-LIVING DEFINED**

### **A. Today New Yorkers occupy apartments differently than people did twenty years ago.**

People today, especially younger people (millennials), occupy apartments differently than people did twenty years ago. I have no citation to an official study to support this introductory section; but I do have extensive anecdotal experience from my landlord and tenant litigation practice in New York City. I represent BOTH landlords and tenants, by the way.

Today, tenants bring more people into apartments with them – including family members, roommates, subtenants, guests, and even sometimes employees. In some cases, we see married couples living together with other married couples – as roommates. People are “location independent” in their work lives these days and operate businesses from their apartments. Then of course, we have people turning their apartments into beds-and-breakfasts and/or hotel rooms, via Airbnb and other short-term leasing platforms. Then we have “Co-Living”, an exploding phenomena all over the world.

Some of these occupancies are illegal and some are perfectly legal. To some landlords, all of this activity might seem like “overcrowding”. The more people in a building, the more stress on the infrastructure, the more garbage, the more noise, the greater the need for maintenance, etc. To tenants these new modalities of occupancy represent more choice in housing in an increasingly expensive marketplace. To the developers and lenders who build the apartment buildings, this changing environment represents more risk and more opportunity.

This area is obviously evolving right before our eyes. When an area is in flux, it creates both peril and opportunity, for all of us.

### **B. Who am I to talk about co-living?**

As of this writing, I have about a dozen co-living clients I consult with. Some I have been consulting with for as long as three years. Some are big, some are small; some refer to what they are doing as “co-living” and some do not; some are property managers, some are owner-operators, some are neither; some get venture capital, some are self-funded. Some are local and some are in multiple cities.

### **C. Co-Living Defined**

I found I needed a working definition of co-living for my practice, and this is what I came up with:

An arrangement by which a landlord rents an apartment to a group of tenants, for at least thirty days, where the tenants occupy and share the apartment as roommates, an arrangement which the landlord consents to and facilitates as an active participant; the tenants have flexible terms, which are often short, and are allowed to vacate the apartment early without liability for the full term of the lease; if a roommate is lost, the landlord assists the remaining tenants with getting a qualified new roommate to take the lost roommate's place and gives the remaining tenants rent-relief while doing so; the landlord frequently provides the tenants with other advantages and amenities, including but not limited to furnishings and personal property, services, and thematic programming, such as dinners or lectures on topics of common interest to the roommates; co-living places a big emphasis on the creation of a community within the apartment; the price per square foot for the apartment is often higher than it would be if the same apartment was not rented for co-living. The advantages of co-living for the tenant are affordability, flexibility, convenience, limited liability for bad roommates, and community. The advantage of co-living to a landlord is a higher price per square foot and greater control of the occupants of an apartment.

## **II. CO-LIVING – A NEW PARADIGM**

### **A. What Your Tenant-Customers Want That They Are Not Getting From the Current Marketplace**

Many tenant-customers<sup>1</sup> want the following things from their housing, which they are finding it hard to get in the current marketplace:

- Tenants want flexible terms.
- Tenants don't want to be on the hook for their roommate's rent when their roommates don't pay or leave.
- Tenants want furnishings and well-stocked kitchens.

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<sup>1</sup> I call tenants "customers" because that's what they are. Sometimes it seems like landlords and managing agents in NYC forget that tenants are their customers.

- Tenants want community.
- Tenants want less hassle.

## **B. How Co-Living Delivers What Tenants Want**

Co-living heals a lot of the above-mentioned pain for tenants.

In a co-living situation, the landlord aggregates the tenants, as opposed to the tenants aggregating the tenants. This makes perfect sense, because a landlord has better powers to discern the suitability of a rental candidate than a tenant. A landlord can do credit and background checks and interviews. And a landlord has just as much stake, if not more, in having qualified people in a unit.

Furthermore, the co-living landlord does more than just introduce potential roommates, the landlord also absorbs many of the tasks that tenants formerly took on themselves, for example, furnishing the apartment and providing basic supplies. Again, the landlord is in a better position to use its economies of scale to buy many coffee makers and rolls of toilet tissue, than a tenant is. Continuing upon this line of thought, a landlord is also in a particularly good position to provide all sorts of ancillary services and benefits – from cleaning to programing to discounts at local shops.

In the co-living scenario, the landlord is selling more than just space, the landlord is selling a package of services and an overall experience. This should not require a huge leap in understanding for onlookers familiar with New York City real estate, since a residential lease in New York City is already considered to be more than just a temporary grant of real property, it is also a contract by landlord for services. Every residential lease, for example, implicitly carries with it a “warranty of habitability” as articulated in New York Real Property Law §235-b.<sup>2</sup>

Moreover, the landlord is also in a better position than the tenant to absorb the risk of loss in the event that a roommate leaves early.

**In all of these ways, the landlord becomes an active participant with the tenants in the deal. The price for the landlord doing more is that the price per square foot for the apartment is often higher than it would be if the same apartment was not rented for co-living.**

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<sup>2</sup> See *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316 (1979).

### III. WHAT CO-LIVING IS NOT

Next, let us go over in detail how co-living is an extremely different thing from other residential rental paradigms. Sometimes the best way to learn what something is, is to learn what it is not.

#### A. Co-Living is NOT the Classic Roommate Situation

Under the classic roommate scenario, a tenant decides she wants an apartment that she probably cannot afford on her own. Therefore, she aggregates a group of roommates on Craig's List or using social media. That tenant finds the apartment and becomes the contact person for the group of tenants with the landlord. Maybe the landlord puts only the contact tenant on the lease, or maybe all roommates are on the lease. ***After the initial renting, the landlord is done.***

If one of the roommates leaves or stops paying rent, then there is tremendous pressure on the remaining roommates to make up the difference. When a landlord calls me up and tells me that one roommate has stopped paying rent, my best practices legal advice is always to sue ALL tenants on the lease, because they are all jointly and severally liable. This makes the nonpayment proceeding more expensive for the landlord, because there are more people to serve with the predicate notice and the nonpayment proceeding. This is a very stressful and burdensome situation for the tenants who paid their share of the rent. Now their names are in the Housing Court records even though they paid their share of the rent.

If there is only one tenant on the lease, this is all the more burdensome for that tenant. Also consider the plight of the guarantor of the single tenant. I have often gotten calls from parents who guaranteed a lease for an adult child in New York City. That guarantor can find themselves pursued for tens of thousands of dollars.

None of this is ideal for the landlord, who just wants the rent, not a Housing Court proceeding or a Guarantor Action.

Furthermore, the classic roommate situation is fraught with other difficulties. If Tenant 1 bought the coffee maker and then leaves and takes it with him, gone is the coffee maker. Tenant-roommates in the classic scenario have to divide responsibility for buying items used by all, like toilet paper.

Moreover, the classic roommate situation does little in terms of creating community for people who are looking for that as part of a roommate experience.

## **B. Co-Living is NOT SRO Usage**

### **1. Co-living - when done correctly and according to my definition - is not SRO Usage.**

Co-living - when done correctly and according to my definition - is not SRO Usage.

Co-living operators are not making (or should not be making) individual contracts with individual people for individual rooms. Rather, they make one lease for one term with all tenants' names on it. In co-living, tenants are each renting the entire apartment. They are each jointly and severally liable for the entire rent. Tenants can each move freely throughout the apartment. They can choose their own bedrooms.

Co-living spaces do not have locks on the outsides of bedroom doors. Tenants in a co-living modality are selected for their predilection to live communally, and are signing up for co-living because they want to live in a common household, not in isolation from their roommates. The co-living tenant doesn't set up a microwave or a mini refrigerator in his room.

In the SRO scenario, a landlord goes out and rents rooms within an apartment directly to individual tenants, people who have nothing to do with one another, although they may share a bathroom and a kitchen. The landlord uses separate leases for each room and each tenant, with separate prices and terms. There are most likely locks on the outside of the individual bedroom doors, as if each bedroom door is the threshold to a separate living unit.

### **2. Why You May Not Legally Rent Rooms in Non-SRO Buildings**

A landlord may not rent rooms in regular apartments. Multiple Dwelling Law ("MDL") § 4(16) states:

"Single room occupancy" is the occupancy by one or two persons of a single room, or of two or more rooms which are joined together, separated from all other rooms within an apartment in a multiple dwelling, so that the occupant or occupants thereof reside separately and independently of the other occupant or occupants of the same apartment.

MDL § 301 says that every building will be used in conformity with its certificate of occupancy ("CO"). The CO will state whether a building contains apartments or whether it may be rented for SRO use. Therefore, MDL § 301 would be violated if an apartment in a regular building was rented for SRO use.



If MDL § 301 is violated, then, according to MDL § 302, the building's mortgage goes into default, no rent is due from the tenants, no law suit for rent may be brought against the tenants, and:

2. The department may cause to be vacated any dwelling or any part thereof which contains a nuisance as defined in section three hundred nine, **or is occupied by more families or persons than permitted in this chapter**, or is erected, altered or occupied contrary to law. Any such dwelling shall not again be occupied until it or its occupancy, as the case may be, has been made to conform to law. [Emphasis supplied.]<sup>3</sup>

The New York City Housing Maintenance Code ("HMC") applies to all dwellings.<sup>4</sup> There is a similar definition of an SRO (to that in the MDL) in the HMC, which calls an SRO unit a "Rooming Unit" at § 27-2004(a)(15) and states:

Rooming unit shall mean one or more living rooms arranged to be occupied as a unit separate from all other living rooms, and which does not have both lawful sanitary facilities and lawful cooking facilities for the exclusive use of the family residing in such unit. It may be located either within an apartment or within any class A or class B multiple dwelling.

Under HMC § 27-2004(14), an *"Apartment shall mean one or more living rooms, arranged to be occupied as a unit separate from all other rooms within a dwelling, with lawful sanitary facilities and a lawful kitchen or kitchenette for the exclusive use of the family residing in such unit."* Under HMC § 27-2004(4), a "family" is:

- (a) A single person occupying a dwelling unit and maintaining a common household with not more than two boarders, roomers or lodgers; or
- (b) Two or more persons related by blood, adoption, legal guardianship, marriage or domestic partnership; occupying a dwelling unit and maintaining a common household with not more than two boarders, roomers or lodgers; or
- (c) Not more than three unrelated persons occupying a dwelling unit and maintaining a common household; or....

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<sup>3</sup> In *Association For Neighborhood Rehabilitation, Inc. v. Board of Assessors of Ogdensburg*, 81 A.D.3d 1214 (3<sup>rd</sup> dept. 2011), the court found that "SRO tenants have a single sleeping room, with access to a communal kitchen, bathroom and social area."

<sup>4</sup> N.Y. ADC. LAW § 27-2003.

Here is an example of a recent Environmental Control Board case. In *Zhao*: ECB App. No. 1700674 (8/3/17) [LVT Number: #27928], the New York City Department of Buildings (“DOB”) issued violation notices to landlord for converting a two-family house to six SRO units [pursuant to Title 28 of the HMC which has to do with construction]. Landlord claimed that she hadn't changed the building since buying it in 2014. She claimed that she lived on the first floor and landlord's relatives lived on the second floor. But landlord submitted photographs showing that there were locks on room doors. DOB submitted a number of photographs documenting its claim. The Administrative Law Judge ruled against landlord and fined her \$47,400, which included daily penalties. Landlord appealed and lost.

### **C. Co-Living is NOT Short Term Leasing (Like Airbnb)**

It is only permissible for not more than **two guests** to stay in an apartment **building with three or more units** for **less than 30 consecutive** days under two circumstances:

(1) If the guest is (or two guests are) “living within the household of the permanent occupant”, *i.e.* the tenant is home.

(2) If the permanent occupant is temporarily away and the guest does NOT pay.<sup>5</sup>

Suffice it to say, a professional Airbnb operator is NOT engaged in “co-living”, even if the pro-operator tries to dress it up that way.

### **D. Co-Living is NOT Micro Units**

This last section has no law in it, and it contains mostly my opinion, so skip it if you want to.

Co-living is NOT Micro! Micro units, to me, mean that a development has little tiny apartments. Those apartments are not rooms, they have kitchens and baths. To compensate for the tiny apartments, the development will have great building-wide common space amenities. Maybe your kitchen is teeny-tiny, but there is a great barbeque area on the roof, complete with tools and stocked with charcoal. Maybe you have almost no living room, but there are party rooms in the building you can rent, and various decks and lounges available for free. This is all great. But it is not co-living. Micro means you have a small apartment in a great building.

Co-Living has an unmistakable communal aspect to it that the Micro development lacks.

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<sup>5</sup> See Short-Term Renting in the Sharing Economy; <http://www.itkowitz.com/booklets/Short-Term-%20Renting-in-%20the-Sharing-Economy.pdf>.

#### **IV. CO-LIVING'S LIMITATIONS AND DRAWBACKS**

##### **A. Co-Living Does Not Work in Rent Stabilization**

Co-living does not, in my opinion, work in Rent Stabilized assets.

###### **1. Rent Stabilization Primer**

Rent Stabilization applies to about one million tenancies in New York City<sup>6</sup>. Rent Stabilization limits the rent an owner may charge for an apartment, restricts the right of an owner to evict tenants, and imposes other requirements on landlords and tenants. Rent Stabilization is overseen by the New York State Division of Housing and Community Renewal ("DHCR")<sup>7</sup>.

Rent Stabilized tenants are entitled to leases and automatic lease renewals.<sup>8</sup> Under Rent Stabilization, leases must be entered into and renewed for one- or two-year terms, at the tenant's choice. Actually, a Rent Stabilized lease protects an owner much more than it protects a tenants. Tenants have all the same rights whether they have a lease or not, because their rights derive from the statute. One of the obligations of the landlord under Rent Stabilization is to renew the lease. When the landlord fails in that obligation, it cannot collect rent increases or sue a tenant in Housing Court. A landlord's refusal to renew a Rent Stabilized tenant's lease, or the failure to renew it properly, is a basis for a tenant complaint with the DHCR and a defense to the eviction effort.<sup>9</sup>

Family members residing in a Rent Stabilized apartment often have succession rights to the tenancy.<sup>10</sup>

Rent increases for Rent Stabilized tenants are controlled by the New York City Rent Guidelines Board, which sets maximum rates for rent increases once a year, which are effective for leases beginning on or after October 1st.

Owners are required to register all Rent Stabilized apartments initially and then annually with the DHCR and to provide tenants with a copy of the annual registration. Owner's must be very careful when filing DHCR registrations because once they are filed they cannot be amended without filing initiating a DHCR proceeding and explaining

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<sup>6</sup> Selected Initial Findings of the 2014 New York City Housing and Vacancy Survey; <http://www1.nyc.gov/assets/hpd/downloads/pdf/2014-HVS-initial-Findings.pdf>.

<sup>7</sup> Omnibus Housing Act § 3 (L. 1983, c. 403).

<sup>8</sup> 9 NYCRR § 2523.5(a).

<sup>9</sup> *Haberman v. Nuemann*, 2003 WL 222807 (AT 1st 2003) ("Since landlord's notice for renewal of the lease was not in the form 'prescribed' or 'approved' by DHCR, and the requisite rider promulgated by DHCR was not attached, this holdover proceeding based upon tenant's alleged refusal to renew the lease does not lie.").

<sup>10</sup> 9 NYCRR § 2523.5 (b)(1); 9 NYCRR § 2520.6 (o).

the reason for the amendment<sup>11</sup>, which is time consuming and costly and which makes the landlord look suspicious in the eyes of DHCR or the Courts.

**2. Why It Is So Hard To Tell If An Apartment Is Rent Stabilized; Get a clear reading on any apartment's regulatory status before you devote that unit to co-living.**

**There is no official list somewhere that definitively tells the world which apartments are subject to Rent Stabilization and which are not.** The DHCR has jurisdiction over matters relating to Rent Stabilization and the DHCR maintains some records. But the records the DHCR maintains contain information that is largely self-reported by landlords and that is not controlling with regard to an apartment's Rent Stabilization status. Therefore, year after year, a landlord can report to the DHCR that an apartment is "permanently exempt", but that does not make it so.

Moreover, a current or former tenant may have signed a document acknowledging that an apartment is not subject to Rent Stabilization. But this, also, does not make it so. Parties may not contract in or out of Rent Stabilization coverage.<sup>12</sup>

How do you ever get a definitive answer on an apartment's Rent Stabilization status? With some exceptions, the last word on whether an apartment is Rent Stabilized is in the hands of the courts or the DHCR. Until a judge is satisfied that an apartment is not Rent Stabilized, the matter is always, in some measure, unsettled.

Why is this so complicated? Because it is. There are many statutes and mountains of case law, stretching back to the 1970's, that, when woven together, make up the rent regulatory scheme in New York City. There are rules, and exceptions to the rules, and exceptions to the exceptions to the rules. The information that I need to answer the question with respect to an individual apartment is never altogether in one place. In general, I have to look for decisions on the administrative or court level that might have a *collateral estoppel* or *res judicata* effect on a particular apartment's status; in other words, the issue may have been decided already for that unit. I must look at the date a building was built, and sometimes I have to consider the building's possible substantial rehabilitation. I have to look at the number of units, including possible illegal units. I have to look for tax abatements, which have a strong relationship with Rent Stabilization status. I have to look at claims of Individual Apartment Improvements and claims of High Rent Vacancy Deregulation, which are often faulty. I have to run spreadsheets and do math. It isn't simple.

In general, if a Building was built before 1974 and contains six or more units, then the apartments therein are Rent Stabilized<sup>13</sup> unless certain exceptions apply. And

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<sup>11</sup> 9 NYCRR 2528.3 Annual registration requirements.

<sup>12</sup> *Thornton v. Baron*, 5 N.Y.3d 175 (2005).

<sup>13</sup> NYC Admin. Code 26-505(b).

those exceptions do not apply as often as most people think. I estimate that there are approximately 250,000 illegally deregulated apartments in New York City at this time.<sup>14</sup>

Therefore, I have developed a product called “Rent Stabilization Due Diligence for Multi-Family Buildings”<sup>15</sup>. **My advice is simply that you get a clear reading on any apartment’s regulatory status before you devote that unit to co-living.**

### **3. Why Rent Stabilization and Co-Living Do Not Mix**

Rent Stabilization is about stability. Co-living is about flexibility. Also, you cannot charge a Rent Stabilized tenant a premium for ancillary services, Rent Stabilized rents, as was discussed above, are strictly controlled. For these reasons, I do not see how Rent Stabilization and Co-Living are compatible.

Hey, I am happy to proven wrong, that’s better for all of us.

### **B. Co-Living and Affordable Housing for New Yorkers**

As of this writing, I am, personally, not clear about how co-living could work for families. Co-living works for single people, and maybe for couples. Co-living makes safe and pleasant housing more affordable for the single New Yorker. I do not know that it offers anything to a working family. To the extent that more housing is devoted to co-living, it could mean less housing for working families.

Maybe, however, if allowed to grow, the co-living paradigm can expand to a place where it could be very good for families. They say it takes a village to raise a child, co-living might be the pathway to creating more villages with New York City for working families.

## **V. FOUR TYPES OF CO-LIVING BUSINESSES AND HOW THE SMALLER TO MEDIUM OWNER OR MANAGER MIGHT ENCOUNTER CO-LIVING – AND WHAT TO BEWARE OF!**

### **A. Co-Living Advertising Platforms**

I am encountering many companies (I do not represent any) that have created platforms where landlords can advertise “rooms for rent”.

I think this is very problematic for owners or managers, since, as discussed in detail above, it is strictly illegal to rent rooms in regular buildings in NYC.

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<sup>14</sup> <http://www.itkowitz.com/booklets/illegal-deregulated-rent-stablized-apartments-in-NYC.pdf>.

<sup>15</sup> <http://www.itkowitz.com/due-diligence>

If you, as an owner or manager, advertise a room on such a platform, and subsequently get in trouble for it with the City, the State, or a court, then I doubt you could look to the co-living advertising platform for relief.<sup>16</sup>

### **B. Co-Living Companies that Manage Your Asset**

There are co-living companies that will manage an asset for an owner. The owner is still the landlord, and the co-living company is the property manager.

### **C. Co-Living Companies that Net Lease Your Asset**

There are co-living companies that will net-lease a whole building. In this case, the owner is the landlord and the co-leasing company is the only tenant. Then the co-leasing company becomes to sub-landlord to the occupants of the apartments, the sub-tenants.

### **D. Risks When Working with Co-Living Management Companies or Net Leasing to a Co-Living Tenant**

Co-living, *if done improperly*, can lead to serious consequences for an owner. I list them here:

- If the City inspects and finds, as per HMC § 27-2004(a)(15), that you are renting rooms, then there could be a finding of illegal SRO use, which could result in violations, fines, and vacate orders.
- If the building has less than six units, and co-living creates six or more units, and the building was building before 1974, then the building could be found to be Rent Stabilized. If a Building was built before 1974 and contains six or more units, then the apartments therein are Rent Stabilized. This is so, however, even if the building in question had less than six units in 1974, but *after* to 1974, six units were created in the building. This is so, even if the extra units were (a) illegally created, and (b) subsequently eliminated!<sup>17</sup>

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<sup>16</sup> See *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F.Supp.3d 1097 (USDC CD California,2017) (Apartment owners and operators brought a putative class action against online housing marketplace asserting state law causes of action alleging that the rentals of their properties on the online marketplace's website purportedly violated their own lease agreements with their tenants. Online marketplace moved to dismiss. The District Court held that an online marketplace was not an information content provider so that it was not precluded from asserting the Communications Decency Act's (CDA) grant of immunity, and owners and operators' claims treated marketplace as a publisher or speaker of the information that tenant users provided on its website, and thus the CDA's grant of immunity preempted the claims.)

<sup>17</sup> See *Wilson v. One Ten Duane Street Realty Co.*, 123 AD2d 198 [1stDept 1987]; *Robrish v. Watson*, 48 Misc3d 143(A)[App Term, 2nd Dept, 2nd, 11th & 13th Jud Dists 2015]; *Joe Lebnan, LLC v Oliva*, 39 Misc3d 31 [App Term, 2nd Dept,2nd,11th & 13th Jud Dists 2013] ; *Rashid v. Cancel*, 9 Misc 3d 130(A) [App. Term 2<sup>nd</sup>Dept, 2nd & 11th JudDists 2005], *124 Meserole, LLC v. Recko*, 55 Misc 3d 146(A) [App Term, 2nd Dept,2nd,11th & 13th Jud Dists 2017].

- The Tenants of such units could refuse to pay rent if the use of the subject building does not conform to the building's certificate of occupancy by reason of the break-up of the apartments.<sup>18</sup>

### **E. The Owner-Operator Who Runs the Building with Co-Living**

I have a client that is buying and renovating buildings for its branded co-living model. This client is already a big player on the national multi-family scene.

There is nothing to prevent a small operator from trying a co-living experiment! You can start small and work with just one apartment.

## **VI. CO-LIVING AND DISCRIMINATION: IT VIOLATES ANTI-DISCRIMINATION LAWS TO ONLY RENT TO PEOPLE OF A CERTAIN AGE OR FAMILY COMPOSITION STATUS**

### **A. Anti-Discrimination Laws**

There are three statutes under which housing discrimination liability is created in New York City -- the Fair Housing Act ("FHA") and the New York State and New York City Human Rights Laws (collectively "HRL"). All prohibit discriminatory housing practices and are similar in most instances except that the HRL creates more protected classes. We will discuss the general background of these laws separately but merge the discussion when talking about each type of discrimination because FHA and HRL causes of action have similar elements and burdens of proof (i.e. for most purposes they are largely identical).

#### **1. Fair Housing Act**

The FHA<sup>19</sup> is a United States federal act intended to protect the buyer or renter of a dwelling from discrimination. Its primary prohibition makes it unlawful to refuse to sell, rent to, or negotiate with any person because of that person's inclusion in a protected class.

In the sale and rental of Housing, no one may take any of the following actions **based on race, color, national origin, religion, sex, familial status or handicap:**

- Refuse to rent or sell housing;
- Refuse to negotiate for housing;

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<sup>18</sup> Multiple Dwelling Law § 302(b).

<sup>19</sup> The FHA was enacted as Title VIII of the Civil Rights Act of 1968, and codified at 42 U.S.C. 3601-3619, with penalties for violation at 42 U.S.C. 3631

- Make housing unavailable;
- Set different terms, conditions or privileges for sale or rental of a dwelling;
- Provide different housing services or facilities;
- Falsely deny that housing is available for inspection, sale, or rental;
- Deny anyone access to or membership in a facility or service (such as a multiple listing service) related to the sale or rental of housing; or
- Advertise or make any statement that indicates a limitation or preference based on race, color, national origin, religion, sex, familial status, or handicap. This prohibition against discriminatory advertising applies to single-family and owner-occupied housing that is otherwise exempt from the Fair Housing Act.<sup>20</sup>

## **2. Human Rights Law**

There is both a New York State<sup>21</sup> and New York City<sup>22</sup> Human Rights Law. We will refer to both interchangeably as the “HRL”.<sup>23</sup>

The HRL prohibits discriminatory housing practices by owners, brokers, and managing agents of residential and commercial properties **on the basis of race, creed, color, national origin, sex, sexual orientation, age, disability, marital or familial status, and source of income** including:

- Refusal to sell, rent, or lease to a protected class<sup>24</sup>;
- Discriminating against a protected class as to conditions or privileges of a sale, rental, or lease or in the furnishing of facilities or services in connection therewith<sup>25</sup>; or

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<sup>20</sup> See 42 USCA § 3604. See also [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/FHLaws/y o urrights](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/y%20urrights).

<sup>21</sup> Article 15 of the Executive Law §§ 290-301.

<sup>22</sup> New York City, N.Y., Code § 8-107.

<sup>23</sup> Discussing the marginal differences between these two statutes will not be time well spent. They are largely identical, except that the New York City HRL adds an extra protected class – lawful source of income.

<sup>24</sup> See Exec. Law § 296(5)(a).

<sup>25</sup> See Executive Law § 296(5)(b).



- Orienting or circulating or causing to be printed or circulated any “advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status, or any intent to make any such limitation, specification or discrimination.”<sup>26</sup>

The HRL contains a very broad definition of housing; it is defined as “any building, structure, or portion thereof which is used or occupied ... as the home, residence or sleeping place of one or more human beings.”<sup>27</sup>

### **B. Burden of Proof for Disparate Impact claims under HRL and FHA**

Violations of the FHA and HRL can be established by a demonstration of either disparate treatment or disparate impact.<sup>28</sup> By way of example, disparate treatment is a regulation that says “*no handicapped people allowed*” or “*no children allowed*”. Disparate impact is a regulation that says something like “*one tenant per room*,” which affects families, minorities, and/or some other protected class unequally by affecting, for example, 76% of married couples.

### **C. Familial Status Discrimination**

Under both the FHA and HRL, landlords are not allowed to explicitly or indirectly discriminate against tenants based on family status, which includes discrimination on account of one’s marital status, having children, and/or old age.<sup>29</sup>

Under the HRL and FHA, a landlord may not legally decline to rent to or evict a tenant because he or she has children or because the applicant or tenant is pregnant.<sup>30</sup> Even if the landlord has a worthy motive, such as believing that children will not be safe

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<sup>26</sup> See Executive Law § 296(5)(c).

<sup>27</sup> See Executive Law § 292 (10).

<sup>28</sup> (For FHA) E.g., *Bangerter v. Orem City Corp.*, 46 F3d 1491, 1501 (10th Cir 1995) cited in *Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development*, 56 F3d 1243, 1250 (10th Cir 1995); (For HRL) *Levin v Yeshiva Univ.*, 96 NY2d 484, 491 (2001).

<sup>29</sup> 42 US Code § 3604; Exec Law § 296(5); NYC Admin Code § 8-107(5).

<sup>30</sup> 42 U.S. Code § 3604; Exec. Law § 296(5); N.Y.C. Admin Code § 807(5); See *Morgan v. Secretary of Housing and Urban Development*, 985 F.2d 1451 (10th Cir. 1993) (upholding constitutionality of Act as applied to private owners); *Seniors Civil Liberties Ass'n, Inc. v. Kemp*, 965 F.2d 1030 (11th Cir. 1992) (same).

in the building or the neighborhood, it is illegal to refuse to rent on that basis or to make other discriminatory moves such as steering families to certain parts of the property.

#### **D. Discrimination Based Upon Age**

The HRL expressly prohibits housing discrimination based on age.<sup>31</sup> While the FHA does not expressly ban discrimination based on age, it is forbidden under the broader prohibition against discrimination on the basis of familial status.<sup>32</sup> A landlord cannot refuse to rent to an older person or impose special terms and conditions on the tenancy unless these same standards are applied to everyone else. If a tenant has excellent references and credit history, a landlord has no legal basis for refusing to rent, even if the applicant relies to some degree on the regular assistance of a nearby adult child or friend. However, a landlord could legally give the rental to someone else with equal or better references or financial stability.

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<sup>31</sup> See Exec. Law § 296(5).

<sup>32</sup> See, e.g., *Stalker v Stewart Tenants Corp.*, 93 AD3d 550, 551 (1st Dept. 2012).

## **ABOUT THE AUTHOR**

Michelle Maratto Itkowitz is the owner and founder of Itkowitz PLLC and has been practicing landlord and tenant litigation (both complex-residential and commercial) in the City of New York for over twenty years. Michelle represents BOTH tenants and landlords and her core competencies include: Rent Stabilization and DHCR Matters; Rent Stabilization and Regulatory Due Diligence for Multi-Family Properties; Rent Stabilization Coverage Analysis for Tenants; Sublet, Assignment, and Short Term Leasing Cases (like Airbnb!); all kinds of Residential Tenant Representation; Good Guy Guaranty Litigation; Co-op Landlord and Tenant Matters; Loft Law Matters; De-Leasing Buildings for Major Construction Projects; Emotion Support Animals in No-Pets Buildings; and Co-Living.

Michelle publishes and speaks frequently on landlord and tenant law. The groups that Michelle has written for and/or presented to include: Lawline.com, Lorman Education Services, Rosedale CLE, The New York State Bar Association, Real Property Section, The Columbia Society of Real Estate Appraisers, The Appraisal Institute, LandlordsNY, The Association of the Bar of the City of New York, Thompson Reuters, The Cooperator, and Argo University.

Michelle regularly creates and shares original and useful content on landlord and tenant law, including via booklets, blogs, videos, and live presentations. As the “Legal Expert” for LandlordsNY.com, the first social platform exclusively for landlords and property managers, Michelle answers member’s questions, guest blogs, and teaches. Michelle developed and regularly updates a seven-part continuing legal education curriculum for Lawline.com entitled "New York Landlord and Tenant Litigation". Over 20,000 lawyers have purchased Michelle’s CLE classes on Lawline.com (a labor of love for which Michelle gets not a dime) and the programs have met with the highest reviews. Michelle co-authored a chapter on lease remedy clauses and guaranties for the New York State Bar Association, Real Property Section, Commercial Leasing Committee.

Michelle is immensely proud that Itkowitz PLLC was awarded its NYS Women Business Enterprise Certification by the Empire State Development Corp. Michelle’s eponymous law firm is one of the largest women-owned law firms, by revenue, in the State.

Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York. She received a Bachelor of Arts in Political Science in 1989 from Union College and a Juris Doctor in 1992 from Brooklyn Law School. She began her legal career at Cullen & Dykman.



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