WINDOWS WITHOUT SCREENS
No More Immigration-Status Screening in California

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While immigration policy continues to be a topic of heated national debate, there's increasing confusion in California about what park owners should and should not do to comply with the law. Whatever our opinions, the laws affecting resident screening changed effective January 1, 2008.

In a nutshell, the change is this: No more inquiries regarding immigration or citizenship status. Management may not "Make any inquiry regarding or based on the immigration or citizenship status of a tenant, prospective tenant, occupant or prospective occupant," or require "any statement, representation, or certification concerning his or her immigration or citizenship status." Despite a previous HUD position that the Fair Housing Act does not prohibit discrimination based solely on a person's citizenship status and existing federal immigration law that it is illegal to conceal, harbor, or shield an illegal alien from detection, the California Legislature now prohibits screening for lawful residency.

Why all the fuss? The City of Escondido passed an ordinance barring all landlords from renting to illegal immigrants and requiring landlords to evict them. A suit ensued and the ordinance was promptly rescinded. Many other municipalities had passed or considered such ordinances. The Apartment Association of California Southern Cities sponsored AB 976 to protect landlords, stating that regulation of immigration is exclusively a matter of federal law and conflicting local laws would result in lawsuits and create landlord liability (to enforce federal laws as "de facto immigration cops").

Specifically, AB 976 adds Section 1940.3 to the Civil Code. This section:

- prohibits local government from requiring owners of rental property to gather or report information about a tenant or a prospective tenant's immigration or citizenship status.

- prohibits a landlord from making any inquiry regarding or based on the immigration or citizenship status of a tenant, prospective tenant, occupant, or prospective occupant of residential rental property.

- prohibits a landlord from requiring that any tenant, prospective tenant, occupant, or prospective occupant of the rental property make any statement, representation, or certification concerning his or her immigration or citizenship status.

AB 976 does not prohibit the landlord from:

- Complying with any legal obligation under federal law.

- Requesting information or documentation necessary to determine or verify the financial qualifications of a prospective tenant, or to determine or verify the identity of a prospective tenant or prospective occupant.

Thus, the law does not affect operation or application of the statutes (Civil Code section 798.74) that deals with the qualification of a prospective homeowner for a mobilehome tenancy.

Management would be violating the law to inquire concerning residency status in this country. It is, for example, illegal to ask a prospective homeowner (verbally or in writing) if he, she or any member of the prospective household is a U.S. citizen, in this country illegally, has a "green card" or other documentation, intends on becoming a citizen or attaining legal residency status. Of course, indirect questions designed to elicit information regarding citizenship or residency status would be similarly prohibited. These questions and all like them would violate the law. No questions or inquiries designed to reveal residency status may be directed to the prospective homeowner. However, verification of the identity of your prospective homeowner, by reliable identification, is permitted; otherwise management could not obtain a financial report and credit rating.

A New Quasi-Protected Class. A good "fair housing" adage to remember, is that "if you are not entitled to know a fact, you are not entitled to ask about it." In other words, residency status is not a subject for inquiry or discussion of any kind. Put another way, we know that management is not entitled to ask about any protected class status. "Residency status" creates a new *quasi-protected class status*. *What are protected classes in California?* Sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, familial status, sexual orientation and source of income. "Source of income" includes failing to account for the aggregate income of persons proposing to reside together on the same basis as the aggregate income of married persons. The one exception to "familial status" protections applies only to "older persons" or "senior" parks, and there management is required to seek and document status of "older persons" (55+) or "seniors" (62+) for tenancy. Thus, management may not ask if an applicant is African-American, Catholic, or female, for example. No protected class status or characteristic is open for screening, discussion or scrutiny. Simply, residency status is also a protected class for purposes of the tenancy application.

Management's Rights and Duties? The law also states that "Nothing in this section shall prohibit a landlord from either: (1) complying with any legal obligations under federal law (2) requesting information or documentation necessary to determine or verify the financial qualifications of a prospective tenant, or to determine or verify the identity of a prospective tenant or prospective occupant."

Do I Modify My Tenancy Application? Does your application request citizenship information? If so, such inquiries must be removed from the application. Have you requested residency status information? You can no longer seek such information. Does your resident interview sheet contain questions as to residency or citizenship status? Such inquiries must be deleted from the interview topics of discussion.

Does the New Law Affect Tenancy Screening under the MRL? The operation and scope of Civil Code section 798.74 is *not* affected by the new law. Management may and should inquire into ability to pay the rents and other charges, gross income, and ability to comply with the rules and regulations. A tenant may be required to demonstrate the "financial ability to pay the rent and charges of the park." Hence, credit screening should continue to remain park policy without change.

For example, due to the right to determine or verify the financial qualifications of a prospective tenant, the information used for the processing of a credit screening check, employment and income verification are permitted. Under Civil Code section 798.74, management has the right to require proof of gross income ("management may require the purchaser to document the amount and source of his or her gross monthly income . . . "). The Mobilehome Residency Law expressly allows the management to "obtain a financial report or credit rating . . ." The law allows the management to set up and use reasonable standards for determining sufficient income. All these requirements for information set forth on a tenancy application remain permissible.

The Difference Between an Incomplete Application and a Denial of Tenancy. A tenancy application must be approved or denied within 15 business days. Civil Code section 798.74 (a) (within 15 business days of receiving *all of the information requested* from the prospective homeowner . . .). And within that fifteen day period, the applicant must submit to a park interview at management's request. Where truthful and correct information is provided, the management can then proceed to procure a financial report showing a history of experience with financial obligations. This information bears upon the reasonable expectancies for timely payment of rents and other charges of the tenancy. Proof of income is also provided. In such cases, management is provided with a reasonable, demonstrable assurance that the prospective homeowner will not default in future payment. Accordingly, management then provides a notice of approval of the application. But this is not always the case.

What if the management has not received "all of the information requested from the prospective homeowner"? In such case, the submitted application should be promptly returned to the prospective homeowner so a complete application can be submitted. The time frame for approval or denial of the application, of course, cannot begin to apply until a completed application has been received. If there is insufficient information provided on which to obtain a financial report or credit rating, the management is deprived of the right to determine financial ability to pay the rent. The new law does not purport to relax any financial requirement for tenancy in the park. The law does not require the management to make a tenancy decision devoid of all the information requested, and without proof of reasonable expectation of sufficient source and amount of income to make timely payment. Consistently applied tenancy application criteria including review of financial reports, credit ratings and amount and source of income do not violate the new law.

The application provided to the management must also contain correct information. Providing false information (in the same manner as fraudulent concealment of the truth) about material facts pertaining to a tenancy application is a lawfully recognized basis for refusing to enter a contractual relationship. For example, providing a false social security number to enable processing of a financial report constitutes a fraudulent effort to deceive the management into an acceptance for tenancy. Obviously, management is entitled to reject an applicant for such a tactic. In the same way, the failure to provide any social security number disables management from obtaining a financial report. Such an application is incomplete.

Thus, management is entitled to screen prospective homeowners for ability to pay the rents and other charges of the park, as always. The new law does not require approval of tenants without reasonable assurance of performance under a rental agreement. The law does not impose a requirement or assumption of greater credit risk, costs for defaulting tenants, or qualifications below management's standards.

Am I a "de facto immigration cop"? Do I have a duty to take action against homeowners

whom I discover are undocumented aliens? Legislative Counsel once wrote that a landlord may refuse to rent to such a person without running afoul of a ban on immigration-status discrimination if so renting would violate federal law for "harboring" an alien known to be in the country illegally. According to the Bill analysis, prohibiting residency status inquiries is to be read in harmony with any federal obligation to refuse to rent when management is put on sufficient notice of facts indicating that a tenant or prospective tenant is undocumented. "Sufficient notice" means to be aware of, but consciously and carelessly ignore, facts and circumstances clearly indicating that the alien entered or remained in the U.S. in violation of law.

What happens if a property owner determines that an existing homeowner is an illegal immigrant? Preventive response to avoid potential liability is a hallmark of good management. And is there any higher business priority than avoidance of any lawsuit entitled "The United States of America vs. [Park Owner]"? It is a violation of federal law to harbor an illegal immigrant. So, let's first understand the meaning and operation of the federal prohibition against 'harboring."

What does "harbor" mean? Do you know that an illegal immigrant is your homeowner? Is that enough to "harbor" an illegal alien? The reported decisions are mixed, even here in the 9th Circuit. Some decisions find liability for allowing a residency, some require more egregious conduct. Certainly, management must have had an *awareness and knowledge* of undocumented residency before being required, under federal law, to take action. At present, the personal counsel of your attorney is the *only* source of authority on which to rely in this matter. This is because the law varies across the country, and there have been very few prosecutions reported for violations of the federal "harboring" law.

"Harboring" has included the church official who invited an illegal alien to stay in an apartment behind his church (harboring did not require an intent to avoid detection). "Harboring" is proved if the accused "intended to violate the law," with "the purpose of avoiding [the aliens'] detection by immigration authorities." "Harboring" has been established by proof of "conduct tending substantially to facilitate an alien's 'remaining in the U.S. illegally,' provided, of course, the person charged has knowledge of the alien's unlawful status." One Court stated that the word "harbor" means to "clandestinely shelter, succor and protect improperly admitted aliens." When an act is done "clandestinely" it is done secretly or in hiding.

So, we have a range of precedents, from the benevolent act of sheltering an illegal alien at a church, to promoting illegal entry and sustenance. On discovery that the homeowner is an undocumented alien (that is, the registered owner under a rental agreement for mobilehome tenancy), it is imperative that management consult with experienced counsel with likely two alternatives in mind: 'blow the whistle' and terminate the tenancy. There is no specific ground for termination of tenancy based on compliance with federal law to avoid "harboring." However, presumably, rules and regulations that prohibit unlawful activity, violation of statutes, laws and ordinances, etc., will be a basis to assert violation of rules and regulations. Management's choices can only be decided definitively by considering the facts, location, judicial attitudes, government agency propensity for enforcement and other relevant factors.

Simply, have a plan and follow it. Financial ability to pay rent is management's concern: proof of gross income, a financial report, a credit rating; the ability to comply with the rules and regulations. Make sure your credit screening, interviews and decisions are made timely. Carefully review Civil Code section 798.74. Follow your plan consistently. Retain your records, applications, approvals and denials. And, make sure the plan does not include inquires into residency status.

When confronted with clear evidence that a homeowner is an undocumented alien, management's decisions should be based on consideration of all factors made in conjunction with the opinions of your counsel.

Park owners should keep in mind that immigration is a fluid issue and federal policy may yet emerge from the ongoing spirited debate. For the present, we should stay focused on California law that prohibits inquiries into a prospective applicants residency status, and the federal mandate to avoid "harboring" illegal aliens.