

FAIR HOUSING STANCE ON OCCUPANCY STANDARDS/LIMITATIONS

There is no hard-and-fast rule as to what, for purposes of fair housing laws, is an allowable occupancy limit. Probably the best known "rule of thumb" is the "Keating Memo," issued by HUD's General Counsel, Frank Keating, in 1991, and later adopted by HUD as noticed in the Federal Register, Dec. 22, 1998. In that memo, Mr. Keating wrote, "Specifically, the Department believes that an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act." But, it was noted, a number of factors could justify deviating from that general rule. The size of the bedrooms, the ages of children, and configuration of the unit could all be relevant.

"For example," Mr. Keating wrote, "if a mobile home is advertised as a 'two-bedroom' home, but one bedroom is extremely small, depending on all the facts, it could be reasonable for the park manager to limit occupancy of the home to two people."

In 1998 the California Department of Fair Employment and Housing adopted a guideline that slightly expanded the Keating formula by saying that they would be disinclined to investigate cases *unless the occupancy limits were more restrictive than 2 persons per bedroom plus one*. The "plus one" acknowledges, as does the Uniform Housing Code, that most dwellings are so configured that it would be reasonable for at least one person to use some non-bedroom space (e.g. a loft, den, or living room) as a sleeping area.

Although the "2+1" guideline has never been formally adopted by legislation or state regulation, it has become widely used and referred to. Nevertheless, landlords should remember that, unless a local jurisdiction has adopted it, it has no legal status and cannot be depended upon as a safe harbor.

The safest guideline, then, is probably this: If you are going to have an occupancy limit, it should be based on the number of people allowed, and it should not limit, or mention, the number of children.

