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Source of Income Discrimination Law Becomes a Source of Contention and Confusion

By Gary M. Rosenberg, Cori A. Rosen & Ethan R. Cohen
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In *Matter of People of the State of N.Y. v. Commons West, LLC*, the New York State Attorney General commenced a proceeding against an owner and operator of residential rental properties in the City of Ithaca, alleging unlawful "source of income discrimination" in violation of Executive Law §296(5)(a)(1), after two prospective tenants filed complaints asserting that respondents had refused to rent apartments to them on the ground that they were receiving housing assistance pursuant to Section 8 of the United States Housing Act of 1937 (42 USC §1437f).

The proceeding was commenced based upon an April 2019 amendment to New York State's antidiscrimination law, the New York Human Rights Law, which made it an unlawful discriminatory practice to refuse to sell, rent, or lease housing accommodations to a person based their "lawful source of income," such as a Section 8 housing voucher.

Specifically, Executive Law §296(5)(a)(1) prohibits "an owner, landlord, managing agent, or other person having the right to sell, rent, or lease a housing accommodation…[t]o refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such

No ruling has been issued with respect to the near identical prohibition in the New York City Human Rights Law, creating a debate among officials and attorneys on the constitutionality of source of income discrimination as whole.

a housing accommodation because…of the race, creed, color, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, status as a victim of domestic violence, *lawful source of income* or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available" (emphasis supplied).

The Human Rights Law, Executive Law §292(36), defines "lawful source of income"

to "include, but not be limited to, child support, alimony, foster care subsidies, income derived from social security, or any form of federal, state, or local public assistance or housing assistance including, but not limited to, *section 8 vouchers*, or any other form of housing assistance payment or credit whether or not such income or credit is paid or attributed directly to a landlord…" (emphasis supplied).

Pursuant to section 8 of the United States Housing Act of 1937, the federal government operates the Housing Choice Voucher Program that provides housing assistance to eligible low-income families by giving rent vouchers and subsidies to landlords who rent apartments to eligible families (*see* 42 USC §1437f).

However, to accept a Section 8 housing voucher as payment for rent, a landlord is required to enter into a Housing Assistance Payment (HAP) contract with a Public Housing Agency. In turn, a HAP contract, which cannot be altered and must be signed in the form required by the United States Department of Housing and Urban Development (HUD), compels a landlord to consent to the inspection of "the contract unit and premises *at such times as the PHA determines necessary*," and to provide the PHA, HUD, and the Comptroller General of the United States "*full and free access* to the contract unit and the premises, and to all accounts and other records of the owner that are relevant to the HAP contract," which includes "any computers, equipment or facilities [of owner] containing such records" (HAP contract, Part B §3[e], 11 [emphasis supplied]; 24 CFR §982.405).

Accordingly, although the Section 8 itself is a voluntary program for landlords under federal law, in *Matter of People of the State of N.Y. v Commons West, LLC*, the respondents argued that because New York's antidiscrimination law now *requires* landlords to participate the section 8 program by making it unlawful to discriminate based upon same, it unlawfully compels landlords to consent to warrantless searches of their premises and records, in violation of the Fourth Amendment of the U.S. Constitution.

The Cortland County Supreme Court, highlighting that "respondents' argument that the source of income antidiscrimination statute is unconstitutional because it compels landlords to waive their Fourth Amendment rights presents an issue of first impression," agreed, holding that the source of income antidiscrimination law violates the Fourth Amendment by both compelling landlords to consent to warrantless searches of their properties and compelling landlords to consent to warrantless searches of their records.

On March 5, 2026, the Appellate Division, Third Judicial Department affirmed the Supreme Court's holding that Executive Law §296(5)(a)(1) is unconstitutional on its face to the extent that it requires landlords to participate in the Section 8 program, because it necessarily obligates landlords to consent to warrantless searches of their premises and records, in violation of the Fourth Amendment of the U.S. Constitution.

The Third Department agreed that, "although the source-of-income discrimination law does not, itself, require any searches, they are indirectly compelled through the terms of the Section 8 program and the HAP contract, which obligate landlords to make their premises and records available for searches" the HAP contract required by the Section 8 program states that the owner "must" provide pertinent

information, "must" grant access to electronic records and "shall" afford the PHA and other entities "full and free access" to its premises and records.

The court rejected the argument that the source-of-income discrimination law is constitutional because it does not, on its face, authorize warrantless searches.

Put simply, the court explained "[b]y prohibiting discrimination based upon source of income, respondents argue, the Legislature has required landlords to accept Section 8 vouchers and, as a condition of participating in that program, agree to allow searches of their properties and records" (*Matter of People of the State of N.Y. v Commons West, LLC*, 2026 NY Slip Op 01253 at 1).

New York making it mandatory to accept Section 8 vouchers and enter into a HAP contract arguably violates Federal preemption. It was critical in Congress's creation of Section 8 that the program be voluntary, whereby housing providers could opt in to a search of their premises, books, and records in exchange for program participation.

The 2019 Amendments to the Executive Law by New York State (and the 2008 amendments to the NYC Administrative Code by the City of New York), mandating participation, intrude upon that Congressional intent and are arguably preempted by federal law.

Notably, the Appellate Division rejected the Attorney General's argument on renewal below that a new "policy" issued by New York State Homes and Community Renewal (HCR), a public housing agency responsible for administering the Section 8 program, alleviated any constitutional issue.

The policy provided that in instances where a landlord in Tompkins County refused to allow warrantless searches, HCR would have to obtain either consent from another authorized person or an administrative warrant before searching.

Under the policy, a landlord who wishes to object to Section 8 participation on Fourth Amendment grounds must make their objection known in writing before any Section 8 voucher holder occupies a unit. Once the written objection is received, the landlord must still sign the HAP contract, but HCR's policy provides that it will not rely on the contract to gain access to the premises and records, instead either seeking consent from another authorized person or obtaining an administrative warrant.

The court held "Simply put, this policy does not cure the facial unconstitutionality of the source-of-income discrimination law. The policy does not apply statewide and, in fact, does not even cover all of Tompkins County, as HCR is not the only Section 8 administrator there. Further, the policy is merely voluntary and does not have the force of law"

As such, the Third Department held: "Supreme Court properly...declared the source-of-income provision in Executive Law §296(5)(a)(1) facially unconstitutional to the extent that it makes it an unlawful discriminatory practice to refuse to rent or lease housing accommodations to any person, or group of persons, because their source of income includes Section 8 vouchers" (*Matter of People of the State of N.Y. v. Commons West, LLC*, 2026 NY Slip Op 01253 [3d Dept. 2026]).

The court did not opine or rule on the constitutionality of Executive Law §296(5)(a)(1) to the extent that it makes it an unlawful discriminatory practice to refuse to rent or lease a housing accommodation to an individual because their income includes a "lawful source

of income" other than a Section 8 subsidy. Moreover, the New York City Human Rights Law (NYC Admin Code §8-107), creates an independent cause of action for source of income discrimination applicable to New York City and its outer boroughs.

Halimah Elmariah, a spokeswoman for Letita James' office, is quoted in the Real Deal as stating that the ruling "does not directly impact NYC since it has its own law" (*see* Letita James Comment to *Section 8 Ruling Throws NYC Landlords, Tenants Into Limbo,* REAL DEAL, Caroline Spivack [March 12, 2026, 4:30 PM].

The decision is only persuasive authority, and may be not binding, in the First and Second Departments, which include all counties in New York City. However, the New York City Human Rights Law (NYC Admin. Code §8-107), which is nearly identical in scope to the State Human Rights Law, was enacted pursuant to the State's Municipal Law, and ratified by the State's Executive Law section 8 source of income provision.

Thus, there is an argument that the City Law is preempted by the Third Department's decision in *Commons West*. Notably, Leila Bozorg, the city's deputy mayor for housing and planning, is quoted in the above Real Deal article as stating that *Commons West* "theoretically has an impact on local law" (*see* Leila Bozorg Comment to *Section 8 Ruling Throws NYC Landlords, Tenants Into Limbo,* REAL DEAL, Caroline Spivack [March 12, 2026, 4:30 PM],).

Complaints for unlawful discriminatory practices under the federal, state and city Human Rights Law can expose housing providers to more than defense costs and expenses. Fiscal liability for compensatory damages, punitive damages, and civil penalties may be awarded, as well as affirmative directives and injunctive relief, such as a mandate to create fair housing policies, set aside units for members of the aggrieved protected classes (e.g. persons paying rent with rental subsidies other than Section 8), conduct trainings, publish notices, and report on future compliance.

In the event of a challenge to a rejection of a tenant, injunctive relief might include an order preventing leasing or sale of the housing accommodation in question during the pendency of litigation, further increasing the long term costs.

The most daunting exposure, however, is arguably that an adverse discrimination finding (or published settlement with an agency like the State Division on Human Rights) opens the floodgates to opportunistic lawsuits by attorneys and testing agencies hoping to establish a flagrant disregard of responsibility to comply with these laws, and to profit from the right to a successful complainant to recover its attorney fees.

Gary M. Rosenberg *is the founding member of Rosenberg & Estis.* Cori A. Rosen *is a member with the firm's litigation department and is the head of its human rights practice.* Ethan R. Cohen *is a member with the firm's litigation department and is the head of its appellate litigation department.*

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