# Seattle City Council

## Central Staff - Memorandum

**Date:** June 14, 2016

**To:** Members of the Committee on Civil Rights, Utilities, Economic Development, and Arts

**From:** Asha Venkataraman, Council Central Staff

**Subject:** Council Bill 118686: Source of Income Discrimination issues and amendments

Council Bill (CB) 118686 was introduced and referred to the CRUEDA committee, which was briefed by the Office of Civil Rights (OCR) on May 24, 2016. Passage of CB 118686 would codify a Housing Affordability and Livability Agenda (HALA) recommendation to prohibit discrimination against potential tenants based on their source of income. This memo provides a summary of the bill as introduced and lays out provisions potentially warranting amendment, along with possible implementation issues.

**Bill Summary**

Under the City's current fair housing law (SMC 14.08), it is already illegal to discriminate against a renter based on their use of a voucher issued by a public housing authority (PHA), under which the PHA pays a landlord the difference between a unit's rent and 30 percent of a household's annual income (commonly known as Section 8 housing vouchers).[1] This legislation would expand that protection to prohibit discrimination based on other categories of verifiable sources of income, including child support payments, Social Security, Supplemental Security Income, unemployment insurance, short-term rental assistance, or veteran's benefits.

The main changes the bill makes to the SMC are as follows:

- Including alternative sources of income and subsidy programs other than Section 8 as bases upon which a person cannot discriminate;
- Newly defining "alternative source of income" as lawful and verifiable income derived from sources other than wages, salaries, or other employment related compensation
  - This definition is intended to describe income paid directly to a person rather payment to a landlord for rent.
- Revising the definition for Section 8 programs to include other subsidy programs, short- or long-term, provided by private non-profits or other assistance programs and not just government assistance
  - This definition is intended to describe payments made from a third party to a landlord on behalf of the tenant for rent Rental payment to the landlord
- Making it an unfair practice to apply income screening that does not:

[1] This program is authorized by provisions in Section 8 of the U.S. Housing Act of 1937, regulated under 24 CFR Part 982 and 983, and administered by the U.S. Department of Housing and Urban Development (HUD).

- Reduce by the amount of a subsidy the amount of rent the tenant is responsible for
- Include all sources of income.

**Potential Amendments**

The text of the amendments discussed below are provided in the ordinance in Attachments A, B, and C to this memo.

1. Addition of language to exclusions in SMC 14.08.190 (Attachment A Page 18)

This amendment will help to ensure that preferences can be given when required by a specific program, such as set asides of low income units.

**Proposed addition to Section 7 of CB 118686**: Nothing in this chapter shall: “K. Be interpreted to limit a person’s obligation or ability to lease or sell real property which has been designated for certain types of tenants or purchasers as part of a government sponsored or legally required low-income housing program or policy, subsidy, voucher or tax-related program for the provision of affordable housing, to such tenants intended to be served or benefited by such designation or program;”

2. Definition of “Section 8 or other subsidy program” (Attachment A Page 9)

This amendment would strengthen the definition by ensuring that all arrangements wherein a tenant’s rent is sent from a subsidy program to a landlord are covered, not just those in direct contract relationships, as to prevent any legal loopholes.

**Currently codified language:** "Section 8 program" means a federal, state or local government program in which a tenant's rent is paid partially by the government program (through a direct contract between the government program and the owner or lessor of the real property), and partially by the tenant.

**Change currently proposed in Section 2 of CB 118686:** "Section 8 or other subsidy program" means short or long term federal, state or local government, private nonprofit, or other assistance programs in which a tenant's rent is paid either partially by the ~~government~~ program (through a direct contract between the ~~government~~ program and the owner or lessor of the real property), and partially by the tenant or completely by the program. Other subsidy programs include but are not limited to HUD-Veteran Affairs Supportive Housing (VASH) vouchers, Housing and Essential Needs (HEN) funds, and short-term rental assistance provided by Rapid Rehousing subsidies.

**Further proposed change (shown in double strikethrough):** "Section 8 or other subsidy program" means short or long term federal, state or local government, private nonprofit, or other assistance programs in which a tenant's rent is paid either partially by the ~~government~~ program ~~(through a direct contract between the government program and the owner or lessor of the real property),~~ and partially by the tenant or completely by the program. Other subsidy programs include but are not limited to HUD-Veteran Affairs Supportive Housing (VASH) vouchers, Housing and Essential Needs (HEN) funds, and short-term rental assistance provided by Rapid Rehousing subsidies.

**Final language:** "Section 8 or other subsidy program" means short or long term federal, state or local government, private nonprofit, or other assistance programs in which a tenant's rent is paid either partially by the program and partially by the tenant or completely by the program. Other subsidy programs include but are not limited to HUD-Veteran Affairs Supportive Housing (VASH) vouchers, Housing and Essential Needs (HEN) funds, and short-term rental assistance provided by Rapid Rehousing subsidies.

3. Definition of "verifiable" (Attachment A Page 10)

This amendment clarifies the proposed definition to mean source of income.

**Change currently proposed in CB 118686:** "Verifiable" means the source can be confirmed as to its amount or receipt.

**Further proposed change (shown in double underline):** "Verifiable" means the source of income can be confirmed as to its amount or receipt.

4. First in time policy (Attachment A Page 13)

This amendment will require landlords to offer the rental unit to the first person who meets all of the criteria set out in the landlord's written policy. Fair housing organizations often recommend first in time policies to landlords as a best practice to ensure that unconscious biases do not result in discrimination when a landlord is deciding between multiple tenants who qualify for a rental unit.

**Proposed addition to Section 3 of CB 118686:** 14.08.040 "H. It is an unfair practice for a person to fail to:

1. Note the date and time of receipt of a rental application;

2. Offer the tenancy to the first prospective tenant meeting the criteria stated in the written notice required in RCW 59.18.257(1)(a)(ii), except that if a person is required to or chooses to reserve a rental unit or units for low-income tenants who are receiving or qualify for section 8 or other subsidies, this information shall be included in the required notice and the first prospective tenant who meets the criteria stated in the written policy and who are receiving or qualify for section 8 or other subsidies shall be offered the tenancy."

**Implementation**

Use of a first in time policy affects the a landlord's ability to exercise discretion when deciding between potential tenants that may be based on factors unrelated to whether a potential tenant is a member of a protected class. Additionally, a first in time policy may favor potential tenants located geographically closer to a unit, so requiring a landlord to accept electronic submission of applications and treat them the same way as a paper submission could be an important consideration.

5. Addressing community pledges (Attachment A Page 14)

This amendment would ensure that a landlord honors pledges to pay a portion or all of a tenant's rent from community organizations.

**Proposed addition to Section 3 of CB 118686**: 14.08.040 "H. It is an unfair practice for a person to fail to:

> 3. Accept a written pledge or commitment by a section 8 or other subsidy program provider to pay for past due or current rent, sufficient to allow the tenant to be current on all rent due once the pledge or commitment is fulfilled."

6. Addressing landlords completing rental subsidy paperwork (Attachment A Page 14)

This amendment would essentially require a landlord to complete their portion of rental subsidy applications in a timely manner upon request by a potential or current tenant. It would help to ensure that potential tenants or occupants actually receive the assistance they need in a timely manner and are not rejected on the sole basis that part of the needed paperwork was not completed by a landlord.

**Proposed addition to Section 3 of CB 118686:** 14.08.040 **"**H. It is an unfair practice for a person to:

4. Fail to cooperate with a potential or current occupant in completing and submitting required information and documentation for the potential tenant or occupant to be eligible for or to receive rental assistance from Section 8 or other subsidy program;"

7. Preferred employer programs (Attachments B and C)

A preferred employer program refers to any policy or practice in which an owner provides different terms and conditions, including discounts, in connection with renting, leasing, or subleasing real property to a prospective tenant because the prospective tenant is employed by a specific employer. As you may be aware, OCR recently issued guidance explaining how it plans to address any complaints of discrimination based on the use of a preferred employer program. There is interest in addressing the potential for preferred employer programs to cause disparate impact on protected classes in legislation rather than only in guidance.

Two options to incorporate the potential disparate impact of preferred employer programs are proposed below. Both of these options contain the same definition of what a preferred employer program entails, with specific exemptions.

**Option 1:** Preemptive determinations (Attachment B)

This option would make preferred employer programs an unfair practice if an owner or lessor advertises or uses such a program without conducting an assessment and submitting to OCR or requesting OCR to conduct an assessment of whether it would cause a disparate impact on a

protected class. In either case, the assessment would be conducted in accordance with OCR's guidance.

Upon conducting the assessment and submission to OCR or OCR's completion of the assessment, OCR would be required to make a finding of fact and determination that there is no reasonable cause for believing that an unfair practice has been, is being, or is about to be committed. Provision for making such a finding of fact and determination of reasonable cause is already in the code. At that point, the provisions already in the code would govern further action by the Director and the owner or lessor to remedy or appeal. In the circumstance that any terms and conditions in the preferred employer program are contained in an unexpired lease when this legislation goes into effect, those terms can remain effective but cannot be renewed unless the requisite finding of fact and determination have been made.

This intent of this amendment is to place the onus of ensuring discrimination did not result from a preferred employer program on the landlord and OCR rather than on a tenant making a complaint to OCR.

**Implementation**

The proposed language could create several implementation issues. As a preliminary issue, the provisions are unlike those already in this section of the code, as the prohibition against preferred employer programs is preemptive rather than based on a complaint from someone claiming discrimination from the policy in place. As such, OCR might be conducting an analysis based on implementation of a potential program rather than the effects from an existing program

Second, the prohibition would create two circumstances under which a preferred employer program might be an unfair practice. The first would make such a program an unfair practice if the landlord fails to conduct an assessment or request that OCR conduct an assessment. The second would make such a program an unfair practice if after the assessment was completed, OCR found that there was reasonable cause to believe that the program was an unfair practice. It is unclear whether both of these unfair practices would result in the same level of enforcement if use continued.

Third, the process by which OCR would conduct an analysis of a potential preferred employer program could overlap with liability for such a program, which could create a chilling effect for those landlords voluntarily coming to OCR to assess such a program. The current framework provides that a charging party or the Director charge a landlord with commission of an unfair practice. OCR then conducts an investigation to determine if such an unfair practice has occurred. The charge provides OCR with subpoena powers to obtain information. However, if a landlord were to come to OCR for an assessment without the employer's or other demographic data, OCR would need to acquire the data to conduct an analysis. But without charging the landlord and alleging an unfair practice, OCR would be unable to subpoena the data necessary for a complete analysis. To acquire that ability, OCR would need to charge the landlord, resulting in OCR pursuing enforcement actions against a landlord who had voluntarily come to OCR for advice. This may result in discouraging landlords from seeking advice about how to avoid discrimination.

Fourth, conducting a preemptive analysis would require a significant level of OCR resources and staff. The current structure of this existing section of code is complaint based, which results in the claim of discrimination by a person belonging to a specific protected class. However, a preemptive determination would require OCR to analyze every protected class to ensure no disparate impact resulted. An effort to make this determination for the sixteen classes currently protected by the SMC for every potential policy that needs assessment rather than the limited number of classes a person making a claim might be a member of would require a substantial increase resources used by OCR.

Lastly, there are several additional issues that need to be addressed with such a preemptive determination, such as the amount of time such a determination would last, the effect of a preemptive determination on a later complaint of discrimination based on the same preferred employer program, and the ability of the landlord to acquire data to conduct such an assessment of disparate impact.

**Proposed additions to Section 2 of CB 118686:** "Discriminatory effect" means a practice that actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation, gender identity, political ideology, honorably discharged veteran or military status, alternative source of income, participation in a Section 8 or other subsidy program, the presence of any disability, or the use of a service animal by a disabled person.

"Legally sufficient justification" means it is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent and those interests could not be served by another practice that has a less discriminatory effect. A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.

"Preferred employer program" means any policy or practice in which a person provides different terms and conditions, including but not limited to discounts or waiver of fees or deposits, in connection with renting, leasing, or subleasing real property to a prospective tenant because the prospective tenant is employed by a specific employer. "Preferred employer program" does not include different terms and conditions provided in city-funded housing or other publicly funded housing for the benefit of city or public employees, housing specifically designated as employer housing which is owned or operated by an employer and leased for the benefit of its employees only, housing for individuals or groups on individuals based on honorably discharged veteran or military status, current or retired members of public law enforcement in good standing, or education providers.

**Proposed addition to Section 3 of CB 118686:**

14.08.040 "H. It is an unfair practice for any person to advertise, institute, or maintain a preferred employer program unless:

1. The person conducts an assessment and submits it to the Director, or submits a request to the Director to conduct an assessment to determine:

a. Whether the program has a discriminatory effect, and if so,

b. Whether the program is supported by a legally sufficient justification; and

2. The Director makes a finding of fact and determination of no reasonable cause for believing that an unfair practice has been, is being or is about to be committed under subsection 14.08.040. The Director shall promulgate rules to provide guidance for conducting the assessment required by subsection 14.08.040.H.1.

I. Any preferred employer program that is part of an unexpired rental agreement upon the effective date of this legislation may continue until the end of the current lease term but the landlord may not renew the program in any form after expiration of the lease unless section 14.08.040.H.2 has occurred."

**Option 2**: Complaint based approach (Attachment C)

This option would make use of a preferred employer program an unfair practice if it discriminated against a protected class. It would not be an outright ban, but instead, a ban on those programs that are discriminatory. It is framed similarly to the unfair practices already identified in the housing code. Landlords would be allowed to use a preferred employer program as long as it was not discriminatory, and would not need to acquire any prior approval from OCR. Upon a complaint of discrimination by a party, the assessment of whether an unfair practice occurred would follow the process currently provided for in the housing code.

**Implementation**

This option places the onus on the potential tenant to claim discrimination. Thus, a preferred employer program could be discriminatory but until a potential tenant made a complaint to OCR or OCR conducted testing or investigation, the program would continue.

**Proposed addition to Section 2 of CB 118686:** "Preferred employer program" means any policy or practice in which a person provides different terms and conditions, including but not limited to discounts or waiver of fees or deposits, in connection with renting, leasing, or subleasing real property to a prospective tenant because the prospective tenant is employed by a specific employer. "Preferred employer program" does not include different terms and conditions provided in city-funded housing or other publicly funded housing for the benefit of city or public employees, housing specifically designated as employer housing which is owned or operated by an employer and leased for the benefit of its employees only, housing for individuals or groups on individuals based on honorably discharged veteran or military status, current or retired members of public law enforcement in good standing, or education providers.

**Proposed addition to Section 3 of CB 118686:** 14.08.040 A. It is an unfair practice for any person to discriminate by:

"6. Advertising, instituting, or maintaining a preferred employer program."