

**HOW OLD IS OLD ENOUGH?
ARE THERE ANY AGE RESTRICTIONS LEFT IN
SENIOR HOUSING COMMUNITIES?**

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When we think about senior housing or retirement communities, many people visualize gray-haired grandmother and grandfatherly types, zipping around in golf carts en route to the wood workshop or a bridge game at the clubhouse. That picture generally does not include small children, teenagers, young adults or people under 40. But the reality is that the "face" of senior communities is changing. Though not a flood by any means, we are seeing younger people living in and some asserting that due to current senior housing laws, they have the legal right to live in the community – even if the governing documents and/or rules state otherwise. This article will discuss and include illustrative examples of the different categories of residents, both under and over 55 years of age, who can stay in a senior community.

Aside from perhaps surprising the reader, it should become clear that senior communities must review, and many will need to update their governing documents and adopt senior housing residency rules in order to comply with the current senior housing laws.

QUALIFYING RESIDENT a/k/a SENIOR CITIZEN

It goes without saying that a "senior citizen housing development" – which is the term used by the state "Unruh Civil Rights Act" (Civil Code sections 51 et seq.) – is housing that is established and intended to be set aside for "senior citizens." State law defines a "qualifying resident" or "senior citizen" as a person 62 years of age or older or 55 years of age or older in a senior citizen housing development. Most if not all of the senior communities we see are "55+" communities.

Qualifying residents/senior citizens obviously have the right to live in a senior community. Questions rarely arise as to whether someone is a qualifying resident or not; it is easy enough to check the person's drivers' license or birth certificate.

QUALIFIED PERMANENT RESIDENT

Depending on the circumstances, some individuals under 55 years of age have the right, under the Unruh Civil Rights Act, to stay in the residence they lived in with the senior citizen and cannot be forced to leave after the senior citizen has left. Examples follow:

- June was 58 years old when she passed. Her roommate Jane was 47 years of age at the time of June's death. While under 55 years of age and thus not a senior citizen, Jane can stay because she was at least 45 years of age.

- Jim, 60 years old, has been living with Joe, who is 38 years old, for the past three years and they jointly own their home. Jim has a stroke and moves to an assisted living facility, but the prognosis is good that he can return home after six months of therapy. Jim and Joe consider themselves as "partners for life"; they equally shared all of the bills, have joint bank accounts, and each is named the beneficiary of the other's trust. One month before Jim's stroke, they had a commitment ceremony and signed the paperwork and mailed it off to the Secretary of State to become legal "domestic partners," but they forgot to include the filing fee. Can Joe stay? Joe can be forced to leave the community, even though he is a joint owner, because he was not a cohabitant who is defined by the Unruh Act to include domestic partners. The outcome would be different if only they'd remembered the check (or if Joe was 45 when Jim had his stroke).
- Jerry, who is 57, has three grown daughters and four grandchildren. Jerry marries his second wife, Belinda, who is 42 years of age. Belinda has no children and her biological clock is ticking. Though Jerry is reluctant to have another child, he relents and they are blessed with a beautiful healthy boy, JJ. The happy couple brings their son home, and neighbors complain to the manager that a baby has no right to live in their senior community. Can Jerry and Belinda stay in the community? YES. Jerry is a senior citizen, and Belinda, as his wife, is a qualified permanent resident. Can JJ be forced to leave? YES! Why? JJ does not satisfy the requirements of a qualified permanent resident. His parents face the difficult decision of taking their son and moving away, or placing their son elsewhere and staying in the community without him.
- Consider, instead, that in the previous example, JJ was born with a cleft palate. Or, what if he was instead born with an enlarged heart? Must JJ leave? In either case, maybe. JJ, as the son of a qualifying resident (i.e., Jerry), would be a qualified permanent resident if he meets the statutory definition of a "disabled person" or a "person with a disabling illness or injury." Given the intricacies of the applicable statutes, further details, review and analysis will be needed before the Board can reach a conclusion.
- Gramma, 90 years of age, decides that she is getting on in age and needs some help. Granddaughter, 20 years of age, has dropped out of college, much to the dismay of her parents who tell her she cannot move back home unless she gets a job or goes back to school. Gramma, concerned about her favorite granddaughter and seeing an opportunity to get some help with housekeeping, errands and rides to the doctor, allows Granddaughter to move in with her. During the summer, Gramma slips and breaks her hip and moves into a convalescent home. While Gramma is recovering, Granddaughter holds parties every weekend at the pool, and several residents call the manager demanding that Granddaughter be forced to move out. Can Granddaughter be forced out? Unless she can show that she provided primary physical or economic support (unlikely under these facts but further investigation and review of documentation is essential), the Board may require that Granddaughter move out of the community.

- Would it make any difference if, in the previous example, Granddaughter had also attempted suicide and was diagnosed with clinical depression before moving in with Gramma? And, what if Gramma's concern about her mental state was another reason she asked Granddaughter to move in? Granddaughter may be a disabled person or person with a disabling condition (due to a mental disability) and thus a qualified permanent resident entitled to stay. What if the Board finds that Granddaughter does qualify as a disabled person but after taking medication and going to therapy, her condition improves? Can the Board then force her to leave? Maybe, but further investigation and analysis are necessary. The law provides that for any qualified permanent resident whose disabling condition ends, the Board may require that person to leave upon six months' notice (but the Board can decide to let that person stay up to one year after the disabling condition ends).

PERMITTED HEALTH CARE RESIDENT

Permitted health care residents of any age are hired to provide live-in, long term or terminal health care to the senior citizen; they can also be a family member of the senior citizen who provides that care.

Unlike a qualified permanent resident, permitted health care residents do not have the right to permanently reside in the community after the senior citizen has died, been hospitalized, or left for a prolonged absence. However, under certain circumstances they can stay in the residence on a temporary basis while the senior citizen is away, in, for example, a hospital.

The care provided by the permitted health care resident must be substantial in nature and provide either assistance with daily activities or medical treatment or both. Questions will often arise as to whether a family member is a qualified permanent resident (as a person providing primary physical support and thus entitled to stay in the residence after the senior has left), or instead a permitted health care resident (who must eventually leave the residence after the senior citizen is gone).

QUALIFIED RESIDENT OR PERMITTED HEALTH CARE RESIDENT? HOW DO YOU DECIDE?

As some of the examples illustrate, in many cases it may be hard to determine which category applies, especially since some of the applicable statutes are unclear or lack adequate descriptions or definitions. In any event, the burden of proof should be on the person claiming a particular status and assistance of legal counsel may be required. That person can and should be required to prove (via documentation, testimony or other evidence), to the reasonable satisfaction of the Board, that they satisfy the statutory requirements and thus qualify as they claim.

NEED FOR REVIEW AND UPDATING OF GOVERNING DOCUMENTS, ADOPTION OF SENIOR HOUSING RESIDENCY RULES

As briefly illustrated in this article, the answer to the question "how old is old enough to live in a senior community?" is no longer 55 years of age. Depending on the circumstances, old enough may be one day old, 21 years old, or even 45 years of age.

As with many homeowner associations, the governing documents and rules of too many senior communities date back 10, 20, even 30 years and well before many of the changes in senior housing laws reflected in some of the earlier examples. As a result, some Boards, in reliance on their outdated documents, may be taking or considering action against individuals contrary to current law. This can expose the community to lawsuits and/or claims filed with state or federal agencies, such as HUD or the Department of Fair Employment and Housing ("DFEH").

Aside from possible judgments and assessment of penalties and attorneys' fees, acting contrary to the senior housing laws as they now exist also creates the very real risk that the community may lose its status as a senior citizen housing development under federal and/or state law. The result of this would be that the community could no longer restrict occupancy to senior citizens (at least to the maximum extent possible under current law) and anyone, of any age, could live in the community.

In the face of all of this, every senior community must have in place up-to-date governing documents, which should include a "senior housing residency policy" or "senior housing residency restrictions" describing, in detail, who may permanently as well as temporarily live in the community. To accomplish that, work with legal counsel to review and update your governing documents as needed, and adopt appropriate senior housing restrictions. Can you afford not to?

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