

LITIGATION INFORMATION MEMO

AUGUST 17, 2023

Court Finds Compulsory Participation in Section 8 Unconstitutional

A portion of the New York State Human Rights Law prohibiting landlords from discriminating against potential tenants based on their source of income, forcing landlords to participate in Section 8, was found unconstitutional.

When a landlord agrees to accept a Section 8 housing voucher it must enter into a Housing Assistance Payment (HAP) contract with a Public Housing Agency (PHA). Under Federal law, a HAP contract requires a participating landlord to consent to inspection of the contract unit and premises at any time the PHA deems necessary. Additionally, a HAP contract requires landlords to provide the PHA and HUD access to all accounts and other records that are relevant to the HAP contract, which includes access to any computers, equipment or facilities containing such records.

Congress created Section 8 as a voluntary program, and landlords opting to participate in the program knowingly waived their Fourth Amendment rights to searches of premises, books and records and computer devices. However, in 2019 the State Legislature amended the Human Rights Law to include tenants' "lawful source of income" as a protected category, along with race, gender, ethnicity and others, that landlords could not consider when making housing decisions. The law specifically defined "lawful source of income" to include Section 8 vouchers.

In order for landlords to accept Section 8 vouchers, they have to enroll in the federal Section 8 program and give up the aforementioned rights. The State essentially made the voluntary federal program compulsory under state law. It removed any discretion by a landlord to participate in that program by not allowing a landlord to deny an application based upon source of income.

Ithaca Renting Company and affiliated landlords in Ithaca opted not to participate in the voluntary federal Housing Choice Voucher program, and on Oct. 31, 2022, New York State Attorney General Letitia James sued the landlords for violating state law.

Ithaca Renting Company raised several defenses, including that a state law compelling its participation in Section 8 was unconstitutional. In *Sokolov v. Village of Freeport*, 52 N.Y.2d 341 (1981), the New York Court of Appeals established that laws which coerce property owners into consenting to warrantless inspections of their property are unconstitutional and cannot be upheld. *Sokolov* dealt with an ordinance which required landlords to obtain an inspection from the village before they could get a permit to rent their property, or face a penalty for renting without such a permit. The amendment to the Human Rights Law has the same effect on landlords which are required to permit the PHA access to their premises and all records related to the HAP contract, regardless of where they are stored. Since the statute requires landlords to accept Section 8 housing vouchers, it effectively forces the landlord to authorize warrantless searches and seizures, while interfering with the landlord's constitutional right to rent property free from such violations of the Fourth Amendment.

Ithaca Renting Company, represented by Bond, Schoeneck & King PLLC, in a matter of first impression, argued that by compelling landlords to enter into HAP contracts, they were illegally being compelled to waive Fourth Amendment rights in violation of the federal and state constitutions. The Supreme Court of New York, Tompkins County issued a decision finding that the 2019 Amendment to the Human Rights Law is indeed unconstitutional in *People of the State of New York v. Commons West, LLC, et al.*

An appeal to the Third Department has been noticed.

Currently, as many as 19 states and the District of Columbia, as well as several municipalities, have source of income laws that specifically include or fail to exclude Section 8 vouchers from the definition of lawful source of income. These similar laws could be subject to scrutiny. So too could short term rental laws that require inspection of landlords' premises as a condition of engaging in that type of rental activity.

If you have any questions about this memo, please contact [Curtis Johnson](#), any attorney in Bond's [litigation practice](#) or the attorney at the firm with whom you are regularly in contact.

