



HUD's new Criminal Screening Guidelines

A Practical Guide to Understanding
and Updating Your Criteria

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The purpose of this white paper is threefold: 1) to provide a basic understanding of the HUD criminal screening guidelines; 2) provide some best practices to conform to the new guidelines; and 3) demonstrate that while the intent of the new criminal guidelines are designed to provide applicants with a criminal history greater access to rental housing, many of these applicants with serious criminal records are still more likely to be denied based upon the presence of additional, non-criminal related criteria factors.

Overview of HUD's Guidance

As most property managers are aware, on April 4th, 2016 HUD published new guidelines related to the use of criminal background checks during the applicant screening process, and the new steps that must be taken to conform to Fair Housing Laws. These new guidelines apply to all property managers, and all categories of multi-family housing.

Within the guidance, HUD warns that in order to comply with Fair Housing Laws, any owner/manager that performs a criminal background check or in any way considers criminal history as part of their approval criteria must ensure that the criteria has no “disparate impact on individuals of a particular race, national origin, or other protected class”.

Disparate impact theory is based on evidence that while policies aren't explicitly discriminatory, statistical disparities between different races can show that a policy has a negative discriminatory effect, even if unintentional. While this new guidance doesn't carry the force of law like formal agency rules it should still be taken seriously.

Three-Step Burden Shifting Process for Disparate Impact Claims

The HUD guidance provides a three-step, burden shifting framework for any applicant's that feel that they have been unfairly denied based upon disparate impact.

Step 1: Any plaintiff (Applicant) must prove the policy has a disparate impact.

Step 2: The defendant (Housing Provider) must then prove that the policy is justified, and cannot be achieved by a different, nondiscriminatory method. Types of cases that specifically *cannot be proven* include:

- Prior Arrests
- Prior convictions that have no specificity to type, level, or timeframe

Step 3: If the defendant can successfully prove Step 2, the plaintiff must prove that a less discriminatory policy could achieve the same result.

The first step under the framework is evaluating whether the screening policy in fact has a discriminatory effect on a protected class. This step however seems to be unnecessary considering the fact that HUD provides national incarceration statistics that seem to satisfy the burden for showing a disparate impact.

The second step requires the defendant prove that it has a “substantial, legitimate, nondiscriminatory” interest to justify the screening policy. The housing provider must not only show evidence that it has such an interest, but also that the policy actually achieves that interest. This will prove to be the most controversial aspect of the process, considering most property managers have not been renting to serious felons for many years, very little empirical data exists to prove that criminal screening achieves the interest.

The guidance does acknowledge that “ensuring resident safety and protected property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy.”

The HUD Guidance indicates that a housing provider can satisfy this prong with reliable evidence that its screening policy actually assists in protecting interests like resident safety, but it warns that generalizations or stereotypes will not satisfy this burden.

The final step shifts the burden back to the plaintiff to show that the housing provider’s interest could be achieved through a less discriminatory alternative policy. The guidance also suggests that one possible less discriminatory practice would be by delaying consideration of criminal history until the very end of the application review, after considering financial and other qualifications.

Recommended Best Practices

The HUD guidance is very clear that broad criteria that excludes a candidate based simply upon the level of a criminal record, regardless of the nature or timeframe since the offense occurred will be challenged and unable to satisfy the burden of Step 2. As a result, this type of criteria should be eliminated and replaced with more granularly defined criteria that take both type of crime and timeframe into consideration.

The best recommended practice is to carefully consider what types of crimes pose the greatest threat to the interests of a housing provider.

For example, the most obvious types of crimes that could be considered relevant to a housing provider might include:

- Crimes against people or property;
- Crimes involving drugs or weapons;
- Crimes involving sex

The justifications in support of these types of concerning convictions should be written down within the policy that includes how many years must have passed, and the types of crimes that will pose the highest amount of concern.

Another component of the HUD guideline discusses the use of arrest record date vs. conviction records. It is essential that you do not have a policy that factors the existence of a prior arrest into consideration for denying an applicant. While most screening providers don't even report arrest data, some still do.

Finally, while the new HUD guidelines seem to ask that each situation be considered individually, HUD does not back away from its prior position that you must apply the background check and policy to each and every applicant consistently. Do not make subjective determinations to only apply screenings to certain individuals, which would only result in exposure to claims of inconsistent and discriminatory treatment.

Defending the Use of Criminal Background Checks

While implementing the best practices provided above should go a long way to demonstrate to HUD that your company has made changes to conform to the guidelines, this doesn't preclude the possibility of a disparate impact claim. In fact, since HUD released their guidelines in April, there have already been more than five claims brought as of July.

As a result, Rental History Reports performed some regression analysis to determine whether or not a correlation exists between criminal history and other common screening criteria.

The following statistics are based on a 1-year analysis of all property types (Market, Affordable, Senior, etc.). They draw a correlation between criminal activity and other criteria factors that typically result in a denial lease decision.

Report #1 – Level of Criminal Record vs. Credit Score

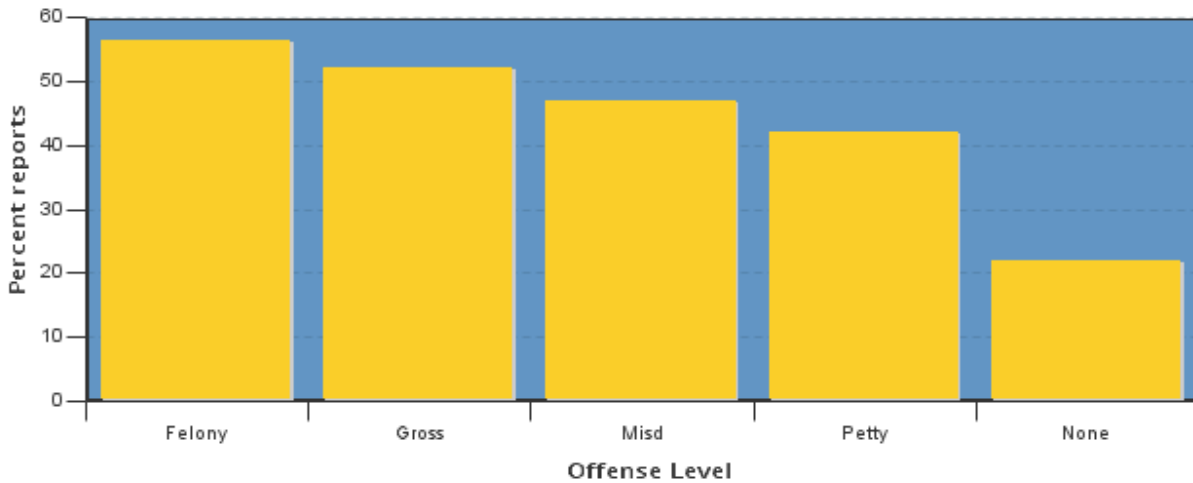
One of the most common criteria guidelines used by housing providers is the FICO credit score. Generally speaking, a 600 FICO score translates to a "C" level risk with the possibility of default credit obligations reaching 50% in the next 24 months. A 600 credit score is often the lowest level that a client will accept.

In looking at the chart below it shows that applicants with a higher level criminal record also have a lower credit risk score. In fact, applicants with a Felony criminal record are more than twice as likely to have a credit score below 600 compared to applicants with no criminal history. This leaves the property manager assuming a much higher financial risk by approving the applicant beyond the presence of a major criminal record.

Client Reports

--- Summary of All Sites ---
 --- Summary of All Types ---
 Low Credit Score - Below 600

Criminal Record Correlation Statistics
ALL CLIENTS
 From 06/13/2015 To 06/13/2016



Report #2 – Level of Criminal Record vs. Eviction

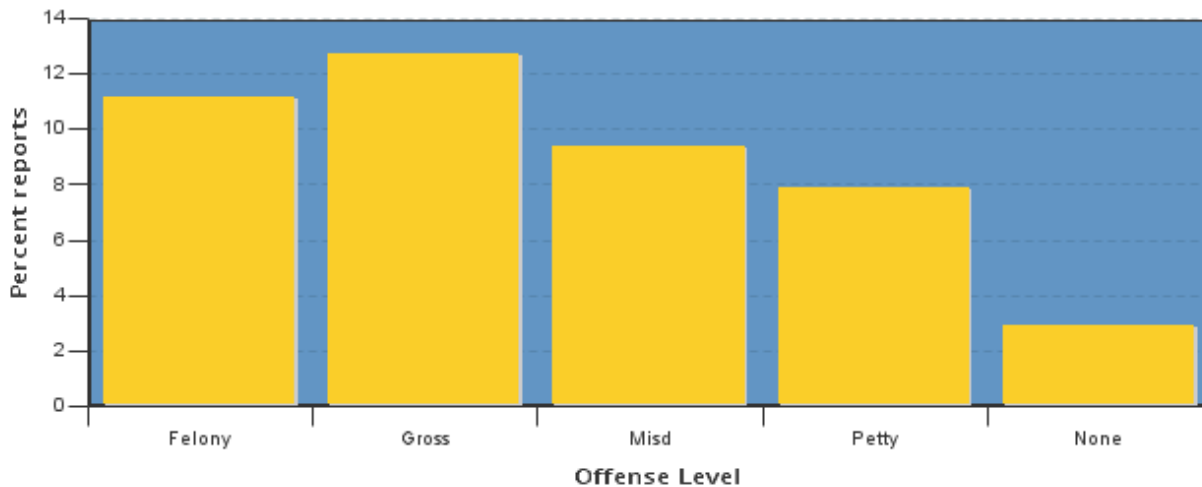
Another common criteria used by housing providers is the presence of an eviction action. Nearly 100% of multi-family clients have denial criteria in place when evidence of a prior eviction is found. While some clients limit the look back period to something less than the 7-year maximum allowable timeframe, others do not.

Again in the following chart the data supports the fact that applicants with a high level criminal record are also 300% more likely to have an eviction record in their background report. Here again, should the property manager overlook the criminal finding, there is a high likelihood that the candidate will be denied based upon the presence of an eviction record.

Client Reports

--- Summary of All Sites ---
--- Summary of All Types ---
Unlawful Detainer

Criminal Record Correlation Statistics ALL CLIENTS From 06/13/2015 To 06/13/2016



Report #3 – Level of Criminal Record vs. Negative Rental Reference

The third most common criteria guideline used by housing providers is the presence of a “negative” rental reference. The types of reference information that would assign a categorization of negative include:

- Skip
- Would not re-rent
- Left owing money
- Multiple lease violations

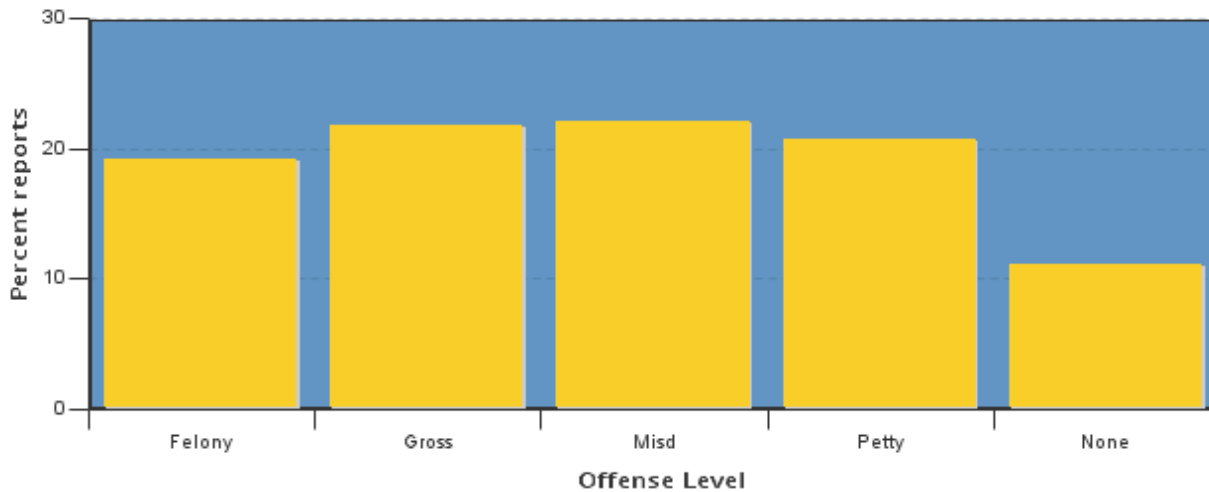
While the treatment and use of rental verifications varies widely from one client to the next, the general fact is that clients that utilize rental references as a part of the screening process are not inclined to rent to a prospect that has unfavorable rental history.

Although the following chart doesn’t show as large a delta between applicants with and without criminal history, it still supports the fact that candidates with criminal records are nearly twice as likely to have a derogatory rental reference.

Client Reports

--- Summary of All Sites ---
--- Summary of All Types ---
Negative Rental References

Criminal Record Correlation Statistics ALL CLIENTS From 06/13/2015 To 06/13/2016



Conclusion

This white paper is intended to provide a better understanding of the recent HUD guidance on criminal background screening policies, provide recommended best practices, and demonstrate the correlation between criminal history and other key decision criteria.

While some may suggest that the statistics provided within this paper further support the idea that criminal screening is unnecessary, the opposite is true. Nearly all housing providers take a “blended” approach to vetting a potential tenant and often do not reject an application based solely upon a single factor. In addition, many automated decision models being utilized by many of the larger management companies use a weighted/scaled system to evaluate the overall risk a candidate presents across a broad array of criteria. Criminal background is an essential component of this overall analysis.

Please direct any questions related to the information provided within this paper; or for a complimentary analysis of your current criminal criteria to:

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