

ENSURE YOUR CRIMINAL HISTORY SCREENING POLICY COMPLIES WITH THE FAIR HOUSING ACT

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The Fair Housing Act (“FHAct”) prohibits discrimination because of race, color, religion, sex, disability, familial status, and national origin in the sale, rental, or financing of dwellings and in other housing-related activities. The FHAct does not include criminal history as a protected class. However, if a screening policy has an adverse disparate impact on a class of people protected by the FHAct, it can violate the federal law. In April 2016, HUD issued guidance (“Guidance”¹) on how the FHAct applies to the use of criminal history by providers or operators of housing and real estate related transactions.

The background section of the HUD Guidance notes that formerly incarcerated individuals, people who have been convicted but not incarcerated, and people who have been arrested but not convicted, encounter significant barriers to securing housing because of criminal history. Nearly 1/3 of the United States population has a criminal record. Statistically, people of color in the United States are arrested, convicted and incarcerated at rates disproportionate to their share of the general population. A policy that bars access to housing because of criminal history therefore is likely to have a disparate impact on persons of certain races or national origins, and may be unlawful under the FHAct.

To analyze whether a housing provider’s criminal history screening policy is discriminatory and violates the FHAct, Courts and HUD utilize a 3-step test:

- ▶ Step 1: Does the criminal history policy have a discriminatory effect?
- ▶ Step 2: Is the policy necessary to achieve a substantial, legitimate, nondiscriminatory interest?
- ▶ Step 3: Is there a less discriminatory alternative?

Step 1 requires an assessment of whether a criminal history policy has an actual or predictable discriminatory impact on persons because of race or national origin. The HUD Guidance states that national statistics can be relied upon where, state or local statistics are not readily available and there is no reason to believe they would differ markedly from national statistics. Nationally people of color experience disproportionately high rates of arrest and incarceration.² Additional evidence that may be considered in determining if a disparate impact exists includes applicant data, tenant

¹ HUD Office of General Counsel, *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, April 4, 2016.

² *E.g.*, in 2014, African Americans made up 36% of the prison population in the US, but only 12% of the nation’s total population. Hispanics represented 22% of the prison population but only 17% of the total U.S. population. In contrast, non-Hispanic Whites made up 62% of the U.S. population but only 34% of the prison population. See HUD Guidance.

files, local census demographic data, and state or local statistics on demographic disparities in the criminal justice system.

Step 2 is to determine whether the criminal records policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the housing provider. The HUD Guidance provides that “ensuring resident safety and protecting property” are likely to be substantial and legitimate interests of a housing provider, if they are in fact the actual reasons for the policy. However, the policy needs to be designed to actually achieve those interests. Since arrests, without convictions, are not a reliable indicator of risk to safety or property, a policy should not exclude people because of arrests without conviction. Similarly, a policy that imposes a blanket prohibition for any conviction, regardless of when it occurred, the nature of the conduct, or post-conduct mitigation, cannot show that the policy is necessary to protect resident safety or property. Even a policy that excludes people for only specified convictions must be based on evidence that it achieves a substantial, legitimate, nondiscriminatory interest. Therefore, a criminal records policy should distinguish between criminal conduct that indicates a demonstrable risk to resident safety or property and criminal conduct that does not. A policy that does not consider the nature and severity of a person’s conviction or the amount of time that has passed is unlikely to be necessary to serve a substantial, legitimate, nondiscriminatory interest.

Step 3 requires an evaluation of whether there is a less discriminatory alternative available to achieve the housing provider’s substantial, legitimate interest of protection of residents and property. The HUD Guidance provides that conducting an individualized assessment of an applicant’s relevant mitigating information is likely to have a less discriminatory effect than a policy that excludes applicants based solely on having a specific type of criminal conviction. Individualized factors to be considered can include the nature of the criminal conduct, age of the person at the time of the conduct, tenant history before and after the conduct, and rehabilitation efforts.

In sum, HUD’s guidance does not preclude housing providers from adopting criminal history-based policies. However, housing providers should create thoughtful policies tailored to serve a substantial, legitimate, and nondiscriminatory interest, such as resident safety or the protection of property, and take into consideration individualized mitigating factors such as the type of the crime and the length of the time since conviction.

Criminal Records Policy Development Tips:

- Determine and state purpose of screening criteria: provide safe housing for residents, minimize property damage, etc.
- Do not reject applicants based on an arrest record
- Do not reject applicants based on a blanket criminal history ban
- List mitigating factors that will be considered as “individualized evidence”
- Delay consideration of criminal history until after financial and other qualifications are verified to minimize any additional costs that an individualized assessment might add to the screening process.

Information provided by Northwest Fair Housing Alliance (NWFHA) is intended to acquaint landlords with issues implicating by fair housing laws, but is not intended as a substitute for legal advice. For more information about NWFHA visit our website at www.nwfairhouse.org.

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