

HUD's Newly Published Guidelines and Warnings Regarding a Landlord's Use of Criminal Records in Screening Potential Tenants

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This article provides information in response to various questions that I (Jodie McDougal) have received over the past several months regarding the April 4, 2016, Memorandum (the "Memorandum") published by the U.S. Department of Housing and Urban Development ("HUD"). The Memorandum's intended purpose is to provide guidance on how the Fair Housing Act (the "FHA") standards apply to the use of criminal records by housing providers. This article provides an overview of HUD's Memorandum, including certain legal concepts discussed within the Memorandum, followed by a discussion of some practical "dos" and "don'ts" regarding the use of criminal records by landlords and other housing providers.

Overview of the Memorandum: As all housing providers should know, the FHA prohibits discrimination in the sale, rental, or financing of residential dwellings on the basis of race, color, religion, sex, disability, familial status, or national origin, which are commonly referred to as protected classes. Since the FHA's inception, HUD has published several regulations and guidance materials pertaining to its enforcement of the FHA. HUD's 2016 Memorandum was published in an effort to give guidance on how housing providers can, and cannot, utilize arrest and conviction records of individuals in the rental or sale of real estate. The Memorandum outlines two distinct ways a housing provider can be found in violation of the FHA: (1) discriminatory effect liability; and (2) intentional discrimination liability.

Intentional Discrimination Liability: A landlord or other housing provider can be liable if its policy or practice regarding its use of criminal records is used to intentionally discriminate against individuals of a protected class. For example, a housing provider can be held liable if they reject a Hispanic individual based on their criminal record but accept a non-Hispanic white individual with a similar criminal record. Most (good) landlords have succeeded in ensuring that no intentional discrimination occurs in its use of criminal records, particularly in the screening of potential tenants.

Discriminatory Effect Liability: Discriminatory effect liability stems from the notion that a housing provider can illegally discriminate against a potential tenant or buyer without actually intending to do so. This occurs when a policy or practice, although neutral on its face, has a disproportionate effect on an individual who is a member of a protected class. This type of liability is often overlooked by landlords. However, particularly in light of HUD's 2016 Memorandum, landlords must examine closely their *neutral* policies and practices, which may have an unintended discriminatory effect thus exposing the landlords to liability. One very common example of such a neutral policy is a landlord's policy of declining to rent to all prospective tenants who are convicted felons. While this is a neutral policy on its face, in its Memorandum, HUD discusses how these types of neutral policies have a disproportionate effect on African Americans and Hispanics. Landlords must now reconsider their use of such neutral policies and, instead, utilize alternative policies and practices that are difficult to correctly implement. Before further discussion of such alternative policies and practices, it is important to understand the legal aspects of this type of liability. In order for a housing provider to be liable under this theory, the following burden-shift analysis is utilized:

(1) Does the criminal record policy or practice have a discriminatory effect? To begin, the complainant or HUD must prove the criminal record policy or practice has a disproportionate effect on a protected class, which is typically satisfied by comparing the housing provider's data with local or national statistics. While local statistics should be used if available, HUD has commenced investigations based solely on their comparison to national statistics. Significantly, the Memorandum discusses how African Americans and Hispanics are arrested, convicted, and incarcerated at rates disproportionate to their share of the population, and, therefore, a housing provider's use of arrest and conviction records has the potential to have a discriminatory effect on the availability of housing for African Americans, Hispanics, and others.

(2) *Is the policy or practice necessary to achieve a substantial, legitimate, nondiscriminatory interest?* At this step, the housing provider has the burden to show the policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. In order for it to be substantial, it must be “a core interest of the organization that has a direct relationship to its function.” Typical examples of these types of interest include the safety of other residents and protection of property, but in order for the policy or practice to be legitimate, it “must be genuine and not false or fabricated.”

(3) *Does a less discriminatory alternative to the practice or policy exist?* Lastly, if the housing provider meets the aforementioned burden, then the complainant or HUD must then show the interest could be served by a less discriminatory alternative. Importantly, in its Memorandum, HUD discusses that a less discriminatory alternative to a facially neutral policy is a policy under which a landlord takes into account the mitigating information the landlord has regarding an applicant/individual when considering such individual’s criminal record. Examples include the surrounding circumstances of the criminal conduct, the individual’s age at the time of the crime, the recency of the crime, and the individual’s rental history.

If the complainant or HUD is able to prove a less discriminatory alternative to the practice or policy exists, the housing provider will be subject to fines, punitive damages, and attorney fees.

Important Exemption: There is a significant exception to the above discussion regarding a landlord taking into account mitigating information when considering an individual’s criminal record. A housing provider cannot be held liable for excluding individuals because they have previously been convicted of manufacturing or distributing a controlled substance. This is true regardless of what discriminatory effect that exclusion may have. However, three important caveats must be noted: (1) this exemption does not apply to arrests without conviction; (2) this exemption does not apply to arrests or convictions of possession of a controlled substance; and (3) this exemption does not apply if the conviction is used as an excuse to intentionally discriminate against a member of a protected class.

Policy and Practice Suggestions: Considering the above, housing providers can take several actions to lessen their liability exposure on this issue:

- (a) Establish a written policy with standards on how to evaluate all individuals and evaluate each individual on a case-by-case basis.
- (b) Document research done and decisions made on individuals and periodically review such information to ensure such policy is being followed and not having an unintended discriminatory effect.
- (c) Delay evaluating an individual’s criminal record until after all financial and other qualifications have been met. This will help avoid any unintentional discriminatory effect and minimize costs and efforts.
- (d) Do not make decisions on individuals based on prior arrests not resulting in convictions, as such policy does not serve a legitimate nondiscriminatory interest. Additionally, landlords should remove application questions that ask about arrests without convictions. While a landlord can ask about prior convictions, it should be clear that each applicant is evaluated on a case by case basis.
- (e) Because a blanket restriction against any particular conviction or all individuals with a criminal record will likely be viewed as having a discriminatory effect, evaluate each individual applicant on a case-by-case basis and taking into account mitigating and surroundings factors.
- (f) Do not apply criminal record policies or practices in an inconsistent manner. This may subject a housing provider to a claim of intentional discrimination.



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