Ensuring Fair Housing for People with Criminal Records

A Conversation with HUD

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The Sargent Shriver Center National Center on Poverty Law provides national leadership in advancing laws and policies that secure justice to improve the lives and opportunities of people living in poverty.
Tonya Robinson, Acting General Counsel

Vanita Gupta, Principal Deputy Assistant Attorney General & head of the Civil Rights Division

HUD Office of General Counsel’s Overview of Fair Housing Guidance on the Use of Criminal Records

Maggie Merrill, Director of Asset Management, Housing Authority of New Orleans

Question & Answer with HUD & HANO

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The Fair Housing Act

Prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin (protected classes).

Individuals with a criminal record are not a protected class under the Act.

The Act does not prohibit housing providers from considering criminal records when screening applicants or making other housing decisions.

The Act does prohibit housing providers from using criminal records:
1. As a pretext for intentional discrimination; or
2. In a manner that causes an unjustified discriminatory effect on a protected class.
Purpose: Explains how the (1) **discriminatory effects** and (2) **disparate treatment** methods of proof apply in Fair Housing Act cases where a housing provider’s use of criminal records is alleged to be discriminatory based on race, national origin, or another protected characteristic.

Coverage:
- All housing providers covered by the Fair Housing Act
- Any use of criminal records, including applicant screening and tenant eviction
**Disparate Treatment Liability & Criminal Record Screening**

- **Overview:** Housing provider intentionally treats individuals with comparable criminal records differently because of their race, national origin, or other protected characteristic.
  - Criminal records are used as a pretext for intentional discrimination.

- **Prima Facie Case Example** (in absence of overt/direct evidence of discrimination):
  - (1) Complainant is a member of a protected class;
  - (2) Complainant applied for a dwelling;
  - (3) Housing provider rejected the complainant because of his or her criminal record;
  - (4) Housing provider offered housing to similarly-situated applicant not of complainant’s protected class, but with a comparable criminal record.
Overview: Housing provider’s facially-neutral criminal records policy disproportionately excludes members of one or more protected classes without a legally sufficient justification.

Limited Exemption: The Fair Housing Act does not impose disparate impact liability for policies that deny housing because a person “is convicted ... of the illegal manufacture or distribution of a controlled substance.” (42 U.S.C. 3607(b)(4))

Three-Step Burden-Shifting Framework (24 C.F.R. 100.500):
- Step 1 - Proof of Disparate Impact
- Step 2 - Housing Provider’s Justification
- Step 3 - Less Discriminatory Alternative
Step 1 - Proving Disparate Impact

• The criminal records policy caused or predictably will cause a disparate impact based on race, national origin, or another protected characteristic

• Plaintiff’s (or HUD’s) burden to prove
Step 2 - Housing Provider’s Justification

- Is the criminal records policy necessary to achieve one or more substantial, legitimate, nondiscriminatory interests?

- Defendant housing provider’s burden to prove

- Justification can’t be based on stereotypes or speculation; must be based on evidence
Step 2 - Housing Provider’s Justification (cont’d)

• **Fundamental Question**: Does the policy accurately distinguish between individuals who pose an unacceptable risk and those who do not?
  
  • Policies that fail to consider the **nature, severity, and recency** of criminal conduct are unlikely to meet this standard.

• **Unjustifiable Policies**:
  
  • **Arrest-Based Exclusions**: An arrest record is not proof of criminal conduct
  
  • **Blanket Ban for Any/All Convictions**: Fails to differentiate between prior conduct that demonstrates a threat to a housing provider’s substantial, legitimate, nondiscriminatory interests and conduct that does not
Discriminatory Effects Liability & Criminal Record Screening

Step 3 - Less Discriminatory Alternative

- Could the substantial, legitimate, nondiscriminatory interests that support a challenged criminal records policy be served by a less discriminatory alternative?

- Plaintiff’s (or HUD’s) burden to prove

- Key Considerations:
  - Do individuals get an opportunity to dispute the accuracy of any criminal record?
  - Does the policy allow for individualized review of criminal records, including an assessment of any mitigating information?
Questions About the Fair Housing Guidance on the Use of Criminal Records

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“The principles discussed in [the April 2016 HUD guidance on the use of criminal records] are instructive in evaluating the fair housing implications of crime-free lease ordinances and crime-free lease addenda mandated or encouraged by localities and enforced by housing providers.”
Maggie Merrill
Director of Asset Management

HANO
Housing Authority of New Orleans
The Housing Authority of New Orleans (HANO) Criminal Background Screening Policy: Assessment of Risk and Individualized Review
Why screen for criminal background?

• Provide a safe, peaceful, and enjoyable community for our residents
• Assessment of risk of potential tenants
• Assumption that past actions can predict future behavior
• Assumption that criminal activity = high risk
Criminal Background Screening: Current vs. New

• Current
  • Blanket bans
  • Standard lookback for all convictions
  • Denial based on any convictions during lookback periods
  • Right to informal review of denial
  • Consideration of mitigating circumstances
Criminal Background Screening: Current vs. New

- **New**
  - HUD-mandated bans
  - Lookback periods based on type of conviction, chance of recidivism
  - Individualized review of certain convictions of concern – *prior* to any denial
  - Look at the totality of the circumstances
  - Consideration of mitigating circumstances
  - Right to informal review of denial
HANO Criminal Background Screening Policy

“There is absolutely no presumption that an applicant with a criminal conviction should be denied housing assistance. Before making a decision to admit or deny applicants with criminal convictions, they shall be given an individualized review based on accurate information, including notice and opportunity to be heard.”
HANO Criminal Background Screening Policy

Two Step Process:

1. Assess any criminal convictions using “the Grid”: categories of crimes and look-back periods for which further review is required

2. Conduct individualized assessment for applicants whose convictions require further review

*Note: if a criminal conviction does not trigger a further review, the applicant is deemed admissible if otherwise eligible.*
## HANO Criminal Background Screening Policy

### Screening Criteria Grid (sample):

<table>
<thead>
<tr>
<th>Type</th>
<th>#</th>
<th>Crime Category</th>
<th>Subcategory</th>
<th>Further Review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crimes Against Persons</td>
<td>1</td>
<td>Assault and Battery</td>
<td>Felony only</td>
<td>Further Review if within 3 years of conviction or 1 year of release from date of screening</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>Misdemeanor Domestic Violence</td>
<td>All</td>
<td>Further Review 3 years of conviction or 1 year of release from date of screening</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>Use of firearm against a person</td>
<td>All</td>
<td>Further Review</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td>Armed Robbery offenses</td>
<td>All</td>
<td>Further Review</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td>Robbery offenses, no weapon involved</td>
<td>All</td>
<td>Further Review if within 3 years of conviction or 1 year of release from date of screening</td>
</tr>
</tbody>
</table>
HANO Criminal Background Screening Policy

Further Review Process:
Three person panel, consisting of two senior HANO officials and one resident representative
The panel takes into account, at a minimum, the following factors in its decision-making:
• Criminal History
• Rehabilitation
• Community Ties/Support
• Employment History

Panel Renders Decision
HANO Criminal Background Screening Policy

Challenges:
• Implementation in Mixed-Finance Communities
• HCVP Landlord Screening
• Staff Training
• Establishing a track record: generating data to assess the effects of this new policy
Why we are here
Why we are here
HANO Criminal Background Screening Policy

HANO’s Criminal Background Screening Procedures can be found at:

http://www.hano.org/home/agency_plans/2016%20CRIMINAL%20BACKGROUND%20PROCEDURES%20FINAL.pdf

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