

HUD Guidance Regarding Criminal Screening

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On April 4, 2016, the HUD Office of General Counsel (Helen R. Kanovsky) issued guidance on the relationship of using criminal records as a screening tool for housing decisions to federal fair housing laws. The essence of the guidance is that reliance on criminal history as the basis for a housing decision may be a violation of fair housing law if it creates a disparate impact for individuals due to a federally protected characteristic.

The guidance states that "A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate." The guidance goes on to state "where a policy or practice that restricts access to housing on the basis of race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect."

Disparate impact cases relating to criminal history will be decided using a three-step approach, as follows:

1. A plaintiff must prove that the criminal history policy has a discriminatory effect, that is, that the policy results in a disparate impact on a group of persons because of their race or national origin. Presenting evidence proving that the challenged practice actually or predictably results in a disparate impact satisfies this burden.

2. If the plaintiff proves discriminatory impact, the second step of the analysis shifts the burden to the housing provider to prove that the challenged policy or practice is justified - that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider. For example, the protection of other residents and the property could be cited as a reason for such a policy. However, the guidance indicates that that the policy must actually assist in making the residents or property safer.

3. If the housing provider is successful in demonstrating that the criminal history policy is necessary to achieve its substantial, legitimate, nondiscriminatory interest, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect. HUD's position here is that an individualized assessment of relevant mitigating information beyond that contained in an individual's criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. HUD infers that owners and managers should delay consideration of criminal history until after an individual's financial and other qualifications are verified in order to minimize any additional costs that an individualized criminal record assessment might add to the applicant screening process. This guidance is enlightening, in that it indicates that HUD is intent or requiring (not recommending) individual assessments, and that owners who fail to implement such a policy will be presumed to have a potentially discriminatory policy.

- The guidance explicitly prohibits - for all housing providers - a policy or practice of excluding individuals because of one or more prior arrests (without any conviction).
 - HUD states that such a policy cannot satisfy the burden of showing that the practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.
 - Arrest records should not be used in the determination of housing approval – only conviction records should generally be considered.

The HUD policy is more forgiving with regard to policies that use a record of prior conviction as a reason for declining housing services.

- However, even a prior conviction policy does not relieve the owner of the requirement to prove that such policy or practice is actually necessary to achieve a legitimate business goal.

- A policy that denies a person based on any conviction record – regardless of when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then - will not be acceptable.

In other words, a housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.

It is clear from this HUD guidance that HUD will consider any criminal screening policy to be discriminatory if it does not (1) take into account the nature and severity of an individual's conviction; and (2) consider the amount of time that has passed since the criminal conduct occurred. Apparently, HUD believes, based on this guidance, that all denials of housing assistance based on criminal convictions, are subject to assessment on a case-by-case basis.

HUD does give approval for one blanket exclusion from housing based on a criminal record.

- A housing provider will not be liable under the Act for excluding individuals because they have been convicted one or more times of the illegal manufacture or distribution of a controlled substance as defined in the Controlled Substances Act.
- Again, this is only if there has been a conviction for manufacture or distribution - not arrest. Also, this does not apply for cases involving drug "possession," - only manufacture or distribution.

Based on this new guidance, owners and managers should carefully examine their criminal screening policies.

- Such policies should never permit the refusal of housing services based solely on arrest records, and use of criminal conviction records should be limited to crimes relating to drugs, violent crimes, property crimes, and sex crimes.
- Also, any such policies should have reasonable timeframes in terms of how much of a "look back" is used when determining that a person's criminal history poses a threat to the community.

This represents a significant involvement of HUD into the legitimate operational issues that housing providers must face on a regular basis. How this will all play out in the long run remains to be seen, but as the federal agency responsible for enforcing the nation's fair housing laws, the guidance promulgated by HUD cannot be disregarded.