

# Using Criminal Records to Screen Housing Applicants: A New Landscape in Shades of Gray



Presentation to the Boone County Bar Association  
July 13, 2016  
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# Introduction

- April 4, 2016, HUD issued guidelines titled “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.” ***Contains legal citations.***
- ***Essence of guidelines – rejection of housing applicants based on criminal records may constitute illegal discrimination on basis of race, color or national origin under legal theories of:***
  - ***discriminatory effect***
  - ***disparate treatment***

# Housing Provider Defined

“Housing provider” refers to anyone involved in the sale, leasing and/or financing of housing or other housing-related activities.

# What's New and What's Not?

- **Not new**
  - Legal principles on which guidelines are based, which have been in place for years.
- **New**
  - HUD's issuance of guidelines signals new attention to this area of law and likelihood of increased enforcement actions.

# Exception to General Anti-Discrimination Rules

- Housing providers may continue to automatically reject applicants who have been convicted of the **manufacture** and/or **distribution** of illegal drugs – because these categories are specifically excepted from discrimination statutes.
- However, exception **does not apply** to convictions for **possession** of illegal drugs. Thus, such convictions must be considered in light of the principles discussed later.

# Factual Background

- As many as 100 million U.S. adults – or nearly one-third of the population – have a criminal record of some sort.
- African Americans and Hispanics are arrested, convicted and incarcerated at rates higher than their share of the general population. As a result, HUD finds that criminal records-based barriers to housing have a disproportionate impact on minorities.

# Legal Background – 1

Fair Housing Act (FHA) 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.

## Legal Background – 2

While it is not illegal *per se* under FHA to reject housing applicants who have criminal records, blanket rejection of applicants based on having criminal records can constitute violation of the FHA if, **without justification**, persons of one race, color or national origin are rejected more often.

***This is called "discriminatory effect" discrimination.***



## Legal Background – 3

Also, intentional discrimination in violation of FHA occurs when housing provider treats applicants with comparable criminal histories differently because of their race, color, national origin or other protected characteristic.

For example, it would be discriminatory to reject an African American applicant having a criminal record while approving a white applicant having a comparable criminal record.

***This is called "disparate treatment" discrimination.***

# Discriminatory Effect – 1

Housing provider can be held in violation of FHA if provider's policies and/or practices have an ***unjustified*** discriminatory effect, *even if provider had no intent to discriminate.*

- Thus, when a policy/practice based on criminal history results in persons of particular race, color, national origin or other protected category being rejected more often, the policy/practice is unlawful if:
  - Not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, **or**
  - Interest could be served by another practice that has less discriminatory effect.

## Discriminatory Effect – 2

An administrative agency or court hearing a claim that a housing provider is liable for discriminatory effect discrimination will consider the claim under a three-step process.

# Discriminatory Effect – 3

## **Step 1 - Evaluating Whether the Criminal History Policy/Practice Has Discriminatory Effect**

- Complaining party has burden to prove that criminal history policy/practice has discriminatory effect – that is, that it results in a disparate impact on a group of persons because of their race, color or national origin.

# Discriminatory Effect – 4

- Burden is satisfied by presenting statistical evidence establishing that the challenged practice actually or predictably results in a disparate impact.
- Generally, local market area statistics are presented if available
- But national statistics on racial and ethnic disparities in criminal justice system may be used when state or local statistics are not readily available and there is no reason to believe they would differ markedly from national statistics.

# Discriminatory Effect – 5

**Example:** National statistics establish that racial and ethnic minorities face disproportionately high rates of arrest and incarceration.

- In 2013, African Americans were arrested at a rate more than double their proportion of the general population.
- In 2014, African Americans comprised approximately 36 percent of the total prison population in the United States, but only about 12 percent of the country's total population.
- Hispanics are similarly incarcerated at a rate disproportionate to their share of the general population – Hispanic individuals comprised about 22 percent of the prison population, but only about 17 percent of the total U.S. population.

**Contrast:** In 2014 non-Hispanic Whites comprised about 62 percent of total U.S. population but only about 34 percent of prison population.

# Discriminatory Effect – 6

- Housing provider is given opportunity to offer evidence to refute claim that its policy/practice causes disparate impact on one or more protected classes.
- Determining whether policy/practice results in disparate impact can only be determined case-by-case.
- If agency or court determines there was no disparate impact, discrimination complaint fails, and additional steps in analysis process do not take place.

# Discriminatory Effect – 7

## **Step 2 - Evaluating Whether Challenged Policy/Practice is Necessary to Achieve Substantial, Legitimate, Nondiscriminatory Interest**

- If disparate impact has been established to satisfaction of agency/court in Step 1, burden shifts to housing provider to prove that challenged policy/practice is justified.



# Discriminatory Effect – 8

- To prove that challenged policy/practice is justified, housing provider must establish that:
  - Policy/practice is necessary to achieve substantial, legitimate, nondiscriminatory interest of the provider, **and**
  - Policy/practice actually serves that interest.

# Discriminatory Effect – 9

- Housing providers typically say excluding prospective tenants who have criminal records is necessary for the protection of other residents and their property.
  - Agencies/courts may consider such interests to be both substantial and legitimate, assuming they are actual reasons for policy/practice.
- However, housing provider must be able to prove through reliable evidence that its policy/practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property.
  - Generalization that any individual with an arrest or conviction record poses greater risk than any individual without such record **is not sufficient to satisfy this burden.**

# Discriminatory Effect – 10

## **Side note: Exclusions based on prior arrest**

- HUD states that housing provider with policy/practice of excluding individuals because of one or more prior **arrests** (*without any conviction*) cannot meet burden to show policy/practice is necessary to achieve substantial, legitimate, nondiscriminatory interest and actually assists in protecting resident safety and/or property.

# Discriminatory Effect – 11

- HUD's position is that a housing provider who imposes a **blanket prohibition** on all persons having a conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – ***will be unable to establish substantial, legitimate, nondiscriminatory interest.***
- HUD further states that a housing provider with a more tailored policy or practice that excludes individuals with only certain types of convictions must still prove that its policy is necessary to serve a “substantial, legitimate, nondiscriminatory interest.”
  - To do this, the housing provider must show that the policy accurately distinguishes between criminal conduct indicative of real risk to resident safety and/or property and criminal conduct that does not indicate such risk.

# Discriminatory Effect – 12

- HUD states that a policy/practice that fails to take into account the nature and severity of an individual's conviction is unlikely to establish a substantial, legitimate, nondiscriminatory interest.
- Similarly, HUD says that a policy/practice that does not consider the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy this standard.
  - Because research shows that, over time, the likelihood that person with prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense.

# Discriminatory Effect - 13

As was the case in Step 1, whether housing provider's policy/practice serves substantial, legitimate, nondiscriminatory interest can only be determined case-by-case.

- If housing provider is able to establish its policy/practice protects a substantial, legitimate, nondiscriminatory interest, inquiry proceeds to Step 3.
- If housing provider fails to establish this, housing provider loses, and Step 3 does not apply.

# Discriminatory Effect – 14

## **Step 3 - Evaluating Whether There Is a Less Discriminatory Alternative**

- Step 3 of discriminatory effects analysis applies only if housing provider successfully proves in Step 2 that its criminal history policy/practice serves substantial, legitimate, nondiscriminatory interest.
- In Step 3, burden shifts back to complaining party to prove that housing provider's interest could be served by another practice that has less discriminatory effect.

# Discriminatory Effect – 15

HUD says that although identifying a less discriminatory alternative will depend on the particulars of the criminal history policy/practice being challenged, **individualized consideration of relevant mitigating information** beyond that contained in an individual's criminal record is **likely to have a less discriminatory effect** than categorical exclusions.



# Discriminatory Effect – 16

Thus, complaining party may argue that housing provider's policy/practice should take into account factors such as:

- Facts or circumstances surrounding criminal conduct
- Age of individual at time of criminal conduct
- Passage of time since criminal conduct
- Whether individual has maintained history of good conduct before and/or after conviction
- Evidence of rehabilitation efforts

# Disparate Treatment – 1

Disparate treatment (intentional) discrimination under FHA arises if housing provider intentionally discriminates in using criminal history information.

# Disparate Treatment – 2

## Examples:

- Rejecting an Hispanic applicant based on criminal record, but accepting non-Hispanic white applicant with comparable criminal record.
- Not renting to persons with certain convictions, but making exceptions for whites but not African Americans.
- Assisting a white applicant despite his potentially disqualifying criminal record, but not providing such assistance to an African American applicant with a similar criminal record.
- Telling prospective Hispanic applicants that a criminal record would be a disqualification, but not similarly discouraging white individuals with comparable criminal records.
- Renting to whites with convictions for **manufacture** or **distribution** of illegal drugs, but not renting to African Americans with such convictions (despite the general exception that such convictions may be used as a blanket basis for rejecting applications).

# Disparate Treatment – 3

- An intentional discrimination claim may be proved by direct evidence of discriminatory statements by a housing provider.
- But this is seldom possible unless the housing provider has made careless statements.

# Disparate Treatment – 4

If there is no overt, direct evidence of discrimination, administrative agencies and courts use following analysis to decide if illegal discrimination occurred:

- First, evidence must establish disparate treatment. For instance, this may be shown in a refusal-to-rent case by evidence that:
  - Complaining party is member of protected class.
  - Complaining party applied for housing.
  - Housing provider rejected complaining party because of criminal history.
  - Housing provider accepted similarly-situated applicant not of complaining party's protected class, but with comparable criminal record.

# Disparate Treatment - 5

- Second, burden shifts to the housing provider to offer evidence of a legitimate, nondiscriminatory reason for the adverse housing decision.
  - Reason must be clear, reasonably specific, and supported by evidence.
  - Purely subjective or arbitrary reasons will not be sufficient.

# Disparate Treatment – 6

While a criminal record can constitute a legitimate, nondiscriminatory reason for a refusal to rent or other adverse action by a housing provider, complaining party can still prevail by showing that criminal record was not true reason for adverse housing decision, but was instead a **mere pretext** for unlawful discrimination.

# Disparate Treatment – 7

## **Examples of pretexts:**

- Housing provider acting on comparable criminal history information differently for one or more individuals of a different class than complaining party (shows provider was not considering criminal history information uniformly or did not in fact have criminal history policy).
- Housing provider did not actually know of applicant's criminal record at time of alleged discrimination.
- Changing or inconsistent explanations offered by a housing provider for denial of application.



# Recommendations – 1

No applicant should be rejected based solely on arrest records.

- This clearly runs afoul of HUD guidelines in all cases.
- **If clients have question about arrests on their application forms, it should be deleted.**

## Recommendations - 2

If housing providers are going to exclude applicants convicted of **manufacture** or **distribution** of illegal drugs (which is not considered discriminatory under FHA):

- They must do so across the board, and
- They cannot make any exceptions on the basis of race or another protected category.

## Recommendations – 3

Providers should not rely on lists of criminal offenses they will and will not consider disqualifying.

This is dangerous because HUD views use of criminal records for resident screening *suspect generally, unless housing providers soften the potential impact through individualized consideration of various factors.*

# Recommendations – 4

Adopt a policy that mandates consideration of the following factors at a minimum:

- Facts and circumstances of criminal conduct
- Nature and severity of criminal conduct
- Age of individual at time of criminal conduct
- Passage of time since criminal conduct without similar repeat conduct
- Whether individual has maintained history of good conduct before and/or after criminal conduct
- Evidence of rehabilitation efforts

# Recommendations – 5

## **Special note regarding sexual offenses:**

- On its face, a policy excluding all applicants with a conviction for sexual offense might seem reasonable.
- However, consider example of teenage boy who has consensual sex with his underage girlfriend and is convicted of statutory rape.
  - It's highly unlikely that this young man is or will be a sexual predator.
  - And there are other so-called sexual offenses that do not reliably indicate that a person is a sexual predator or serial rapist.
- Therefore, sexual offenses should be reviewed on the same basis as other convictions.

# Recommendations – 6

**To minimize the risk of discrimination complaints, applicants who have criminal records should be interviewed, and the housing provider should individually consider their circumstances using the factors previously listed to avoid potentially successful discrimination complaints.**

- After hearing out an applicant, gathering other relevant information, and taking the previously listed factors into account, a provider can deny an applicant if the provider believes in good faith that accepting the applicant would involve a substantial risk to the safety and/or property of other tenants.

# Recommendations – 7

**Whatever the housing provider decides after undertaking the individualized assessment, the following should be carefully documented:**

- Facts obtained from the applicant and other sources**
- Decision made to accept or reject applicant**
- Reason(s) for decision**
- How facts relate to factors taken into account in making decision**

# Conclusion – 1

**Housing providers understandably prefer black-and-white, easy-to-apply rules and will be reluctant to undertake this kind of analysis involving many shades of gray.**

**But it is necessary to engage in individualized assessment of applicants with criminal records to avoid potentially successful discrimination complaints.**



## Conclusion – 2

**It's probably no consolation to housing providers, but they should keep in mind that the basic law involved has not changed, and they could have been found liable for discrimination based on a blanket criminal record policy in the past.**

**What is new is that HUD is now looking over their shoulders more carefully.**

**In other words, they should have been engaging in this kind of individualized consideration of criminal records all along.**