

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

By Steve Scott  
Scott Law Firm, P.C.  
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## Contents

Introduction. . . . .	1
What's New and What's Not. . . . .	2
Exception to General Anti-Discrimination Rules. . . . .	2
Factual Background. . . . .	2
Legal Background. . . . .	2
"Discriminatory Effect" Discrimination. . . . .	3
Step 1 - Does Policy Have Discriminatory Effect?. . . . .	3
Step 2 - Does Policy Serve a Substantial Nondiscriminatory Interest?. . . . .	4
Exclusion Because of Prior Arrest - A Big "No No" . . . . .	4
Exclusion Because of Prior Conviction. . . . .	5
Step 3 - Is There a Less Discriminatory Alternative?. . . . .	6
"Disparate Treatment" (Intentional) Discrimination and Use of Criminal History. . . . .	6
Early Responses to HUD Guidance. . . . .	8
Recommendations. . . . .	8

## Introduction

On April 4, 2016, the Department of Housing and Urban Development (HUD) issued new 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." The guidelines can be found online at:

[https://portal.hud.gov/hudportal/documents/huddoc?id=HUD\\_OGCGuidAppFHASandCR.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf)

***The essence of the guidelines is that rejection of housing applicants based on criminal records may constitute illegal discrimination on the basis of race, color or national origin under the legal theories of "discriminatory effect" and "disparate treatment."***

The term "housing provider" is used in this document to refer to anyone involved in the sale, leasing and/or financing of housing or other housing-related activities.

## What's New and What's Not

### **First, what's not new?**

**Answer:** The legal principles on which the guidelines are based. Those principles have been in place for years.

### **So what is new?**

**Answer:** HUD's issuance of the guidelines signals new attention to this area of law and the likelihood of increased enforcement actions.

## Exception to General Anti-Discrimination Rules

Housing providers may continue to automatically reject leasing applicants who have been convicted of the **manufacture** and/or **distribution** of illegal drugs. This is because these categories are specifically excepted from discrimination statutes.

However, this exception **does not apply** to convictions for **possession** of illegal drugs. Thus, such convictions must be considered in light of the following discussion.

## 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

The 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.

While it is not illegal *per se* under the FHA to reject leasing applicants who have criminal records, blanket rejection of applicants based on having criminal records can constitute a 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* and is discussed in more detail below along with the concept of "justification."

Also, intentional discrimination in violation of the FHA occurs when a 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* and is discussed in more detail below.

### **"Discriminatory Effect" Discrimination**

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

In other words, a facially-neutral policy or practice that has a discriminatory effect violates the FHA if it is not supported by a legally sufficient justification. To explain, when a leasing policy or practice based on criminal history results in persons of a particular race, color, national origin or other protected category being rejected more often, the policy or practice is unlawful if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if that interest could be served by another practice that has a less discriminatory effect.

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

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

The complaining party has the burden to 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, color or national origin.

This 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 the 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.

For 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 – in other words, African Americans were incarcerated at a rate nearly three times their proportion of the general population. Hispanics were 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. In contrast, non-Hispanic Whites comprised approximately 62 percent of the total U.S. population but only about 34 percent of the prison population in 2014.

Additional evidence, such as applicant data, tenant files, census demographic data and localized criminal justice data, may be considered by the administrative agency or court in determining whether local statistics are consistent with national statistics and whether there is reasonable cause to believe that the challenged policy or practice causes a disparate impact.

The housing provider would then be given an opportunity to offer evidence to refute the claim that its policy or practice causes a disparate impact on one or more protected classes.

Determining whether a policy or practice results in a disparate impact is something that can only be determined on a case-by-case basis. If the agency or court determines there was no disparate impact, the discrimination complaint fails, and the additional steps in the process do not take place.

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

If disparate impact has been established to the satisfaction of the agency or court in Step 1, the burden then shifts to the housing provider to prove that the challenged policy or practice is justified. To do so, the housing provider must establish that:

- The policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider, **and**
- The policy or practice actually serves that interest.

Housing providers typically assert that excluding prospective tenants who have criminal records is necessary for the protection of other residents and their property. Ensuring resident safety and protecting property are often considered among the fundamental responsibilities of a housing provider, and agencies/courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy or practice.

However, a housing provider must be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property. The generalization that any individual with an arrest or conviction record poses a greater risk than any individual without such a record **is not sufficient to satisfy this burden.**

### **Exclusions Because of Prior Arrest - A Big "No No"**

HUD states that a housing provider with a policy or practice of excluding individuals because of one or more prior **arrests** (*without any conviction*) cannot meet the housing provider's burden to show that the policy or practice is necessary

to achieve a substantial, legitimate, nondiscriminatory interest and actually assists in protecting resident safety and/or property.

This is because, as the U.S. Supreme Court has stated, "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." HUD states that because arrest records do not constitute proof of past unlawful conduct and are often incomplete, the fact of an arrest is not a reliable basis for assessing the potential risk to resident safety or property posed by a particular individual.

### **Exclusions Because of Prior Conviction**

In almost all cases, a record of conviction (as opposed to an arrest) will be sufficient evidence to establish that an individual engaged in criminal conduct. However, housing providers who apply a policy or practice that excludes persons with prior convictions must still be able to prove that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.

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 a 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.

According to HUD, a policy or 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 or practice that does not consider the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy this standard, especially in light of research showing that, over time, the likelihood that a person with a 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.

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

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

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

The third step of the discriminatory effects analysis process applies only if the housing provider successfully proves in Step 2 that its criminal history policy or practice serves a substantial, legitimate, nondiscriminatory interest.

In the third step, the burden shifts back to the complaining party to prove that the housing provider's interest could be served by another practice that has a less discriminatory effect.

HUD says that although identifying a less discriminatory alternative will depend on the particulars of the criminal history policy or 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 that do not take such additional information into account. Relevant individualized evidence might include:

- The facts or circumstances surrounding the criminal conduct
- The age of the individual at the time of the conduct
- The passage of time since the criminal conduct
- Whether the individual has maintained history of good conduct before and/or after the conviction or conduct
- Evidence of rehabilitation efforts

### **"Disparate Treatment" (Intentional) Discrimination and Use of Criminal History**

A housing provider may also be liable for discrimination under the FHA if the housing provider intentionally discriminates in using criminal history information.

Such intentional discrimination (disparate treatment) will occur if the housing provider uses criminal record histories in a manner that treats an applicant or renter differently because of race, color, national origin or another protected characteristic. Examples:

- Rejecting an Hispanic applicant based on his criminal record, but admitting a non-Hispanic white applicant with a comparable criminal record.
- Having a policy of not renting to persons with certain convictions, but making exceptions for whites but not African Americans.
- Assisting a white applicant in securing approval of his rental application despite his potentially disqualifying criminal record under the housing provider's screening policy,

but not providing such assistance to an African American applicant with a potentially disqualifying criminal record.

- Responding to inquiries from prospective applicants, a housing provider tells African Americans that a criminal record would be a disqualification, but does not similarly discourage a white individual with a comparable criminal record from applying.
- 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).

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.

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

First, the evidence must establish disparate treatment. This may be shown in a refusal-to-rent case by evidence that:

- The complaining party is a member of a protected class.
- The complaining party applied for a dwelling from the housing provider.
- The housing provider rejected the complaining party because of his or her criminal history.
- The housing provider offered housing to a similarly-situated applicant not of the complaining party's protected class, but with a comparable criminal record.

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

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

- The fact that a housing provider acted upon comparable criminal history information differently for one or more individuals of a different protected class than the complaining party is strong evidence that the housing provider was not considering criminal history information uniformly or did not in fact have a criminal history policy.

- The fact that a housing provider did not actually know of an applicant's criminal record at the time of the alleged discrimination.
- Changing or inconsistent explanations offered by a housing provider for the denial of an application may also provide evidence of pretext.

### Early Responses to HUD Guidance

Some housing screening companies have responded to HUD's April 4, 2016 guidance by recommending that housing providers accept or reject applicants with criminal records based on a list of various types of offenses and times frames for rejection. Following is one example:

#### FELONY

Theft of Property (exclude by check) - 10 years from completion of sentence  
 Damage to Property - 10 years from completion of sentence  
 Drug Violation - 10 years from completion of sentence  
 Weapons - 10 years from completion of sentence  
 Violence - No time limit  
 Crime/Injury to Persons - No time limit  
 Sexual Offenses - No time limit

#### MISDEMEANOR

Theft of Property (exclude by check) - 7 years from completion of sentence  
 Damage to Property - 7 years from completion of sentence  
 Drug Violation - 7 years from completion of sentence  
 Weapons - 7 years from completion of sentence  
 Violence - No time limit  
 Crime/Injury to Persons - No time limit  
 Sexual Offenses - No time limit

### Recommendations

My first recommendation is that you not reject any applicant based solely on arrest records. This clearly runs afoul of the HUD guidelines in all cases. **If you have a question about arrests on your application form, delete it.**

Second, if you are going to exclude applicants convicted of manufacture or distribution of illegal drugs, you must do so across the board and not make any exceptions on the basis of race or another protected category.

Third, regarding other convictions (whether by pleading guilty or being found guilty in a trial), I believe that adopting a criminal record policy like the one mentioned in the preceding section is dangerous because the HUD guidance makes clear that, in HUD's view, the use of criminal records for resident screening is suspect generally, **unless housing providers soften the potential impact through *individualized consideration* of the following factors at a minimum:**



- The facts or circumstances surrounding the criminal conduct
- Nature and severity of the criminal conduct
- The age of the individual at the time of the conduct
- The passage of time since the criminal conduct without similar repeat conduct
- Whether the individual has maintained a history of good conduct before and/or after the conviction or conduct
- Evidence of rehabilitation efforts

**A special note regarding sexual offenses:** On its face, a policy excluding all applicants who have a conviction for a sexual offense might seem reasonable. However, consider the example of a teenage boy who has voluntary 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. There are other so-called sexual offenses that do not reliably indicate that a person is a sexual predator or serial rapist. Therefore, I recommend that sexual offenses be reviewed on the same basis as other convictions.

**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 I believe it is necessary to interview applicants who have criminal records and individually consider their circumstances using the factors listed above in order to avoid potentially successful discrimination complaints.**

After hearing out an applicant, gathering other relevant information, and taking the above factors into account, you can deny the applicant if you believe that leasing to him or her would involve a substantial risk to the safety and/or property of other tenants. I believe that as long as you make a good-faith decision based on the above factors, you minimize the risk of discrimination complaints.

**Whatever you decide, you should carefully document the facts obtained from the applicant and other sources, the decision you made, the reason(s) for the decision, and how the facts relate to the factors you took into account in making the decision.**

Finally, it's probably no consolation, but keep in mind that the basic law involved here has not changed and you 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 your shoulder more carefully. In other words, you should have been engaging in this kind of individualized consideration of criminal records all along.