

FAIR HOUSING ACT: CRIMINAL HISTORY-BASED PRACTICES AND POLICIES

NAR LEGAL AFFAIRS DEPARTMENT
April 2016

In the recently issued [“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 U.S. Department of Housing and Urban Development (“HUD”) urges housing providers to exercise caution when implementing criminal history policies or practices used to make housing decisions.

HUD’s guidance comes on the heels of the [Supreme Court’s decision](#) last summer, which held disparate impact claims are cognizable under the Fair Housing Act.¹ While persons with criminal records are not a protected class under the Act, HUD stresses that criminal history-based barriers to housing have a statistically disproportionate impact on minorities, which *are* a protected class under the Act, and as such, creating arbitrary or blanket criminal-based policies or restrictions could violate the Fair Housing Act (“FHA” or “Act”). To be clear, HUD’s guidance does not preclude housing providers from crafting criminal history-based policies or practices, but the guidance makes evident that housing providers should create thoughtful policies and practices that are tailored to serve a substantial, legitimate, and nondiscriminatory interest of the housing provider, such as resident safety or the protection of property.

HUD includes context for its guidance, and offers statistical evidence that the United States minority population experiences arrest and incarceration at rates disproportionate to their share of their population. For instance, HUD asserts that in 2014, African Americans were incarcerated at a rate nearly three times their proportion of the general population.

¹ Texas Dep’t of Hous. & Cmty Affairs v. Inclusive Cmty Project, Inc., 135 S.Ct. 2507 (2015).

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In the context of criminal history policies or practices, disparate impact liability is determined using a burden-shifting framework that first requires a plaintiff or HUD to prove that the criminal history policy or practice has a discriminatory effect, meaning the policy or practice results in a disparate impact on a group of persons because of their race, national origin or other protected characteristic under the Act. In this step of the process, evidence must be provided that demonstrates that the criminal history policy or practice actually or predictably results in a disparate impact. If successful, the burden then shifts to the housing provider to show that the policy or practice in question is justified. Here, the housing provider must show that the policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the housing provider, and further, that the policy or practice actually achieves that interest. Finally, if a housing provider is successful, the burden shifts back to the Plaintiff or HUD to prove that the housing provider's interest could be served by another practice that has a less discriminatory effect.

The determination of whether a criminal history-based policy or practice has a disparate impact in violation of the Act is ultimately a fact and case-specific inquiry. However, HUD's guidance provides insight into how to create a legally defensible policy that does not violate or frustrate the FHA's prohibition on the discrimination in the sale, rental or financing of dwellings or in other housing-related activities. We recommend review of HUD's guidance, but have distilled that guidance to assist in reviewing existing criminal history-based policies or practices or in the creation of a new one:

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<u>CRIMINAL HISTORY-BASED HOUSING POLICIES AND PRACTICES</u>	
<u>Do's</u>	<u>DON'Ts</u>
✓ Create tailored criminal history-based policies/practices.	× Don't create arbitrary or overly-broad criminal history-based policies/practices.
✓ Be sure to have clear, specific reasoning for the criminal history-based policy/practice that can be supported by evidence.	× Don't maintain a policy/practice, or any portion thereof, that does not serve a substantial, legitimate, nondiscriminatory interest.
✓ Exclude individuals only based on criminal convictions that present a demonstrable risk to resident safety or property.	× Don't create exclusions based on <u>arrest</u> records alone.
✓ Consider the nature and severity of an individual's conviction before excluding the individual based on the conviction.	× Don't create a blanket exclusion of any person with any conviction record.
✓ Consider the amount of time that has passed since the criminal conduct occurred.	× Don't provide inconsistent explanations for the denial of a housing application.
✓ Consider criminal history uniformly, regardless of an individual's inclusion in a protected class.	× Don't use criminal history as a pretext for unequal treatment of individuals of a protected class.
✓ Treat all applicants for housing equally, regardless of protected characteristics.	× Don't use comparable criminal history differently for individuals of protected classes.
✓ Conduct individualized assessments that take into account mitigating factors, such as facts and circumstances surrounding the criminal conduct, age at the time of the conduct, evidence of good tenancy before/after conduct, and rehabilitative efforts.	× Don't make exceptions to a policy or practice for some individuals, but not make the same exception for another individual based on the individual's inclusion in a protected class.
✓ Housing providers may exclude persons convicted of the illegal <u>manufacture</u> or <u>distribution</u> of a controlled substance. ²	× Don't include a blanket prohibition against individuals convicted of drug <u>possession</u> .

² 42 U.S.C. 3607(b)(4).