

FACT SHEET: FAIR HOUSING & CRIMINAL BACKGROUND SCREENING IN HOUSING TRANSACTIONS



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What is fair housing?

Fair housing is the right to choose housing free from unlawful discrimination. The federal Fair Housing Act and Michigan laws protect people from discrimination in housing based on race, color, religion, sex, national origin, familial status, disability, marital status, and age. Discrimination is illegal in housing transactions such as rentals, sales, lending, and insurance.

On April 4, 2016, the U.S. Department of Housing and Urban Development (HUD) published "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". This guidance addresses how the Fair Housing Act applies to the use of criminal records by housing providers, and *specifically addresses when a housing provider's adverse housing actions, such as refusal to rent or renew a lease based on an individual's criminal history, could violate the Act.* This fact sheet will serve to summarize HUD's guidance.

How does the Fair Housing Act apply to criminal background screening?

The Fair Housing Act prohibits housing discrimination and housing practices that have an unjustified discriminatory effect on a protected class. Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions pertaining to housing are likely to disproportionately burden African Americans, Hispanics, and others. While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, the use of arbitrary and overbroad criminal history-related restrictions or bans are likely to lack a legally sufficient justification and therefore could be challenged as discriminatory.

Why should a housing provider evaluate their screening policy with a fair housing lens?

A violation of the Act can occur if a housing provider treats individuals with comparable criminal histories differently because of any protected class. For example, a housing provider cannot reject a qualified Hispanic applicant due to their criminal record but accept a similarly qualified White applicant with a comparable criminal record. Even a criminal background screening policy that appears to be neutral on its face and is applied to all equally can violate the Act if it has a discriminatory effect and is not based on a legally sufficient justification.

What should be considered in a criminal background screening or policy?

- A housing provider must treat all applicants equally regardless of race, national origin, gender, etc.
- Criminal history policies must accurately distinguish between criminal conduct that indicates a *demonstrable risk to resident safety and/or property* and criminal conduct that does not.
- A housing provider must be able to prove through reliable evidence that its policy actually assists in protecting resident safety and/or property and is not simply based on generalizations or stereotypes about criminal records.
- A policy should take into account the nature and severity of an individual's conviction.
- A policy should consider the amount of time that has passed since the criminal conduct occurred.

What should **NOT** be considered in a criminal background screening or policy?

- Do not use arrests without convictions as a screening tool. A housing provider who denies persons on the basis of arrests not resulting in conviction cannot prove that the denial actually assists in protecting resident safety and/or property.
- Do not use blanket bans/prohibitions. Blanket bans will be unable to show that the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Circumstances will need to be evaluated on a case-by-case basis.
- There is no liability to excluding persons with convictions of illegal drug manufacturing or distribution of a controlled substance: this does not include drug possession or arrest.

/ Please note that this fact sheet is not intended to be used as legal advice. /

Using the 3-Step Analytical Framework to Evaluate for Discriminatory Effect

Policies that exclude persons based on criminal history must be tailored to serve the housing provider's substantial, legitimate, nondiscriminatory interest and take into consideration the aforementioned factors. Where a policy or practice excludes individuals with only certain types of convictions, a housing provider will bear the burden of proving that any discriminatory effect caused by such policy or practice is justified. Such a determination must be made on a case-by-case basis. This means housing providers need to find a balance between using more discretion while still treating applicants equally.

A housing provider violates the Fair Housing Act when their policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate. HUD provides a 3-step process to evaluate whether a housing provider's use of criminal history results in a discriminatory effect in violation of the Act.

Here is a brief summary:

1. **Evaluating Whether the Criminal History Policy or Practice Has a Discriminatory Effect** – In the first step of the discriminatory effects analysis, the plaintiff (or HUD in an administrative action) must prove that the criminal history policy has a discriminatory effect, in other words, that the policy results in a disparate impact on a group of persons because of their race, national origin or other protected class.
2. **Evaluating Whether the Challenged Policy or Practice is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest** – The second step of the analysis shifts to the housing provider to prove that the challenged policy or practice is justified.
3. **Evaluating Whether There Is a Less Discriminatory Alternative** – The final step of the analysis is applicable only if the housing provider successfully proves that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest.

Resources:

"Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Housing and Real Estate-Related Transactions, www.fhcwm.org/publications

The Fair Housing Center acknowledges that this may be a complex area for housing providers; therefore, please feel free to contact us with any questions.

FAIR HOUSING BEST PRACTICES IN CRIMINAL BACKGROUND SCREENING

- Include statement of **purpose served** by screening policy.
- **Remove any references** to or use of arrest records, any blanket bans or prohibitions, any overly broad categories of criminal activities or vague statements.
- Postpone accessing criminal history report until after the credit report, identity authentication, income and rental qualifications have been met.
- **Update screening practices or services** to use convictions; do not use systems that only provide arrest records.
- Illustrate connection of resident selection criteria to demonstrable risk to resident safety and/or property.
- Conduct individual assessments keeping in mind the aforementioned circumstances.
- Allow applicants or residents an **opportunity to present mitigating circumstances** before an adverse action against them.
- Add/use reasonable time frames for qualifying criteria (also known as lookback periods).
- Communicate all changes with all staff and residents.
- **The policies and subsequent procedures should be applied equally** to all persons regardless of race, sex, disability status, etc., and all persons should consistently receive the same quality of treatment.

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