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Criminal history screening procedures focus of newly issued HUD guidance

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HUD's Office of General Counsel issued guidance on April 4 relative to the Fair Housing Act and landlords using criminal history as a basis for denying applicants for housing. Among other things, the Fair Housing Act, 42 U.S.C. §3601 et seq., prohibits discrimination in the rental of apartments on the basis of race, color, religion, sex, disability, familial status or national origin. As a result of HUD's guidance, attorneys representing residential landlords should advise them to review their qualifying criteria and standards for rejecting applicants.

There are two types of discrimination: intentional discrimination and disparate impact/discriminatory effect, which occurs when a neutral policy or procedure has a disproportionately negative impact on a protected class. In 2015, the U.S. Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, recognized that the disparate impact theory applies in fair housing cases, and the HUD guidance concentrates on this type of discrimination in the context of criminal history.

It points out that as many as 100 million adults in the United States have a criminal record and that it is important for individuals released from incarceration to be able "to access safe, secure and affordable housing." Applicant screening policies that disqualify individuals who have been arrested or convicted of a crime have a disproportionately negative effect on African Americans and Hispanics who are arrested and convicted at a rate much higher than that of the general population.

Landlords generally refuse to rent to applicants with an arrest or conviction because they believe that they are more likely to pose a risk to tenant safety or property. As perhaps their most fundamental obligation is to keep residents safe and secure, the landlords' concern is certainly legitimate. The guidance recognizes this fact, but states that landlords must be able to prove that their criminal screening policies actually do protect tenant safety or property. It then rejects the approach of denying all applicants who have been arrested or convicted as not being an effective means of achieving that goal.

The guidance states that arrest records are not proof of past criminal conduct, since they just show the individual was suspected of committing a crime. An individual with an arrest record does not necessarily constitute a risk to other residents, so excluding that person does not really protect residents and does not satisfy the landlord's burden of demonstrating that the policy "is necessary to achieve a substantial, legitimate, nondiscriminatory interest." The guidance quotes the U.S. Supreme Court in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957), where the court stated that "the 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."

Individuals who have been convicted have committed crimes. However, the guidance notes that there are many different types of crimes of which one may be convicted, some much more serious than others. Similarly, some crimes are more recent than others. It states that a landlord who has a blanket prohibition on accepting any applicant with any type of conviction cannot meet the same burden, that the policy "is necessary to achieve a substantial, legitimate, non-discriminatory interest." The guidance goes on to say that landlords should tailor their criminal history policy so it distinguishes between which criminal conduct poses a risk to resident safety or property and which does not, and consider the "nature, severity and recency of the criminal conduct."

It recommends that landlords perform an individualized assessment of a conviction and relevant mitigating circumstances, which could include the facts surrounding the criminal conduct, the age of the applicant at the time, the applicant's tenant history before and after the conduct, and evidence of rehabilitation efforts.

Since the Fair Housing Act has specific exemptions for the illegal manufacture or distribution of controlled substances, the guidance points out that it is acceptable for a landlord to maintain a blanket rejection policy for convictions for those specific crimes. These exemptions do not apply to arrests for drug manufacture or distribution, or to convictions for drug possession. Aside from these specific exemptions, the guidance states that denying applicants based upon "a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act."

Landlords should now be reviewing and revising their qualifying criteria. Arrests should be eliminated as a basis for denying applicants, and landlords should carefully examine the various types of convictions for their relation to threats to safety or property. Landlords who use firms to search criminal histories and recommend acceptance or rejection of applicants should revise the specific criminal decision criteria used by the firms. An applicant who is rejected solely for criminal history should be given an opportunity to provide evidence of mitigating circumstances for the landlord to consider.

Implementing these new policies will take some time but should not be overly burdensome to landlords. Without a doubt, taking steps now to comply with the Fair Housing Act can help avoid potential disparate impact claims in the future.

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