FAIR HOUSING- LANDLORD'S PERSPECTIVE

Eric M. Steven P.S.
1403 W. Boone Ave.
Spokane, WA 99201
(509) 325-8777
esteven@comcast.net
Ericstevenlaw.com

Topics

I. Advertising

II. Tenant Screening

III. Developing Non-Discriminating Rules

IV. Enforcing Rules in a Non-Discriminating Manner

V. Protecting Against Discrimination

VI. Dealing with discovered discrimination

I. Advertising

Section 3604(c) of the Fair Housing Act makes it illegal to make, print or publish, or cause to be made, printed or published, any notice, statement or advertisement, with respect to the sale or rental of a dwelling, that indicates any preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status or national origin, or an intention to make any such preference, limitation or discrimination.

If it is found that a classified advertisement, display advertisement, insert or any other type of real estate advertisement is published with discriminatory language, the person or agency that placed the advertisement is liable, along with the publisher that printed the advertisement.

Generally, a housing advertisement should describe the property itself, and not the potential occupant. HUD issued guidelines that must be followed in real estate advertising. These guidelines cover primary areas of possible discrimination:

- Advertising that uses certain words, phrases, pictures, or other visual representations that are discriminatory.

- Using certain types of media as a means of discrimination. For example, advertising in media only available to or likely to be seen by targeted groups (protected classes) or in reverse not seen by those groups such as a local newspaper that is read by a White ethnic group.

- Code words, catchwords, or catchphrases: These prohibited words may be a little more subtle or regional in nature. Obvious phrases like "integrated neighborhood" cannot be used. Words like "exclusive," although more subtle, may convey a racially exclusive or ethnically exclusive message and therefore are to be avoided.

- Color: No use of words describing color as it relates to race or ethnicity is permitted. For example, "White" or "Black."

- Familial status: The term "familial status" generally refers to the presence or absence of children in the family. Although marital status is not a protected federal class, HUD guidelines prohibit advertising that states or implies "married couple only" or other similar language.

- Handicap: "Property not suitable for a handicapped person" or any language that suggests an exclusion like that is forbidden. Inclusive words like "Apartment is handicapped accessible" are acceptable.

- National origin: The use of words that describe national origin like Italian, Mexican, and so on are prohibited.

- Race: No use of racially descriptive words, such as Asian or Caucasian, for example, is permitted.

- Religion: Words describing religions, like Catholic, Christian, non-Christian, and so on, is prohibited.

- Sex or gender: This category tends to be a problem more with rental housing. Gender-preference words are prohibited. Exceptions are made for people who want to share an apartment or house with a roommate of the same sex. So you can advertise for a female roommate to share an apartment, but you can't advertise for only a male tenant for a rental apartment in an apartment house you own.

- Sex or gender: This category tends to be a problem more with rental housing. Gender-preference words are prohibited. Exceptions are made for people who want to share an apartment or house with a roommate of the same sex. So you can advertise for a female roommate to share an apartment, but you can't advertise for only a male tenant for a rental apartment in an apartment house you own.

In addition any photos, drawings, or symbols that may imply preference with respect to any of the above categories are prohibited. Describing the location by using potentially biased references, such as "near the Catholic church," is prohibited.

A reference to a known discriminatory facility must also be avoided. So you won't advertise a house for sale "near the XYZ Country Club" when the country club is known to discriminate in its membership policies.

Avoid using welcoming and inclusive terms, such as advertising that states specific groups are welcome. The use of the HUD fair housing logo and words to the effect that fair housing guidelines apply are the proper ways to say that all groups are welcome to buy or rent.

The Housing for Older Persons Act (HOPA), exemption against familial status discrimination.

1) Housing communities for 55 or older housing.

a) at least 80 percent of the occupied units must be occupied by at least one person 55 years of age or older per unit;
b) the owner or management of the housing facility/community must publish and adhere to policies and procedures that demonstrate an intent to provide housing for persons 55 years or older; and
c) the facility/community must comply with rules issued by the Secretary for verification of occupancy through reliable surveys and affidavits.

2)Housing Communities for Persons 62 years of age or Older.

Use of the word "adult" or "adult community" in an advertisement, sign or other informational material, or when describing the facility or community to prospective renters or purchasers or members of the public, does not demonstrate an intent to be housing for older persons as defined by the final rule.

The regulations state that simply publishing that this is an “adult community” is not sufficient to meet this standard. Clear policies and procedures must be published and adhered to. When advertising, the guidelines state that the best practice is to refer to such housing as “Senior Housing” or “A 55 and older community” or “retirement community” and discourages the use of the term “adult housing” or similar language

II. Tenant Screening

A. Develop written screening criteria for tenant applicants

B. Screening criteria should pertain to the applicant's past rental history, credit history, and criminal conviction history as permitted by state and/or federal law.

- i. Fair Credit Reporting Act
- ii. HUD Guidance Memo of April 4, 2016
- iii. Source of income issues

C. Screening criteria should inform the tenant of grounds for denial of the application.

D. Screening criteria should be applied uniformly to all applicants- First qualified applicant accepted.

E. Provide required notice of adverse action for conditionally accepted or denied applicants.

F. Avoid Steering

G. Keep track of and document criminal activity in the area where leasehold is situated for potential exculpatory evidence.

H. Establish safeguards relative to screening process. Screening criteria should address:

- 1) Belligerent/ Hostile Conduct;
- 2) Incomplete Applications;
- 3)Intoxication/Impairment;
- 4) False/Misleading Answers.

I. Establish a review process for denied applications.

15 U.S. Code § 1681c - Requirements relating to information contained in consumer reports

(a)INFORMATION EXCLUDED FROM CONSUMER REPORTS Except as authorized under subsection (b), no consumer reporting agency may make any consumer report containing any of the following items of information:

(1) Cases under title 11 or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years.

(2) Civil suits, civil judgments, and records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

(3) Paid tax liens which, from date of payment, antedate the report by more than seven years.

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(5) Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.

(6) The name, address, and telephone number of any medical information furnisher that has notified the agency of its status, unless—

(A)such name, address, and telephone number are restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific provider or the nature of such services, products, or devices to a person other than the consumer; or

(B)the report is being provided to an insurance company for a purpose relating to engaging in the business of insurance other than property and casualty insurance.

(b)EXEMPTED CASES The provisions of paragraphs (1) through (5) of subsection (a) are not applicable in the case of any consumer credit report to be used in connection with—

(1)a credit transaction involving, or which may reasonably be expected to involve, a principal amount of $150,000 or more;

(2)the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of $150,000 or more; or

(3)the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal $75,000, or more.

(c)RUNNING OF REPORTING PERIOD

(1)IN GENERAL

The 7-year period referred to in paragraphs (4) and (6) of subsection (a) shall begin, with respect to any delinquent account that is placed for collection (internally or by referral to a third party, whichever is earlier), charged to profit and loss, or subjected to any similar action, upon the expiration of the 180-day period beginning on the date of the commencement of the delinquency which immediately preceded the collection activity, charge to profit and loss, or similar action.

(2)EFFECTIVE DATE

Paragraph (1) shall apply only to items of information added to the file of a consumer on or after the date that is 455 days after September 30, 1996.

15 U.S. Code § 1681c continued:

(d)INFORMATION REQUIRED TO BE DISCLOSED

(1)TITLE 11 INFORMATION

Any consumer reporting agency that furnishes a consumer report that contains information regarding any case involving the consumer that arises under title 11 shall include in the report an identification of the chapter of such title 11 under which such case arises if provided by the source of the information. If any case arising or filed under title 11 is withdrawn by the consumer before a final judgment, the consumer reporting agency shall include in the report that such case or filing was withdrawn upon receipt of documentation certifying such withdrawal.

(2)KEY FACTOR IN CREDIT SCORE INFORMATION

Any consumer reporting agency that furnishes a consumer report that contains any credit score or any other risk score or predictor on any consumer shall include in the report a clear and conspicuous statement that a key factor (as defined in section 1681g(f)(2)(B) of this title) that adversely affected such score or predictor was the number of enquiries, if such a predictor was in fact a key factor that adversely affected such score. This paragraph shall not apply to a check services company, acting as such, which issues authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers, or similar methods of payments, but only to the extent that such company is engaged in such activities.

(e)INDICATION OF CLOSURE OF ACCOUNT BY CONSUMER

If a consumer reporting agency is notified pursuant to section 1681s–2(a)(4) of this title that a credit account of a consumer was voluntarily closed by the consumer, the agency shall indicate that fact in any consumer report that includes information related to the account.

(f)INDICATION OF DISPUTE BY CONSUMER

If a consumer reporting agency is notified pursuant to section 1681s–2(a)(3) of this title that information regarding a consumer who [1] was furnished to the agency is disputed by the consumer, the agency shall indicate that fact in each consumer report that includes the disputed information.

(g)TRUNCATION OF CREDIT CARD AND DEBIT CARD NUMBERS

(1)IN GENERAL

Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

(2)LIMITATION

This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.

(3)EFFECTIVE DATE

This subsection shall become effective—

(A)3 years after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is in use before January 1, 2005; and

15 U.S. Code § 1681c continued:

(B)1 year after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is first put into use on or after January 1, 2005.

(h)NOTICE OF DISCREPANCY IN ADDRESS

(1)IN GENERAL

If a person has requested a consumer report relating to a consumer from a consumer reporting agency described in section 1681a(p) of this title, the request includes an address for the consumer that substantially differs from the addresses in the file of the consumer, and the agency provides a consumer report in response to the request, the consumer reporting agency shall notify the requester of the existence of the discrepancy.

(2)REGULATIONS

(A)Regulations required

The Bureau shall,,[2] in consultation with the Federal banking agencies, the National Credit Union Administration, and the Federal Trade Commission,,[2] prescribe regulations providing guidance regarding reasonable policies and procedures that a user of a consumer report should employ when such user has received a notice of discrepancy under paragraph (1).

(B)Policies and procedures to be included

The regulations prescribed under subparagraph (A) shall describe reasonable policies and procedures for use by a user of a consumer report—

(i)to form a reasonable belief that the user knows the identity of the person to whom the consumer report pertains; and

(ii)if the user establishes a continuing relationship with the consumer, and the user regularly and in the ordinary course of business furnishes information to the consumer reporting agency from which the notice of discrepancy pertaining to the consumer was obtained, to reconcile the address of the consumer with the consumer reporting agency by furnishing such address to such consumer reporting agency as part of information regularly furnished by the user for the period in which the relationship is established.

(Pub. L. 90–321, title VI, § 605, as added Pub. L. 91–508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1129; amended Pub. L. 95–598, title III, § 312(b), Nov. 6, 1978, 92 Stat. 2676; Pub. L. 104–208, div. A, title II, § 2406(a)–(e)(1), Sept. 30, 1996, 110 Stat. 3009–434, 3009–435; Pub. L. 105–347, § 5, Nov. 2, 1998, 112 Stat. 3211; Pub. L. 108–159, title I, § 113, title II, § 212(d), title III, § 315, title IV, § 412(b), (c), title VIII, § 811(c)(1), (2)(A), Dec. 4, 2003, 117 Stat. 1959, 1977, 1996, 2002, 2011; Pub. L. 111–203, title X, § 1088(a)(2)(D), (5), July 21, 2010, 124 Stat. 2087.)

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

April 4, 2016

**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**

I. Introduction

The Fair Housing Act (or Act) 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.[1] HUD's Office of General Counsel issues this guidance concerning how the Fair Housing Act applies to the use of criminal history by providers or operators of housing and real-estate related transactions. Specifically, this guidance addresses how the discriminatory effects and disparate treatment methods of proof apply in Fair Housing Act cases in which a housing provider justifies an adverse housing action – such as a refusal to rent or renew a lease – based on an individual's criminal history.

II. Background

As many as 100 million U.S. adults – or nearly one-third of the population – have a criminal record of some sort.[2] The United States prison population of 2.2 million adults is by far the largest in the world.[3] As of 2012, the United States accounted for only about five percent of the world's population, yet almost one quarter of the world's prisoners were held in American prisons.[4] Since 2004, an average of over 650,000 individuals have been released annually from federal and state prisons,[5] and over 95 percent of current inmates will be released at some point.[6] When individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful reentry to society.[7] Yet many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encounter significant barriers to securing housing, including public and other federally-subsidized housing,

because of their criminal history. In some cases, even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest.

Across the United States, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population.[8] Consequently, criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers. While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability).[9] Additionally, intentional discrimination in violation of the Act occurs if a housing provider treats individuals with comparable criminal history differently because of their race, national origin or other protected characteristic (i.e., disparate treatment liability).

III. Discriminatory Effects Liability and Use of Criminal History to Make Housing Decisions

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.[10] Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.[11] Discriminatory effects liability is assessed under a three-step burden-shifting standard requiring a fact-specific analysis.[12]

The following sections discuss the three steps used to analyze claims that a housing provider's use of criminal history to deny housing opportunities results in a discriminatory effect in violation of the Act. As explained in Section IV, below, a different analytical framework is used to evaluate claims of intentional discrimination.

A. Evaluating Whether the Criminal History Policy or Practice Has a Discriminatory Effect

In the first step of the analysis, a plaintiff (or HUD in an administrative adjudication) must 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 or national origin.[13] This burden is satisfied by presenting evidence proving that the challenged practice actually or predictably results in a disparate impact.

Whether national or local statistical evidence should be used to evaluate a discriminatory effects claim at the first step of the analysis depends on the nature of the claim alleged and the facts of that case. While state or local statistics should be presented where available and appropriate based on a housing provider's market area or other facts particular to a given case, national statistics on racial and ethnic disparities in the criminal justice system may be used where, for example, state or local statistics are not readily available and there is no reason to believe they would differ markedly from the national statistics.[14]

National statistics provide grounds for HUD to investigate complaints challenging criminal history policies.[15] Nationally, racial and ethnic minorities face disproportionately high rates of arrest and incarceration. For example, in 2013, African Americans were arrested at a rate more than double their proportion of the general population.[16] Moreover, 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.[17] 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, with Hispanic individuals comprising approximately 22 percent of the prison population, but only about 17 percent of the total U.S. population.[18] 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.[19] Across all age groups, the imprisonment rates for African American males is almost six times greater than for White males, and for Hispanic males, it is over twice that for non-Hispanic White males.[20]

Additional evidence, such as applicant data, tenant files, census demographic data and localized criminal justice data, may be relevant 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. Whether in the context of an investigation or administrative enforcement action by HUD or private litigation, a housing provider may offer evidence to refute the claim that its policy or practice causes a disparate impact on one or more protected classes.

Regardless of the data used, determining whether a policy or practice results in a disparate impact is ultimately a fact-specific and case-specific inquiry.

B. Evaluating Whether the Challenged Policy or Practice is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest

In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified – that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider.[21] The interest proffered by the housing provider may not be hypothetical or speculative, meaning the housing provider must be able to provide evidence proving both that the housing provider has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest.[22]

Although the specific interest(s) that underlie a criminal history policy or practice will no doubt vary from case to case, some landlords and property managers have asserted the protection of other residents and their property as the reason for such policies or practices.[23] Ensuring

resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy or practice.[24] A housing provider must, however, 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. Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient to satisfy this burden.

1. Exclusions Because of Prior Arrest

A housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.[25] As the Supreme Court has recognized, "[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."[26] Because arrest records do not constitute proof of past unlawful conduct and are often incomplete (*e.g.,* by failing to indicate whether the individual was prosecuted, convicted, or acquitted),[27] the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual. For that reason, a housing provider who denies housing to persons on the basis of arrests not resulting in conviction cannot prove that the exclusion actually assists in protecting resident safety and/or property.

Analogously, in the employment context, the Equal Employment Opportunity Commission has explained that barring applicants from employment on the basis of arrests not resulting in conviction is not consistent with business necessity under Title VII because the fact of an arrest does not establish that criminal conduct occurred.[28]

2. *Exclusions Because of Prior Conviction*

In most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal conduct.[29] But housing providers that 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. A housing provider that imposes a blanket prohibition on any person with any 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 meet this burden. One federal court of appeals held that such a blanket ban violated Title VII, stating that it "could not conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed."[30] Although the defendant-employer in that case had proffered a number of theft and safety-related justifications for the policy, the court rejected such justifications as "not empirically validated."[31]

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, a housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.[32]

A policy or practice that fails to take into account the nature and severity of an individual's conviction is unlikely to satisfy this standard.[33] Similarly, 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 criminological 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. [34]

Accordingly, a policy or practice that fails to consider the nature, severity, and recency of criminal conduct is unlikely to be proven necessary to serve a "substantial, legitimate, nondiscriminatory interest" of the provider. The determination of whether any particular criminal history-based restriction on housing satisfies step two of the discriminatory effects standard must be made on a case-by-case basis.[35]

C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect.[36]

Although the identification of a less discriminatory alternative will depend on the particulars of the criminal history policy or practice under challenge, individualized assessment 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; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts. By delaying consideration of criminal history until after an individual's financial and other qualifications are verified, a housing provider may be able to minimize any additional costs that such individualized assessment might add to the applicant screening process.

D. Statutory Exemption from Fair Housing Act Liability for Exclusion Because of Illegal Manufacture or Distribution of a Controlled Substance

Section 807(b)(4) of the Fair Housing Act provides that the Act does not prohibit "conduct against a person because such person has been convicted … of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)."[37] Accordingly, a housing provider will not be liable under the Act for excluding individuals because they have been convicted of one or more of the specified drug crimes, regardless of any discriminatory effect that may result from such a policy.

Limitation. Section 807(b)(4) only applies to disparate impact claims based on the denial of housing due to the person's *conviction* for drug manufacturing or distribution; it does not provide a defense to disparate impact claims alleging that a policy or practice denies housing because of the person's *arrest* for such offenses. Similarly, the exemption is limited to disparate impact claims based on drug *manufacturing or distribution* convictions, and does not provide a defense to disparate impact claims based on other drug-related convictions, such as the denial of housing due to a person's conviction for drug *possession*.

IV. Intentional Discrimination and Use of Criminal History

A housing provider may also violate the Fair Housing Act if the housing provider intentionally discriminates in using criminal history information. This occurs when the provider treats an applicant or renter differently because of race, national origin or another protected characteristic. In these cases, the housing provider's use of criminal records or other criminal history information as a pretext for unequal treatment of individuals because of race, national origin or other protected characteristics is no different from the discriminatory application of any other rental or purchase criteria.

For example, intentional discrimination in violation of the Act may be proven based on evidence that a housing provider rejected an Hispanic applicant based on his criminal record, but admitted a non-Hispanic White applicant with a comparable criminal record. Similarly, if a housing provider has a policy of not renting to persons with certain convictions, but makes exceptions to it for Whites but not African Americans, intentional discrimination exists.[38] A disparate treatment violation may also be proven based on evidence that a leasing agent assisted a White applicant seeking to secure approval of his rental application despite his potentially disqualifying criminal record under the housing provider's screening policy, but did not provide such assistance to an African American applicant.[39]

Discrimination may also occur before an individual applies for housing. For example, intentional discrimination may be proven based on evidence that, when responding to inquiries from prospective applicants, a property manager told an African American individual that her criminal record would disqualify her from renting an apartment, but did not similarly discourage a White individual with a comparable criminal record from applying.

If overt, direct evidence of discrimination does not exist, the traditional burden-shifting method of establishing intentional discrimination applies to complaints alleging discriminatory intent in the use of criminal history information.[40] First, the evidence must establish a prima facie case of disparate treatment. This may be shown in a refusal to rent case, for example, by evidence that: (1) the plaintiff (or complainant in an administrative enforcement action) is a member of a protected class; (2) the plaintiff or complainant applied for a dwelling from the housing provider; (3) the housing provider rejected the plaintiff or complainant because of his or her criminal history; and (4) the housing provider offered housing to a similarly-situated applicant not of the plaintiff or complainant's protected class, but with a comparable criminal record. It is then the housing provider's burden to offer "evidence of a legitimate, nondiscriminatory reason for the adverse housing decision."[41] A housing provider's nondiscriminatory reason for the challenged decision must be clear, reasonably specific, and supported by admissible evidence.[42] Purely subjective or arbitrary reasons will not be sufficient to demonstrate a legitimate, nondiscriminatory basis for differential treatment.[43]

While a criminal record can constitute a legitimate, nondiscriminatory reason for a refusal to rent or other adverse action by a housing provider, a plaintiff or HUD may still prevail by showing that the criminal record was not the true reason for the adverse housing decision, and was instead a mere pretext for unlawful discrimination. For example, 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 plaintiff or complainant is strong evidence that a housing provider was not considering criminal history information uniformly or did not in fact have a criminal history policy. Or pretext may be shown where a housing provider did not actually know of an applicant's criminal record at the time of the alleged discrimination. Additionally, shifting or inconsistent explanations offered by a housing provider for the denial of an application may also provide evidence of pretext. Ultimately, the evidence that may be offered to show that the plaintiff or complainant's criminal history was merely a pretextual

justification for intentional discrimination by the housing provider will depend on the facts of a particular case.

The section 807(b)(4) exemption discussed in Section III.D., above, does not apply to claims of intentional discrimination because by definition, the challenged conduct in intentional discrimination cases is taken because of race, national origin, or another protected characteristic, and not because of the drug conviction. For example, the section 807(b)(4) exemption would not provide a defense to a claim of intentional discrimination where the evidence shows that a housing provider rejects only African American applicants with convictions for distribution of a controlled substance, while admitting White applicants with such convictions.

V. Conclusion

The Fair Housing Act prohibits both intentional housing discrimination and housing practices that have an unjustified discriminatory effect because of race, national origin or other protected characteristics. Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics. While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification. Thus, a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.

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 such factors as the type of the crime and the length of the time since conviction. Where a policy or practice excludes individuals with only certain types of convictions, a housing provider will still 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.

Selective use of criminal history as a pretext for unequal treatment of individuals based on race, national origin, or other protected characteristics violates the Act.

Helen R. Kanovsky, General Counsel

Criminal History Screening

Owner and management desire to provide well maintained and well kept property for the benefit of all residents. Screening criteria herein are adopted with the intent of maximizing the ability to provide safe housing for residents, managerial staff, the property, and neighbors. Screening criteria herein are also intended to minimize liability risks, the costs of insurance, maintenance, and repairs to the premises. Screening shall be designed to provide housing to individuals who do not constitute or pose an unreasonable risk of direct threat to persons and/or property of physical harm and/or adverse housing environment. Owner and management agree to limit screening of conviction history to serious offenses against person and/or property

Owner and management will screen for criminal convictions for crimes against person or property. Crimes listed below, as well as substantially similar crimes, may result in denial of application.

FOR TRAINING PURPOSES ONLY
Please consult Independent legal counsel.

Murder
Manslaughter
Assault
Robbery
Rape
Child Molestation
Rape of a Child
Lewd Conduct
Solicitation of a Minor for Immoral purpose
Registration Requirement under Federal or State Sex Offender Registration Act
Kidnaping
Theft (1°/ 2°/ 3°)
Identity Theft
Prostitution
Burglary
Malicious Mischief
Arson
Reckless Burning
Delivery of a controlled substance
Possession of a controlled substance
Manufacturing a controlled substance

In matters relating to criminal conviction history, circumstances and mitigating facts that may be considered include:
Nature and severity of past conduct; age of individual at time of conduct; evidence of good tenant history before or after conviction or conduct; evidence of rehabilitation and treatment efforts; restitution of damages if any; nature of severity of offenses(s); number of similar past offenses or lack thereof; and impact of housing decision on other non offending household members.

Applicant(s) with an arrest and pending criminal case will be evaluated based upon the facts of the underlying case to determine if conduct justifies exclusion as a threat to others or property. If the applicant has a criminal case pending, for any crime set forth on the Standard Criminal Addendum, the application will be put on hold until the case has been finalized. The applicant(s) are not allowed to be approved to move in to a leasehold until the criminal case is finalized and/or determined. Provided, management may limit application of this policy to conduct that would justify exclusion due to threat posed to person or property.

Source of Income Discrimination

The Tenant's Union of Washington State provides the following information on Tenant Discrimination:

- Discrimination against renters based on verifiable and legitimate sources of income is an unfair and discriminatory practice.
- Policies like "no section 8" are a pretext for illegal discrimination and have a disparate impact on Washington's most vulnerable families.
- Renters who receive a verifiable source of legal income, such as social security, child support, SSI and section 8 vouchers (or any other governmental or non-profit subsidy) should not be automatically assumed to be unacceptable or undesirable renters.
- Limit income to rent quantifiers based upon the tenant's portion of rent. Eg. Applicants must have income in excess of three times the amount of the tenant's portion of rent.

III. Developing Non-Discriminating Rules

a. Know protected classes for potential claims

- Race
- Color
- National Origin
- Ancestry
- Religion
- Sex
- Familial Status/Parental Status
- Disability
- Marital Status
- Section 8
- Source of Income
- Political Ideology
- Age
- Sexual Orientation
- Gender Identity
- Veterans Status

b. Know what's prohibited

Discriminatory Conduct

1. Disparate Treatment- treating similar situated people different based upon protective class status

2. Disparate Impact- facially neutral rule(s) which in its application has a disproportionally discriminating impact on members of a protected class

c. Avoid unintentional violations

- Adult Swim
- Teen Curfew
- Pool Rules
- False Occupancy Restrictions
- Treating Service Animals as Pets
- 3x Rent to Income Requirement may discriminate against someone on SSI with payee

d. Create clear, comprehensive, written neutral tenant rules

- Address Conduct not character

e. Tenant Rules and Policies should address what will happen

f. Consider Policies of progressive discipline- attempt compliance prior to termination if possible

g. Rules must be adequately communicated to the tenant

1) Legible Leases and Rules
2) Translation may be necessary
    a) Limited English Proficiency (LEP)
    b) Language Assessment Plan (LAP)

IV. Enforcing Rules in a Non-Discriminating Manner

a. Keep Activity Logs-

  i. General log
  ii. Tenant file

b. Discover and document Rule violations.

  i. Request third party verification of offenses
  ii. Preserve evidence with photographs if possible

c. Issue written Notice authorized by State law- Serve Notices in accordance with State Law, avoid information and electronic means of communication with tenants

  i. Identify all written Policies when addressing tenant's violation of duties.

  ii. Be specific in describing conduct in derogation of tenant duties including factual summary, name of persons involved, dates, and times of events.

d. Uniformly apply written Policies to All offending parties.

- Avoid disparate treatment and selective enforcement.

e. Understand need to grant reasonable accommodation in terms and conditions when requested.

f. Reconcile and follow all Lease, Federal, State, and Municipal Rules and Regulations through Policy enforcement.

THREE (3) DAY NOTICE TO COMPLY OR VACATE

TO: ____________________, and all occupants, other guests and/or subtenants.

AT: ________________

____

Dear ___________________:

PLEASE TAKE NOTICE that you are in Default in performance of tenant duties under the terms and conditions of your Lease/Rental Agreement for the Premises. Your Default includes, but is not necessarily limited to: ____

____

____

____

____.

Your Lease/Rental Agreement provides: ______________________________________

____

____

____

____

____

____.

Your Lease/Rental Agreement provides: ______________________________________

____

____

____

____

____

____.

Your House/Apartment Rules provide: ____

____

____

____

____

____

____.

Your House/Apartment Rules provide: ____________________________________
____
____
____
____
____
____.

THEREFORE, DEMAND IS HEREBY MADE that you either perform your tenant duties by curing the Default or Vacate the Premises within three (3) days from the date of service of this Notice. If you fail to comply or vacate the leasehold premises, legal proceedings will be commenced against you to recover possession of the premises, to declare the written rental agreement forfeited, to recover attorney fees and court costs, and any rents due and all other charges authorized under the rental agreement for the unlawful detention of the premises. Pursuant to Idaho Code § 6-324, attorney fees shall be awarded to the prevailing party.

This notice is being issued pursuant to Idaho Code § 6-303 et al.

SERVED this _____ day of _____________, 2015.

Very Truly Yours,

____
Authorized Agent for Landlord

*If you vacate the Premises, you shall continue to be liable for rent until the Lease/Rental Agreement is Terminated or the Premises are re-leased, whichever first occurs, as well as the costs of cleaning, repairing or restoring the Premises to the same condition as received, reasonable wear and tear excepted, and all costs, expenses and attorney fees.

EMS/mpm

V. Protecting Against Discrimination

a. Develop Internal Policy protocols Addressing:

- Advertising; tenant screening; lease up; work orders; inspections; rule enforcement; claim management; etc.

b. Education and Training

i. Landlord/Tenant Law

ii. Fair Housing

c. Understand LEP/LAP

i. Limited English Proficiency Policy

ii. Language Assessment Plan

d. Foster an Environment of Inclusion

i. Post Non-Discrimination Posters in offices

ii. Include written non discrimination statements in documents

e. Auditing

i. Internal audits for performance

ii. Outside Agency Testing

f. Consult with counsel or housing experts <u>early</u> when situations arise.

Be prepared to review case strategies with a flexible open minded perspective. Avoid entrenching in on one position.

VI. Dealing with Discovered Discrimination

a. Internal affairs

- Consult HR Director/ Employment Attorney

b. Consider preserving testimony of necessary witnesses even if they have contributed to alleged discriminatory conduct.

c. Responding to Claims

- Be professional
- Clarify facts
- Provide legal briefing only in specific narrow issues that are uncommon
- Provide Documentation supporting proper conduct
- Invite conciliation

d. Conciliation
- Attempt to conciliate claims prior to cause or no cause determination