

Discrimination Based on Criminal History **Now Actionable Under HUD Guidelines**

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On April 4, 2016, HUD published a memorandum entitled “Office of the General Counsel Guidance on the Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate Related Transactions.”

The memorandum announces that HUD is now applying the disparate impact rule to any case where access to housing is denied based on a criminal record. HUD cites statistics showing that the rate of criminal conviction among Blacks and Latinos is disproportionate to their numbers in the general population. Therefore, HUD reasons that the use of a criminal record as the basis to deny access to housing has a disproportionate impact on the availability of housing to minorities in general.

HUD acknowledges that the protection of persons and property from crime is a valid non-discriminatory purpose and that the consideration of criminal history by a landlord or other housing provider is not prohibited by law. However, HUD argues that arbitrary and overbroad criminal history-related bans are: “...likely to lack legally sufficient justification.”

HUD’s new policy means that the Association now has the burden to show that it did not violate the Fair Housing Act when it denied approval of a lease or sale to a person with a criminal history. Under HUD’s new guidelines, an Association must show its lease approval process includes consideration of the type and severity of crime and mitigating factors on case by case basis. Mitigating factors include the age of the individual when the crime was committed and whether there is evidence that the individual was a good tenant before and or after the crime. To prevail in a fair housing case an Association must show, after weighing these factors, there was a reasonable basis to believe the person presented an actual risk to the security of the community.

Even when the Association can show a legitimate non-discriminatory basis for its decision, HUD can still prevail if it can show that the Association treats minorities differently in the use of criminal history in the approval process or other evidence of a specific intent to discriminate. HUD warns also that consideration of multiple arrests without conviction is always a violation of the Fair Housing Act in HUD’s view.

Ironically, HUD concedes that The Controlled Substance Act provides a “safe harbor” for denials based on a criminal history of convictions for manufacturing or distributing a controlled substance. HUD can only pursue those cases if it can show a direct intent to discriminate against members of a protected class.

Any denial of approval for a sale or lease is a serious matter and has downside risk. The Board should always observe all formalities in the decision making process and be sure it can show a good reason for any denial. The Association’s counsel may be of assistance in preparing a resolution adopting a policy consistent with the HUD guidance including a check list of factors to consider in the decision making process. It may also be wise to have counsel draft the denial letter in these situations.