

Criminal History and the Fair Housing Act

The Nebraska Fair Housing Act prohibits discrimination in all housing transactions on the basis of race, color, religion, sex, disability, familial status, or national origin. On April 4, 2016, the HUD office issued guidance on the use of criminal history by housing providers and housing operators. In the investigation of cases, the guidance applies the investigation theories of disparate treatment, and disparate impact, and imparts how the use of criminal history records may discriminate against individuals or protected classes. This paper is a summary of the guidance to help remove discriminatory barriers to housing for persons with criminal records that do not pose a direct threat or safety issue to themselves or others. This paper will also include best practice decisions of housing providers and operators that will be in compliance with the fair housing laws.

Arrest Records

The Department of Justice states that in the 75 largest counties in this country, 1/3 of felony arrests did not result in conviction, and ¼ of all cases ended in dismissal. In addition, arrest records are often inaccurate or incomplete by failing to indicate whether the individual was prosecuted, convicted, or acquitted. In Nebraska, arrest records have to be removed from a public record one year after the arrest when the prosecutor decides to not file charges; two years after the arrest when the accused has completed a diversion program, and three years after the arrest when the charges were dismissed by the court. For all of these reasons, and because arrest records are just a suspicion of wrongdoing, arrest records should not be used by housing providers or operators to screen applicants for a housing transaction. However, the guidance states that conduct underlying the arrest could support a reason to deny housing.

Criminal Records

According to the Department of Justice, over 100 million persons in the United States have criminal records. In 2011, there were 2,266,800 adults were in prison and 4,933,667 were on probation or parole. As of 2012, the United States was 5% of the world population but ¼ of the world's prisoners. There are more startling statistics. Since 2004, in the United States an average of 650,000 people has been annually released from federal and state prisons and they will need housing. Why would this be an issue covered under housing discrimination? It is because 70% of the prisoners in the United States are non-White. As of June 2008, Black Americans were incarcerated in state and federal prisons at a rate 5 times higher than White Americans and in every state the incarceration rate for Blacks is higher than Whites for every offense. The Department of Justice states that Blacks and Hispanics are arrested, convicted, and incarcerated at rates disproportionate to their share of the populations. Public housing providers under federal language, and the Nebraska Fair Housing Act, state that the housing provider or operator is not required to rent to applicants who have been convicted for illegal drug manufacture or distribution. The Public Housing providers may also impose a lifetime ban on sex offenders subject to lifetime registration.

Screening for Criminal History

A housing provider or operator may have a policy or procedure that restricts housing more harshly on Black and Hispanic applicants, or has a bias whereas the policy is applied more harshly to these groups. The guidance recommends the housing provider or operator to consider whether the policy or practice is even necessary to achieve the non-discriminatory interest of the housing provider or operator. To avoid the discriminatory effect, the decision-maker is asked to follow the guidance of establishing (a) a narrow policy about who will be evicted or denied housing when there is a criminal report; (b) determine what specific offenses that would demonstrate unfitness for rental, but this should be validated; (c) have consistency in the application of the policy; (d) keep a record of all rejections; (e) keep the records confidential. The guidance appears to also have adapted the EEOC guidelines for reviewing criminal records and developing a policy that includes a review of (a) the nature and gravity of the offense or conduct; (b) the time that has passed since the offense or conduct and/or completion of the sentence; (c) the applicant's housing/rental history (references).

To avoid discriminatory impact or bias, a housing provider or operator could ask a housing seeker for mitigating factors leading to the convictions and determine whether the record involved violence or a threat of violence. There could be criminal behavior associated with a disability and with intervening treatment the person no longer poses a direct threat- and in such instances the housing provider or operator is making a reasonable accommodation. A person could be a recovering substance abuser and provides evidence of recovery combined with no recidivism of criminal activity. In instances of domestic violence against women, victims are often evicted after repeated calls to the police department of physical, sexual, emotional, economic, or psychological abuse, or someone who was threatened with a weapon or was the victim of stalking or cyberstalking.

Housing providers and operators may have valid reasons for denying a housing transaction based on certain criminal activity, but a judge stated that is not conceivable that every offense renders someone ineligible for housing. HUD no longer requires Public Housing Authorities and owners to adapt "One Strike" policies that required automatic eviction any time a household member engaged in criminal activity. In closing, criminal history policies may have a disparate impact on Blacks, Hispanics, and women seeking housing or engaged in a housing transaction, but the impact could be reduced if one notes the disparity of the criminal justice system and develops a narrow policy and seeks mitigating factors.

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