

Criminal Screening of Residents

A growing number of lawmakers and advocates express concerns about the ability of ex-offenders to successfully transition back to society outside of the correctional system. Policymakers are considering proposals that prohibit the use of arrest and criminal records to varying degrees in resident screening. These restrictions on criminal record screening interfere with housing providers' ability to protect apartment residents, employees and their communities. Additionally, these laws and applicable regulations leave owners and managers vulnerable to potential legal liability under tort laws and disparate impact theory.

Laws and regulations that limit the use of criminal background checks in the housing context appear in a variety of forms at the federal, state and local levels of government. These policies comprise a burdensome patchwork of requirements to which owners and operators must comply.

As a continuation of the Supreme Court's ruling in *Inclusive Communities*,¹ the U.S. Department of Housing and Urban Development (HUD) issued guidance² stating that overly broad screening criteria may have a disparate impact on individuals of a particular race, national origin, or other protected class in violation of the federal Fair Housing Act (the Act). According to disparate impact standards, a rental housing provider would be subject to a fair housing claim or lawsuit if the owner's policy adversely impacts members of a protected class under the Act, regardless of whether the discrimination was intentional. For example, renters' rights advocates argue an owner's policy to deny housing to an individual who has any felony conviction on his or her record would have a disproportionate negative impact on people of color. Using statistical data, they argue African-Americans and Latino populations are incarcerated at higher rates than the general population.

Because agency guidance is easily changed from administration to administration as opposed to regulations or statutes, many state and local jurisdictions have taken steps to enact their own regulations. State and local laws often prohibit housing providers from inquiring into an applicant's criminal history prior to making a conditional offer for housing. Further, jurisdictions may outright prohibit owners from considering criminal history in the screening process or allow owners to evaluate an applicant's criminal convictions from within a certain window of time (e.g. 7 years). Other common provisions that align with HUD's guidance are to prohibit the consideration of arrest and

¹ Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.

² U.S. Department of Housing and Urban Development, 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 (2016): https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

ISSUE FACT SHEET

pending charges and to restrict denial of an application only for “substantial, legitimate, non-discriminatory” reasons as defined in the law. In addition to these restrictions, policymakers have considered making ex-offenders an enumerated protected class under local fair housing laws.

Jurisdictions remain divided in regard to protections for individuals who have arrest and conviction records. In 2011, Wisconsin passed a law that repealed existing criminal background check prohibitions in Appleton, Dane County and Madison, Wis. The law also preempts any localities from enacting ordinances in the future that limit rental property owners’ ability to consider certain information in the resident screening process, including arrest and conviction records. Numerous jurisdictions have taken other approaches, in order to curb crime in their communities, by enacting nuisance abatement or crime-free housing ordinances that require owners to utilize criminal screening or evict current residents who engage in criminal activity.

NAA Viewpoint The National Apartment Association opposes all efforts to prohibit apartment owners and operators from evaluating a prospective resident’s criminal history as part of the overall screening process.