

How to Comply with HUD's Individualized Assessment



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On April 4, 2016, the Office of General Counsel for the U.S. Department of Housing and Urban Development (HUD) issued new guidance with respect to criminal background checks. This article discusses the challenges relating to this new guidance, as well as how to comply.

Overview of the New Guidance on Criminal Background Checks

One of the most important issues raised by HUD's new guidance is what types of criminal information in an applicant's history may be considered in making a rental decision. HUD now advises that criminal policies should not bar a prospective tenant from renting due solely to arrest records. Convictions may be considered; however, blanket bans on any applicants who have a conviction are not allowed. HUD also advises against utilizing blanket bans of certain categories of crime (except for drug manufacture or distribution).

The second notable issue raised by HUD's guidance is that, rather than encouraging the application of objective criminal policies, HUD urges an "individualized assessment" of each prospective tenant with a conviction history. HUD does not provide clear

guidance on what shape this individualized assessment should take, but suggests that possible factors that may be considered in this assessment are:

- 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
- Evidence of rehabilitation efforts

While the particular type of crime is relevant, HUD's new guidance requires the additional step of reviewing the individualized assessment factors.

The Challenge of Individualized Assessment

The single most notable challenge of managing HUD's new guidance relates to the Individualized Assessment requirement, which may seem contrary to Fair Housing obligations that require rental criteria to be uniformly applied to all applicants. How can a company provide individualized assessments and still ensure that all applicants are treated equally? Given these new guidelines, how can a company be simultaneously Fair Housing and HUD compliant?

The Solution: The Two-Step Criminal Background Check

Cohen Willwerth & Marraccini, LLC has teamed up with National Tenant Network's New Jersey office to create an innovative solution to the problems presented by the new HUD guidance. The proposal is a two-step criminal background procedure.

The first step when reviewing an applicant's criminal history is an assessment of crime category and duration. Companies may select the number of years they wish to bar applicants with convictions in those categories and apply that policy uniformly.

Prospective tenants who are disqualified based on uniform company policy have the option of taking the second step and requesting an appeal. The appeal step is very personalized, allowing the applicant to present documentation and write an explanation of the circumstances surrounding their conviction, as well as any other mitigating factors. The appeal is the prospective tenant's opportunity to fully explain why their application should be considered despite a conviction that might otherwise disqualify them. Leasing personnel would submit this information to the landlord's appointed representative for review and determination, after having redacted the prospective tenant's name, sex and any personalized information.

This unique two-step approach allows companies to comply with the new guidance while also avoiding pitfalls that may arise in the context of any individualized assessment. The concern in any individualized assessment is a potential lack of neutrality. This process, as outlined, helps companies avoid discrimination by redacting the applicant's personal information while reviewing their case. Simultaneously, the process permits the management company to perform the recommended individualized assessment in a neutral manner. The following is a sample form which can be used for the two step approach set forth in this article.

While no approach can guarantee immunity from fair housing liability, this innovative solution provides a framework for meeting HUD's new guidance. This article is not legal advice. You should consult your attorney regarding the right approach for your community for complying with HUD's most recent guidance, as well as all fair housing laws.

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