


Lawsuit Waiting to Happen: Navigating HUD's New Guidelines for the Use of Criminal Records in Rental Decisions

Presented by: John McTighe

After completing this session, the attendee will be able to define Title VIII and the HUD guidance surrounding the proper use of criminal background checks in regards to rental decisions. Attendees will also be able to detail what this means for lessees and be able to define the difference between disparate treatment versus disparate impact. We will share the 3-Step Burden Shifting Approach to protect attendees when making rental decisions. To summarize, we will share best practices, as well as statutory exemptions.

Outline:

- What is Title VIII?
- HUD Guidance on the Use of Criminal Records
- Disparate Treatment vs. Disparate Impact
- 3-Step Burden Shifting Approach
 - Details of each step
 - Arrest records
 - Criminal records exclusions
- Statutory Exemption from FHA Liability
- Best Practice Suggestions




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Agenda

- What is Title VIII?
- HUD Guidance on the Use of Criminal Records
- Disparate Treatment VS Disparate Impact
- 3-Step Burden Shifting Approach
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Legal Disclaimer

The information we will cover today is a review of generally accepted interpretations of the guidance issued by the US Department of Housing and Urban Development, in regard to The Federal Fair Housing Law of Title VIII in the Civil Rights Act of 1964. This information should not be construed as legal advice. Strategic Information Resources recommends that you should always consult with your own counsel before implementing any policy changes.



What is Title VIII?

- The Federal Fair Housing Law is encompassed in Title VIII of the Civil Rights Act of 1964.
- The law prohibits discrimination in the sale, rental, and financing of dwellings based on race, color, religion, sex, or national origin.
- Enforced by the US Department of Housing and Urban Development (HUD).



HUD Guidance on the Use of Criminal Records

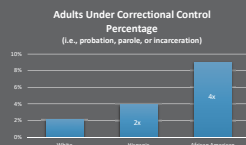


- Issued on April 4, 2016
- Issued in effort to assist multi-family property owners comply with Title VIII
- Not a new law; already established regulation



Disparate Treatment VS Disparate Impact


- Disparate Treatment
- Disparate Impact
 - Hard to Spot
 - Statistical Analysis
 - HUD cites numerous studies which conclude criminal records are likely to have a disparate impact on Title VIII protected classes



3-Step Burden Shifting Approach

HUD uses a 3-step process to analyze claims in which the use of criminal records could have a discriminatory effect.

Step 1 Plaintiff or HUD	• Evaluate whether the criminal history policy or practice has a discriminatory effect.
Step 2 Housing Provider	• Evaluate whether the challenged policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.
Step 3 Plaintiff or HUD	• Evaluate whether there is a less discriminatory alternative.




Step 1: Does the Criminal History Policy Have a Discriminatory Effect?

The Plaintiff or HUD must prove that the criminal history policy has a discriminatory effect.

- Must show evidence that the practice results in disparate impact
- Statistics may be used as evidence
 - HUD cited statistics which suggest African Americans are arrested at a rate double to their proportion of the general population, and incarcerated at a rate triple to their proportion of the general population.


How will housing providers refute these stats?



Step 2: Is the Challenged Policy or Practice Necessary?


In this step, the housing provider must prove that the challenged policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.

- How related is the criminal record to the provision of housing?
 - Does it indicate a history of drugs, violence, theft, or the destruction of property?
- Arrest vs. Conviction
- Must consider the nature, severity, and when the criminal conduct occurred.



Barrier to Arrest Records

- HUD recently clarified that arrests records may not be the basis for:
 - Denying admission
 - Terminating assistance
 - Evicting tenants from public and other federally-assisted housing




View on arrest records is a significant departure from previous guidance allowing landlords leeway to determine if the individual engaged in the criminal activity on their own.



Exclusion Based on Criminal Record

No bright-line automatic exclusion based on mere presence of conviction record.

- Even with a tailored screening policy, the housing provider must still prove that its process is necessary to serve a "substantial, legitimate, nondiscriminatory interest."
- Consideration Factors:
 - Does the criminal conduct indicate a demonstrable risk to resident safety and/or property?
 - The nature and severity of an individual's conviction?
 - How much time has passed?



Step 3: Is There a Less Discriminatory Alternative?


Burden shifts back to plaintiff or HUD to prove such interest could be served by another practice with a less discriminatory effect.

The Housing Provider can protect themselves by utilizing an "Individualized Assessment".

HUD suggests "Individualized Assessment" to show the provider has already instituted a less discriminatory policy/practice to minimize discriminatory effect.

"Individualized Assessment" considers:

- Facts or circumstances surrounding the criminal conduct
- 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.




Statutory Exemption from Fair Housing Act Liability

HUD reiterates in their guidance that there is still a statutory exemption from Fair Housing Act Liability for exclusion because of illegal manufacture or distribution of a controlled substance.




Best Practice Suggestions

- ✓ Create a detailed policy
- ✓ Evaluate correlation between types of crimes and housing.
 - Adjudication Matrix?
- ✓ Train ALL Leasing Managers and Property Managers about Seriousness of Criminal Inquiries and proper management of denials
- ✓ Avoid Arrest Records
- ✓ Instant doesn't allow for the required consideration
- ✓ Implement process for individualized assessment




Q & A

Thank You!



John McTighe
john@backgrounddecision.com
800.813.4381



John McTighe, President of Background Decision, has over fifteen years' experience helping clients screen prospective applicants while promoting compliance with state and federal laws.

John is certified in the FCRA, and is an active member of NAPBS and NCRA.

Background Decision
155 Brookdale Drive
Springfield, MA 01104

800.813.4381
sales@backgrounddecision.com
BackgroundDecision.com