



*Building Communities,  
Changing Lives*

# FAIR HOUSING AND CRIMINAL RECORDS

A TRAINING FOR HOUSING PROVIDERS: WHAT YOU NEED TO  
KNOW AND BEST PRACTICES



# HUD FAIR HOUSING GRANT RECIPIENT

The work that provided the basis for this publication was supported by funding under a grant with the U.S. Department of Housing and Urban Development. The substance and findings of the work are dedicated to the public. The author and publisher are solely responsible for the accuracy of the statements and interpretations contained in this publication. Such interpretations do not necessarily reflect the views of the Federal Government.



# AGENDA

- Background on inequities in criminal justice and housing
- Criminal records and the Fair Housing Act
  - Discriminatory Intent
  - Disparate Impact
  - Reasonable Accommodations
- Best practices for using criminal history for housing/tenant decisions
- Additional Resources



# BACKGROUND AND NEED



# INTRODUCTION

“Decent, stable, and affordable housing is a critical prerequisite to health, safety, education, jobs, and the economy. Unfortunately, individuals with a criminal history consistently face daunting barriers to obtaining and maintaining housing.”

- Memorandum, June 10, 2022, U.S. Dept. Housing and Urban Development.



# DISPARITIES IN THE JUSTICE SYSTEM

- There are significant disparities in the arrest and incarceration rate of certain minority groups.
- These disparities are not attributable to a higher incidence of committing crimes.
- Among the minority populations, the groups most affected by these disparities are people who identify as:
  - Black/African American
  - Latino
  - And those with disabilities

# DISPARITIES EXTEND TO HOUSING

- Justice system disparities continue after incarceration and into housing.
- Criminal history use in housing disproportionately affects certain minorities because they have been disproportionately incarcerated.
- A blanket policy or application statement that denies all applicants with criminal records will unnecessarily deter good candidates, especially with respect to:
  - The type of offense, and
  - The recency of offense.
- Third party screening company results may be:
  - Inaccurate;
  - Incomplete;
  - Unrelated to tenant qualifications/qualities; or
  - Use algorithms that include racial bias.

# CRIMINAL RECORDS AND THE FHA



# FAIR HOUSING ACT BASICS

- The Fair Housing Act prohibits discrimination in housing based on membership in a protected class.
- Federally protected classes include: race; color; national origin; religion; family status; and disability. State law has additional protected classes like marital status and source of income.
- An act or action is discriminatory under the FHA when:
  - A person is a member of a protected class;
  - They suffer a housing related harm or unequal treatment; and
  - That harm or unequal treatment is based on their membership in a protected class.

# CRIMINAL RECORDS AND THE FAIR HOUSING ACT

- Many housing providers value the use of criminal histories in evaluating prospective tenants and making housing decisions.
- Criminal histories are often used to:
  - Screen applicants;
  - Deny renewals; and
  - And to evict tenants.
- Using criminal history in housing decisions may violate the Fair Housing Act.
- Care and consideration should be used to minimize the chance a policy may violate the FHA.

# THREE THEORIES OF LIABILITY

- Disparate Treatment – Discriminatory Intent
  - A policy or practice of different or unfair treatment motivated by a tenant or applicant's protected class status.
- Disparate Impact – Discriminatory Effects
  - A facially neutral policy, procedure, or practice that has a disproportionate affect on a protected class.
- Refusal to Make Reasonable Accommodations
  - A refusal to waive or modify a program requirement to accommodate a person with a disability.
- NOTE: VAWA has separate requirements for use of criminal records when conviction is related to domestic violence

# DISPARATE TREATMENT AND CRIMINAL RECORDS

- Also called discriminatory intent.
- This theory of liability is used to describe instances when a person is treated differently based on membership in a protected class. Examples include:
  - Checking someone's criminal history, but not a non-class member.
  - Denying someone for a criminal background, while accepting a non-class member with similar background.
  - Telling someone that criminal history will be checked, but not making a similar statement to a non-class member.
  - Evicting or denying renewal to someone convicted of an offence, while not responding the same to a non-class member.
- Use of criminal record as a pretext for a discriminatory action.

# DISPARATE TREATMENT – BEST PRACTICES

- Understand that there is explicit bias and implicit bias
- Everyone has implicit bias. Recognizing this is the first step in preventing or correcting actions based on implicit bias.
- Establish a written screening process (on neutral characteristics).
- Decide what you want to screen for; screen only for that.
- Screen all applicants with the same process.
  - Make sure your process is easy to repeat.
  - Record your determinations for all applicants.

# DISPARATE IMPACT AND CRIMINAL RECORDS

## 3 STEP ANALYSIS

- Does a policy have a disproportionate impact
  - Fact intensive comparison, nation/local statistics, housing providers records.
  - Burden is on plaintiff or investigating agency.
- Is the policy/practice necessary to achieve a substantial legitimate non-discriminatory interest
  - No generalizations or stereotypes.
  - Burden shifts to the housing provider.
- Is there a less discriminatory alternative
  - Policy/practice specific, generally individualized inquiry is less discriminatory than categorical exclusion.
  - Burden shifts back to plaintiff or investigating agency.

# DISPARATE IMPACT – BEST PRACTICES

- Big Picture – take all possible steps to minimize any chance of discriminatory impact.
- Have a written policy
  - Include a written justification for the policy
  - Policy should be easy to apply consistently
  - Procedural compliance should be easy to document
- Narrowly tailor the search
  - Avoid any total exclusion or blanket policy
  - Do not exclude for arrests
  - Limit exclusions by: type/severity; age at offence; recency
  - Limit offenses to those related to housing concerns (e.g. physical safety/fraud/property damage)
- Allow for consideration of mitigating factors or demonstration of rehabilitation.

# DISPARATE IMPACT – BEST PRACTICES

- Train all Staff
  - All staff making screening or other housing decisions that may consider criminal history should be trained.
  - All staff should be familiar with the procedures and paperwork, and be able to produce consistent results.
- Use of a third party vendor
  - Third party application screeners or property management companies also use criminal histories in making housing decisions and recommendations.
  - Request a copy of their policy and procedure.
  - Make sure the policy is narrowly tailored to your needs.
  - Ask if they have taken steps to ensure any algorithms used have been reviewed for bias.

# CRIMINAL HISTORY AND REASONABLE ACCOMMODATIONS

- Fair Housing protections for people with disabilities include the right to reasonable accommodations.
- Reasonable accommodations are changes “in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. §3604(f)(3)(B).
- A policy or practice regarding use of criminal history may need to be changed, or an exception granted, in order to accommodate a person with a disability when their criminal conduct was related to their disability.

# THE REASONABLE ACCOMMODATION PROCESS – AT A GLANCE

- The reasonable accommodation process is interactive and is designed to easily exchange information between the tenant and housing provider.
- There are no magic words or forms, but starts when the tenant asks for an accommodation.
- A tenant must assert they have an impairment, and it is connected to the need for an accommodation.
- Providers should grant an accommodation unless it is:
  - An undue administrative or financial burden;
  - A fundamental alteration; or
  - A direct threat.

# CRIMINAL HISTORY AND REASONABLE ACCOMMODATIONS – AN EXAMPLE

- A housing provider has a screening policy that denies applicants who have been convicted of assault within the last 10 years.
- An applicant is denied because he has an assault conviction from eight years ago.
- The applicant requests a reasonable accommodation because the conviction was related to mental illness.
- The applicant explains that he was off his medication at the time, but has been compliant since, remains in treatment, and has not had an incident since.

# CRIMINAL RECORDS AND ACCOMMODATIONS – BEST PRACTICES

- Include a statement on reasonable accommodations in denials and terminations.
- Have a policy or practice
  - Forms are fine, but use cannot be compelled
  - No magic words
- Be responsive
  - Delay may be denial
- Be interactive
  - Request information only when not obvious
    - Any service provider letter (not only Dr.)
    - No medical records
- Considerations: mitigating measures, different circumstances
- Denials/terminations: remain engaged, and seek alternative accommodations when possible to avoid adverse decisions.

# VAWA BASICS

- VAWA provides housing protections for all survivors of domestic violence.
- These protections include the right to break a lease and not be denied housing because of their domestic violence background.
- VAWA protections extend to disregarding or exempting certain otherwise disqualifying criminal records when they are directly related to domestic violence background.
- Covered housing – all housing that receives federal assistance, including section 8 voucher payments.

# VAWA AND CRIMINAL RECORDS

- VAWA protections may need to be extended to survivors in the context of criminal history/criminal involvement.
- Housing applications or terminations based on criminal history should allow for exceptions for survivors when their criminal involvement is directly related to their domestic violence background.
- Examples:
  - Criminal activity committed under duress;
  - Criminal activity committed related to coping/survival; and
  - Criminal activity related to abuser.

# VAWA, FAIR HOUSING, AND CRIMINAL RECORDS

- Disparate Impact theory of housing discrimination may provide similar protections as VAWA related to the use of criminal history.
- Women are overwhelmingly the victims of domestic violence.
- A rule that would disproportionately screen out (or terminate) women, especially as victims of domestic violence, may violate Fair Housing protections based on sex.
- NOTE – this means the FHA may require similar protections even in housing that does not receive federal assistance.

# VAWA AND CRIMINAL RECORDS – BEST PRACTICES

- Application denials or terminations should provide a statement on VAWA protections, and requests for reconsideration.
- Protections should be extended to all tenants to cover instances of disparate impact under the FHA.
- If criminal history is directly related to domestic violence history, strongly consider a policy exception to allow the survivor to access housing.
- It is ok to ask for documentation of domestic abuse
  - Note, many people do not report domestic violence or seek legal assistance.
  - It is important to have another way to verify DV background.

# RESOURCES



# FHA AND CRIMINAL RECORDS

- HUD Guidance on FHA and Criminal Records, June, 2022:  
<https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf>
- OGC Guidance on Criminal Records and the FHA:  
[https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF)
- HUD Memo on Eliminating Barriers:  
[https://www.hud.gov/sites/dfiles/Main/documents/Memo\\_on\\_Criminal\\_Records.pdf](https://www.hud.gov/sites/dfiles/Main/documents/Memo_on_Criminal_Records.pdf)

# FAIR CRIMINAL RECORDS SCREENING

- Tenant Screening with Criminal Backgrounds:  
<https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-051722.html>
- NMHC Screening Policies:  
[https://www.naahq.org/sites/default/files/naa-documents/government-affairs/protected/business-management-operations/fair-housing/criminal-conviction-screening-policies-white-paper-2016-05-final\\_1.pdf](https://www.naahq.org/sites/default/files/naa-documents/government-affairs/protected/business-management-operations/fair-housing/criminal-conviction-screening-policies-white-paper-2016-05-final_1.pdf)
- Federal Register, 28776, Screening Policies:  
<https://www.govinfo.gov/content/pkg/FR-2001-05-24/pdf/01-12840.pdf>

# REASONABLE ACCOMMODATIONS

- HUD/DOJ Joint Statement on Reasonable Accommodations:  
[https://www.hud.gov/sites/documents/DOC\\_7502.PDF](https://www.hud.gov/sites/documents/DOC_7502.PDF)
- See also, Guidance from HUD and the OGC in the general resources section on FHA and Criminal Records

# VAWA

- VAWA 2022 Summary:  
<https://www.murkowski.senate.gov/imo/media/doc/2.9.22%20VAWA%20Senate%202022%20Section%20by%20Section.pdf>
- HUD VAWA Resources:  
[https://www.hud.gov/program\\_offices/housing/mfh/violence\\_against\\_women\\_act](https://www.hud.gov/program_offices/housing/mfh/violence_against_women_act)
- HUD Guidance on Nuisance and Crime Free Housing Ordinances and Domestic Violence, 2016:  
<https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>
- NHLP Guidance: <https://www.nhlp.org/wp-content/uploads/2017/09/NHLP-DV-Fair-Housing-Toolkit-FINAL.pdf>
- MassLegalHelp: <https://masslegalhelp.org/domestic-violence>

# STAY CONNECTED

- Email: [fairhousing@commteam.org](mailto:fairhousing@commteam.org)
- Website: [www.commteam.org](http://www.commteam.org)
  - Online Request for Assistance:  
<https://www.cognitofrms.com/CommunityTeamwork1/FairHousingRequestForAssistance>
  - Online Training Registration:  
<https://www.cognitofrms.com/CommunityTeamwork1/FairHousingTrainingRegistration>
  - Email Listserv
    - Tenant  
<https://www.cognitofrms.com/CommunityTeamwork1/FairHousingTenantMailingList>
    - Housing provider  
<https://www.cognitofrms.com/CommunityTeamwork1/FairHousingHousingProvidersMailingList>

# THANK YOU!



Community Teamwork  
155 Merrimack Street  
Lowell, MA 01852

[www.commteam.org](http://www.commteam.org)

978.459.0551



Aaron Ginsberg

Fair Housing Program

[aginsberg@commteam.org](mailto:aginsberg@commteam.org)

[fairhousing@commteam.org](mailto:fairhousing@commteam.org)

Desk: (978)654-5736

Cell: (978)221-8921