

FAIR HOUSING CENTER OF THE LEGAL AID SOCIETY OF SAN DIEGO, INC. *- FAIR HOUSING NEWSLETTER -*



THE IMPACT OF EXCLUDING TENANTS FOR PRIOR CONVICTIONS

The Fair Housing Act prohibits discrimination in housing based on a protected class: race, color, religion, sex, disability, familial status, and national origin. In April 2016, the Department of Housing and Urban Development issued guidance on how prior criminal history is effecting prospective tenants from obtaining housing under intentional and disparate impact theories. HUD's guidance can be found at https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHStandCR.pdf.

Intentional theory

Intentional theory of discrimination is when a housing provider intentionally discriminates against someone in a protected class. This can occur even when a neutral policy is in place. For instance, if a housing provider has a policy of not approving prospective tenants who have been convicted of a felony and denies an African-American because of a criminal history, but approved a white tenant with a similar criminal history, then the housing provider has intentionally discriminated. Even though there is a policy of not approving prospective tenants who have been convicted of a felony, the housing provider did not apply the ban uniformly and used it as a pretext for denying the African-American prospective tenant.

Disparate Impact Theory

Disparate impact theory is when the housing provider has a facially neutral policy and applies it uniformly, but it impacts a group in one of the protected classes disproportionately than the other groups. Using the same policy as above, a housing provider may have a blanket policy of not allowing people who have been convicted of a felony and applies it uniformly to everyone who applies for housing. On its face, this does not seem like discrimination because the housing provider applies it to everyone and people who have been convicted of a felony are not a listed protected class in the Fair Housing Act. However, it could be discrimination under the disparate impact theory.

African-Americans and Latinos are incarcerated at a much higher rate than their percentage of the population. African-Americans make up about twelve percent of the United States' population, but are thirty-six percent of the prison population.¹ Latinos are seventeen percent of the total population, but are twenty-two percent of the prison population.² That means that a blanket ban on prospective tenants that have a criminal history affects minority groups, which is a protected class under the Fair Housing Act.

HUD has now provided guidance regarding housing providers and using prior criminal history as part of their determination.

Step 1: Discriminatory Effect

The first step of the analysis is for the complainant to show that the housing provider's policy has a discriminatory effect. HUD stated that this has been established by looking at local statistics of incarceration rates or if that is not readily available, by looking at national statistics.

Step 2: Nondiscriminatory Reason

The burden then shifts to the housing provider to show that it has a substantial, legitimate, and nondiscriminatory reason. Housing providers may argue that people who have been convicted of felonies are not good tenants, but this would not be sufficient. Citing reasons of other tenants' health and safety may be sufficient. HUD did note that a blanket ban on people who have prior convictions without considering when the crime was committed, the nature of the crime, or rehabilitative steps taken, have not met their burden.

Step 3: Less Discriminatory Alternative

The burden then shifts back to the complainant to overcome the housing provider's substantial, legitimate, and nondiscriminatory reason with a less discriminatory alternative. This may be difficult to do, but HUD states that mitigating factors such as the circumstances of how or when the crime was committed, the age when the complainant committed the crime, and anything else that would not normally appear on the rental application.

The take-away is that housing providers cannot have a blanket ban on people who have been previously convicted of a crime. The housing provider is required to approve or deny the tenant on a case-by-case basis.

For More Information please call:

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**The Legal Aid Society of San Diego Inc. offices are
accessible to persons with disabilities**



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¹ 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, April 4, 2016,
https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHStandCR.pdf.

² *Id.*