

The Fair Housing Act and Criminal Background Checks: What Housing Providers and Case Managers Need to Know

Introduction to the Fair Housing Act

People who have experienced homelessness often face high barriers to finding new housing. One of the hardest barriers to overcome is housing discrimination where landlords or property managers refuse to rent to someone because of some aspect of their identity or life experience.

The Fair Housing Act (FHA) is a federal law that addresses some forms of discrimination. The FHA makes it **illegal for almost all types of housing providers – public and private – to discriminate based on race, color, national origin, religion, sex (including gender identity and sexual orientation), familial status, and disability.**¹ The FHA applies to many different types of housing-related transactions, including renting or buying a home, or seeking housing assistance (such as applying for CoC- or ESG-funded programs). The Fair Housing Act also applies to emergency shelters that receive ESG funding.²

Unfortunately, there are also many groups of people that are regularly denied housing where the FHA does not explicitly protect them from discrimination. One of these groups includes people who have criminal records and are regularly subjected to overly broad criminal background checks that lead to housing denials. However, although people with criminal records are not a protected class under the FHA, **the Department of Housing and Urban Development (HUD) has issued guidance regarding when the use of criminal background checks in housing decisions may violate the FHA.**

This guide provides an overview of **what housing and service providers should know about the FHA and criminal background checks** so that they can comply as housing providers and help ensure the rights of their clients are not violated when they seek housing.

“Too often, criminal histories are used to screen out or evict individuals who pose no actual threat to the health and safety of their neighbors... We also cannot ignore the fact that persons who have been involved with the justice system are disproportionately racial minorities or persons with disabilities. We must understand the potential discriminatory impact exclusions based on criminal history can have on protected classes.”

- HUD Secretary Marcia Fudge

¹ 42 U.S.C. §§ 3601 - 3619.

² 24 CFR § 576.403(b)(2); <https://www.govinfo.gov/content/pkg/FR-2011-12-05/pdf/2011-30938.pdf>.

Criminal Background Checks and the Fair Housing Act

How does the FHA apply to people with criminal records? The connection between the FHA and criminal background checks is rooted in racial inequality.

Because of longstanding race-based policies and practices, Black, Indigenous, and other people of color experience homelessness and are incarcerated at disproportionate rates.

For example, Black individuals make up only **13%** of the U.S. population,³ but account for:

- **38%** of the U.S. prison population,⁴ and
- **52%** of people experiencing homelessness.⁵

In addition, people who have been incarcerated are **nearly ten times** more likely to experience homelessness than the general population.⁶

Therefore, when housing providers – including private landlords and HUD-funded programs – deny housing or housing assistance to people based on their criminal records, **such denials are likely to disproportionately exclude people of color – and that impact may violate the FHA.**

There are **three ways** that using criminal history information to screen out program participants and tenants can violate the FHA:

- 1) **Discriminatory intent:** when a housing provider wants to discriminate against someone based on a protected characteristic (such as race), but they use that person's criminal record as the excuse to do so.
- 2) **Discriminatory effects:** when a provider has no intent to discriminate against a protected class, but their policy actually or predictably leads to disparate outcomes.⁷ In these cases, the housing provider must have a legitimate, nondiscriminatory objective underlying their policy, the policy must actually

³ <https://www.census.gov/quickfacts/fact/table/US/IPE120221>.

⁴ https://www.prisonpolicy.org/research/race_and_ethnicity/.

⁵ <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/>.

⁶ <https://www.prisonpolicy.org/reports/housing.html>.

⁷ Investigators can determine this by looking at statistics, such as those that show disparities in the criminal legal system in the location where the complaint was made.

achieve that objective,⁸ and there must be no less discriminatory practice that could achieve that objective.

- 3) **Refusal to make reasonable accommodations:** If a person's disability contributed to their past criminal conduct, they may ask for a reasonable accommodation to a criminal background screening policy that would otherwise lead to their denial. If a housing provider refuses to make a reasonable accommodation, this refusal may violate the FHA.⁹

People who feel they have been discriminated against under the FHA may make complaints to [HUD's Office of Fair Housing and Equal Opportunity \(FHEO\)](#). The FHEO or another appropriate agency will then investigate the complaint and take action to enforce the law.

HUD Guidance on Criminal Background Checks and Housing Decisions

Over the past decade, HUD has increasingly encouraged housing providers to reconsider stringent and overly broad policies that deny applicants based on their criminal records. The reasoning includes a recognition that:

- Almost one third of adults in the United States have criminal records,
- The United States has the largest prison population in the world,
- Disproportionate policing and prosecution of communities of color have directly led to racially disparate impacts in housing denials, and
- There is no empirical evidence showing that applicants with criminal records make worse tenants than people without criminal records.¹⁰

One of the most important guidance documents from HUD on this topic is the [April 4, 2016 Memorandum from HUD's Office of General Counsel: "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."](#) This memo provides the following key directives:

- **Housing providers need to prove that their policy achieves a legitimate objective.** The most common reasons provided for criminal-history related housing denials include the protection of residents and property. These are legitimate goals, but housing providers still must show that their denial process

⁸ Housing providers must have actual evidence. They cannot rely on generalizations or stereotypes about people with criminal histories.

⁹ [6/10/22 Memorandum from the Office of Fair Housing & Equal Opportunity: "Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related."](#)

¹⁰ [5/17/22 Post on HUDuser.org: Tenant Screening with Criminal Background Checks: Predictions and Perceptions are not Causality.](#)

actually achieves that goal. Simply stating that anyone with a criminal record poses a greater risk than another applicant will not pass muster.

- **Arrests are not enough.** Arrests alone are not a basis to deny someone housing because they are not “proof of past unlawful conduct.” People can be arrested based on false accusations, and arrests don’t always lead to prosecution.
- **Criminal records are often inaccurate.** For example, many records fail to reflect when a case has been dismissed or a record has been expunged. Housing providers should always provide the applicant with an opportunity to review and correct their record before denying them housing.
- **HUD recommends that criminal background screenings are conducted on a case-by-case basis.** This includes considering the “nature and severity” of an individual’s conviction as well as the amount of time that has passed. This will help housing providers accurately distinguish between criminal records that pose a risk to other residents and property and those that do not.
- **Blanket bans will likely violate the FHA.** Bans that exclude entire categories of convictions – regardless of the circumstances surrounding the crime, how long ago the conviction occurred, or any efforts the applicant has made at rehabilitation – are disfavored because they do not take into consideration the actual risk an applicant poses.
- **Even if a policy is necessary to achieve a housing provider’s legitimate objectives, the provider must still show that there is no less discriminatory practice that could achieve that same objective.** HUD recommends allowing applicants to provide any relevant mitigating information that shows they will be a suitable tenant. Examples could be a positive past tenancy record, evidence of rehabilitation, and details about how the circumstances surrounding the conviction no longer exist.

Recommendations for Housing Providers & Advocates

Housing providers, including CoC- and ESG- funded programs, can take these recommendations to improve criminal background check policies. Advocates and others who are helping clients with criminal records obtain housing, such as case managers and housing navigators, can also use these points to help clients protect their rights.

Housing Providers	Housing Navigators, Case Managers, and Advocates
<p>Put criminal background check policies in writing. Make these policies available to all applicants.</p>	<p>Ask for written and unwritten screening procedures, including criminal background check processes. This will inform areas where your client may run up against barriers and can help pinpoint the best way to address any landlord concerns.</p>
<p>Do not rely on third-party background check companies that use algorithms to make decisions for a provider about a tenant. Obtain complete records that have details about the convictions in question.</p>	<p>Ask how the provider obtains records. If they rely on a private, third-party service to run these checks, offer to obtain your client’s records from a more reputable source (e.g., law enforcement agencies).</p>
<p>Provide applicants with copies of their criminal background check documents before denial. Give them an opportunity to respond and correct any errors.</p>	<p>Ask to review any criminal records the housing provider relies upon. Go over these records with your client (and possibly their prior attorney) to check them for accuracy.</p>
<p>Limit background checks to convictions. Do not consider arrests or other criminal history information such as police reports.</p>	<p>Confirm that housing providers are not relying on arrest records to make their decisions. If they are, consider providing education on why arrest records are not informative, and why they should only focus on convictions. You may also consider assisting your client with making a complaint to HUD or a state, or local fair housing agency.</p>
<p>Adopt look back periods. Limiting how far back a provider should go when reviewing a person’s record helps ensure that the provider is not considering irrelevant or outdated information.</p>	<p>Learn how far back the housing provider looks when carrying out their background check. If it seems unreasonable, explain why convictions from beyond a certain time are not relevant because of events that have occurred since then, or how your client has changed.</p>
<p>Consider the nature and severity of the conviction, including whether it is directly related to anything about a person’s ability to be a good tenant.</p>	<p>Look at each conviction and be prepared to explain why it doesn’t indicate anything about your client as a tenant. Most crimes are not related to housing or tenancy. For</p>

	<p>particularly serious convictions, help your client articulate why those convictions did not impact them as tenants in the past, and how the landlord can trust that they won't impact your client in the future.</p>
<p>Ask for and consider any information that helps explain why the applicant's conviction would not impact their tenancy, or any information that lessens their culpability for the crime. For example, were they a survivor of domestic violence when they were convicted? Do they have any disabilities underlying the criminal conviction? Do they have a solid work history? Can they obtain letters from past landlords vouching for them? Did they hold leadership positions while they were incarcerated? This will help the landlord complete an individualized risk assessment that accounts for the whole person and not just their record. Housing providers should list any circumstances they consider in their background check policy.</p>	<p>Help your clients obtain a packet of mitigating information that speaks to anything about their conviction or their past that makes them more appealing as a tenant. Service providers, probation and parole officers, judges, social workers, clergy, past landlords and neighbors, and employers may be able to provide supportive letters. Clients may also have certifications of completion for programs, or they can obtain letters from services they are currently engaged in.</p> <p>Clients may also be able to explain what was happening in their life at the time of the crime and be able to explain how they are now differently situated. For example, if they were aging out of foster care with no support at the time, and they are now an older adult with additional supports, this may be helpful to point out.</p>

Check out State and Local Laws Too!

In addition to learning about the FHA, providers must also be aware of any state and local laws that go beyond the FHA to add additional fair housing rights, including **additional protections for people with criminal records**. For example, see California's [Fair Housing and Employment Act](#), and [New Jersey's Fair Chance in Housing Act](#).

Additional Resources

The following resources may be useful for those seeking additional information about the Fair Housing Act and how it applies to people with criminal records.

[5/14/04 Joint Statement of The Department of Housing and Urban Development and the Department of Justice on Reasonable Accommodations Under the Fair Housing Act](#)

- *Helpful overview of how the Fair Housing Act protects people with disabilities, including the law regarding reasonable accommodations. This document also provides examples illustrating important principles.*

[9/13/16 HUD Memorandum: Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services](#)

- *In depth memorandum on the intersection between the Fair Housing Act, rights of survivors of violence, and criminal activity. The focus of this document is on the negative impact on survivors of local nuisance and crime-free housing ordinances.*

[6/10/22 HUD Memorandum: Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions](#)

- *Detailed memo on Fair Housing Act compliance and criminal background checks, breaking down how fair housing investigators analyze provider practices.*

[7/20/22 HUD Webinar - Strategies for Addressing Discrimination: Housing Providers' Use of Criminal Records](#)

- *HUD's National Fair Housing Training Academy webinar provides an in-depth overview of how the Fair Housing Act applies to people with criminal histories, including implications for people with disabilities.*