

# Improving Equitable Housing Access for Californians with Criminal Records Through the Fair Employment and Housing Act

## Why is the Fair Employment and Housing Act Important?

**The California Fair Employment and Housing Act (FEHA)** prevents unlawful discrimination in employment and housing contexts. Among its many provisions, FEHA addresses housing decision-making based on criminal history information, including when such decision making may rise to the level of unlawful discrimination.<sup>1</sup> This document describes how housing providers can use FEHA to understand if and when their clients may experience unlawful discrimination based on the use of criminal history information, either as a result of housing program practices or the actions of other housing providers, including private landlords. This knowledge will allow housing providers to take corrective action to align any of their own exclusionary policies and procedures with California law, and to address discrimination their clients face on the private housing market.

Black, Indigenous, and other People of Color experience homelessness and are incarcerated at disproportionate rates nationally and in California. For example, Black adults make up 6% of California's population, but comprise 29% of the people experiencing homelessness in the state.<sup>2</sup> Black Californians are also incarcerated at almost seven times the rate of white and Latinx Californians. This means that when housing providers – including programs and landlords – deny housing or housing assistance to people on the basis of their criminal records, the denials are likely to disproportionately exclude people of color.<sup>3</sup>

## What is the Fair Employment and Housing Act?

**The Fair Employment and Housing Act (FEHA)** is a California civil rights law that prohibits housing and employment discrimination based on certain characteristics, such as race, color, or national origin.<sup>4</sup> In January 2020, regulations went into effect that implemented FEHA in the context of the use of criminal history information in housing. Now, a housing provider's policy or practice regarding criminal history information may violate California law if it has an unjustified discriminatory effect on a protected class (even when the provider had no intent to discriminate), or if such a policy or practice constitutes intentional discrimination based on a protected characteristic.<sup>5</sup>

**FEHA applies to most types of housing and housing programs**, including single and multi-family homes, apartments, transitional housing, supportive housing, residential hotels/motels, public housing authorities, sober living environments, group homes, and shelters.

<sup>1</sup> 2 CCR § 12005 (2020). For full regulations, see <https://www.dfeh.ca.gov/LegalRecords/>

<sup>2</sup> While available data on the intersection is limited, other groups are disproportionately impacted by both the criminal legal system and homelessness, including Native American, Pacific Islander, Native Hawaiian, and Alaskan Native people. See: <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/inequality/>; <https://www.prisonpolicy.org/blog/2020/04/22/native/>; <https://www.urban.org/urban-wire/asian-americans-and-pacific-islanders-missing-minority-criminal-justice-data>

<sup>3</sup> State of California Department of Fair Employment and Housing, *Fair Housing and Criminal History FAQ* (2020), available at [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/04/FairHousingCriminalHistoryFAQ\\_ENG.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/04/FairHousingCriminalHistoryFAQ_ENG.pdf).

<sup>4</sup> Characteristics include race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information.

<sup>5</sup> State of California Department of Fair Employment and Housing, *Fair Housing and Criminal History FAQ* (2020), available at [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/04/FairHousingCriminalHistoryFAQ\\_ENG.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/04/FairHousingCriminalHistoryFAQ_ENG.pdf).

**Violations can occur when** a housing provider considers criminal history information when making decisions including whether to offer rental assistance or subsidies, rent or lease a unit, terminate assistance or evict a tenant, or make reasonable accommodations. Housing providers may also have policies or practices that are not FEHA-compliant because they have an unjustified, discriminatory effect that results in unequal access to housing or housing-related services.<sup>6</sup>

Discrimination complaints can be filed with the **California Department of Fair Employment and Housing** (DFEH), which investigates the complaint and enforces the law through various processes, including possible legal action.

## FEHA and Criminal History Information

FEHA removes barriers to housing for Californians who have been involved with the criminal legal system by limiting the ways in which housing providers can use criminal history information to decide whom to house and serve.

### What is criminal history information?

**Criminal history information** is any information about a person's contact with the criminal legal system, including being stopped or questioned by law enforcement, arrests, criminal charges, criminal convictions, infractions/tickets, participation in diversion programs, and other outcomes of criminal court cases (such as dismissals and appeals).

### What are the limits on considering criminal history information?

Housing providers can consider criminal history information when making housing decisions, but there are limits on what information they can consider and how.

**Housing providers can only consider convictions.** A person may be arrested and even charged for a crime, even if ultimately it is determined that the person was not culpable, or a crime did not occur.

**Therefore, housing providers can only consider convictions.** Housing providers **cannot consider any other form of criminal history information.**<sup>7</sup> In addition, juvenile court findings and convictions that have been sealed or expunged cannot be considered.<sup>8</sup>

**Convictions must be directly related to housing.** Because people may have been convicted of crimes that have no bearing on their conduct as tenants, housing providers and programs cannot deny housing or housing-related assistance based on a criminal conviction unless the crime in question poses a **demonstrable risk to other residents or the property, based on objective evidence.**<sup>9</sup> For example, check cashing fraud or a driving offense may not be directly relevant, but residential arson *could* be. Factors to consider include:

- The nature of the crime – was it violent? Where did it occur? Who or what was harmed?
- The severity of the crime – how serious or dangerous was it? To what? To whom?
- When the crime occurred – was it a long time ago, or was it recent?

<sup>6</sup> For complete details, please visit: <https://www.dfeh.ca.gov/housing/>

<sup>7</sup> 2 CCR § 12269 (2020). For full regulations, see <https://www.dfeh.ca.gov/LegalRecords/>

<sup>8</sup> 2 CCR § 12269 (2020). For full regulations, see <https://www.dfeh.ca.gov/LegalRecords/>

<sup>9</sup> 2 CCR § 12266 (2020). For full regulations, see <https://www.dfeh.ca.gov/LegalRecords/>

**Providers cannot have blanket bans.** Policies that deny assistance or housing to groups of people with a category of criminal convictions violate FEHA.<sup>10</sup> For example, one cannot have a policy that says “no felons,” or “we will not accept anyone with an assault conviction.”

## Best Practices for Implementation

**Providers should consider mitigating information.** Mitigating information demonstrates that a person is not likely to pose a demonstrable risk to the health and safety of others, the property, or other legitimate and non-discriminatory goals of the housing provider.<sup>11</sup> Examples of mitigating information include:

- The criminal conduct occurred a long time ago or when the person was very young.
- The criminal conduct was related to a disability. For example, a person on the sex offense registry may produce mitigating information that they exposed themselves in public during a mental health crisis.
- The criminal conduct was related to the person being a survivor of interpersonal violence.
- The person has successfully addressed underlying issues related to criminalized behavior since their conviction. Examples of mitigating documentation include letters of support from service providers, employers, or other community members; program completion certificates; and educational degrees earned after conviction.

**Service providers should help clients obtain mitigating information.** Service providers that are not making the housing decision can assist clients with collecting and providing mitigation information as part of their housing application.

**FEHA is consistent with HUD’s guidance on conducting criminal background checks.** CoC and ESG-funded programs can serve people with criminal histories regardless of their conviction histories, including people on sex offense registries.<sup>12</sup> In fact, Housing First principles require lowering barriers to housing access, including those related to criminal legal system involvement.

## Homebase Technical Assistance

Homebase provides training and technical assistance to housing providers to further FEHA’s goal of ending housing discrimination. Focus areas may include:

### 1. **Training on FEHA Compliance:**

- Updating providers on FEHA requirements around criminal history information
- Reviewing or drafting criminal background check policies and procedures

### 2. **Identification and mitigation of housing discrimination:**

- Training on how to support clients that face criminal legal system-related and/or other housing discrimination, including helping clients obtain mitigation documentation for landlords
- Developing materials to help providers educate landlords about FEHA compliance

## Additional Department of Fair Employment & Housing Resources

- **Information on Housing Discrimination**
  - <https://www.dfeh.ca.gov/housing/>

<sup>10</sup> 2 CCR § 12266 (2020). For full regulations, see <https://www.dfeh.ca.gov/LegalRecords/>

<sup>11</sup> 2 CCR § 12005 (2020). For full regulations, see <https://www.dfeh.ca.gov/LegalRecords/>

<sup>12</sup> See <https://www.hudexchange.info/homelessness-assistance/coc-esg-virtual-binders/coc-esg-additional-requirements/fair-housing-and-equal-access/criminal-history/>. Note that some HUD-funded programs, such as Section 8, have stricter requirements that require public housing authorities to deny admission to people convicted of methamphetamine production on federally-assisted property as well as people who are subject to lifetime registration on state sex offense registries.

- **Video for people on parole, “Criminal History and Housing Rights”**
  - <https://www.youtube.com/watch?v=fSXlxl-acM0>
- **Resources for Housing Providers**
  - <https://www.dfeh.ca.gov/housing/providerresources/>
- **FAQ on “Fair Housing and Criminal History”**
  - [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/04/FairHousingCriminalHistoryFAQ\\_ENG.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/04/FairHousingCriminalHistoryFAQ_ENG.pdf)
- **Poster: “California Law Prohibits Discrimination and Harassment in Shelters”**
  - <https://www.dfeh.ca.gov/discrimination-and-harassment-in-shelters-poster/>