

Navigating Housing Choice Voucher Program Applications for People with Criminal Records

Public Housing Authority Programs and Vouchers

Over 3,000 Public Housing Authorities (PHAs) manage millions of dollars in HUD funding for public housing, project-based vouchers, and housing choice vouchers (HCVs), among other programs. People with criminal records are eligible for many of these resources and should apply for assistance while also preparing for common barriers that may come up related to their records.

Local PHAs choose which federally assisted programs they will administer and define who is eligible for admission. Program admissions policies vary, particularly for people with criminal records, even when PHAs are in the same county or Continuum of Care. Further, admissions policies for people with criminal records may vary within a single PHA for different programs, particularly between PHA-owned public housing units and tenant-based HCVs for use with private landlords.

HCVs subsidize private housing for low-income, elderly, and disabled individuals with landlords who offer safe and sanitary property for lease.¹ This resource outlines where PHAs have discretion to provide HCVs to people with criminal records and how to prepare for the HCV application process.

Mandatory and Discretionary Bars to HCV Admission

When applying for an HCV with a criminal record, it is important to know the local PHA's screening rules. Some PHA rules and policies are "mandatory," or required by law, and some are "discretionary," or up to the local PHA to decide.

Federal statutes and regulations set basic, mandatory guidelines regarding who PHAs can admit to their HCV programs, while HUD memoranda and notices guide the implementation of those policies.² PHAs then have a great deal of discretion in setting additional admission policies.

Based on this combination of federal and local rules, PHAs will screen HCV applicants for criminal records and potentially deny admission based on mandatory or discretionary factors.

What are the absolute bars to admission?

Federal law requires PHAs to deny HCVs to people who have been convicted of either of the following:

- 1) manufacture or production of methamphetamine in federally assisted housing; and/or
- 2) convictions requiring registration **for life** as a sex offender under a state sex offender registration program.³

These prohibitions may only be changed through an act of Congress at the federal level.

¹ For more information on the HCV program, see: <https://www.hud.gov/hcv>.

² The *Housing Choice Voucher Program Guidebook: Eligibility Determination and Denial of Assistance* (2019) is a helpful summary of overall HCV admissions policies. Available at: https://www.hud.gov/sites/dfiles/PIH/documents/HCV_Guidebook_Eligibility_Determination_and_Denial_of_Assistance.pdf. HUD's policy guidance to PHAs can be found through Public and Indian Housing Notices, Rules, and Regulations. Available at: https://www.hud.gov/program_offices/public_indian_housing/publications/notices/.

³ 24 C.F.R. § 982.553(a).

PHAs are **not** required to deny HCVs for people who must register on a sex offense registry for any period less than life. This is one reason why it is critical to know whether someone is required to register for life, because if they are not, they may be eligible for the HCV program.

People required to register should also take advantage of any opportunities they have to change their registry status if their state laws change. For example, in 2021, California went from requiring everyone to register for life to creating a “tiered” system where some people must register for shorter time periods.⁴

Are there other factors PHAs must consider?

PHAs must establish policies for three categories of applicants where drug or alcohol related convictions might be considered during the screening process:

1. when there is a prior eviction from federally assisted housing within three years due to drug related criminal activity;
2. where any household member is currently engaging in illegal use of a drug; and
3. where the PHA has reasonable cause to believe that illegal drug use (or a pattern of illegal drug use) or alcohol abuse (or a pattern of alcohol abuse) may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

Within these categories, local PHAs have discretion to enact low barrier policies, and **should not consider arrests that did not lead to conviction.**⁵

In all three categories, PHAs should consider relevant circumstances and **mitigating information** when determining whether to deny an applicant, through conducting an individualized assessment, particularly to avoid liability under the Fair Housing Act (FHA).⁶

HCV applicants with disabilities may also request **reasonable accommodations** under the FHA, including changes to rules, policies, or practices when such accommodation is necessary to give a person with a disability an equal opportunity to use and enjoy a dwelling.⁷ This includes rules, policies, and practices related to denying applications based on criminal records. While current illegal drug use is not protected, chronic mental illness, substance use disorder, alcohol use disorder, and recovering from substance and alcohol use disorders are considered disabilities under the FHA.

Category 1: Prior eviction from federally assisted housing within three years due to drug related criminal activity.⁸

Drug is defined under federal (not state or local) law as “a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802),”⁹ and *drug related criminal activity* means “the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug.”¹⁰ In this category, PHAs **must** deny HCV applicants, **unless**:

⁴ For more information on this California law change, see: <https://oag.ca.gov/sites/all/files/agweb/pdfs/csor/registrant-faqs.pdf>.

⁵ See: HUD, Notice PIH 2015-19: Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions (2015). Available at: <https://www.hud.gov/sites/documents/PIH2015-19.PDF>.

⁶ Mitigating information is information that shows that a person does not currently pose a risk. See: *Housing Choice Voucher Program Guidebook*, *Id.* at FN 2; HUD, *Office of Fair Housing & Equal Opportunity Memorandum on 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* (2022). Available at: https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation_of_OGC_Guidance_on_Application_of_FHA_Standards_to_the_Use_of_Criminal_Records_-_June_10_2022.pdf.

⁷ 42 U.S.C. § 3604(f)(3)(B).

⁸ *Id.* at FN 3.

⁹ 24 C.F.R. § 5.100.

¹⁰ *Id.*

- The household member who engaged in drug related criminal activity has completed a supervised, PHA-approved drug treatment program, or
- The circumstances leading to the eviction no longer exist. Examples include:
 - Death or imprisonment of the household member who engaged in the activity.
 - The household member can be excluded from the application.
 - The circumstances surrounding the eviction were caused by a guest who will not be allowed in the residence.
 - The applicant has completed, or is participating in, a rehabilitation program and is likely to be successful, or has otherwise been rehabilitated successfully.
 - The applicant has refrained from drug use for a reasonable amount of time.
 - The PHA otherwise reasonably believes that the circumstances have changed based on other mitigating factors.

Category 2: The PHA determines that any household member is currently engaging in illegal use of a drug.¹¹

PHAs have discretion to define “currently engaging in” as any length of time, but HUD cites best practice as referring only to the three months prior to the application date.¹²

Category 3: The PHA has reasonable cause to believe that illegal drug use (or a pattern of illegal drug use) or alcohol abuse (or a pattern of alcohol abuse) may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.¹³

In this category, PHAs may define what “reasonable cause” and “patterns of use” mean, as well as which drugs and related convictions may be considered.

Do PHAs have any discretion to admit people with criminal records?

Outside of the categories listed above, PHAs have discretion in their HCV admissions policies regarding eligibility for people with criminal records. PHAs can choose to eliminate all other criminal records from consideration, as the Housing Authority for the City of Austin¹⁴ and the Ann Arbor Housing Commission¹⁵ have done, or they may choose to deny applicants based on current or recent engagement in drug-related criminal activity, violent criminal activity, or other criminal activity threatening health, safety, or peaceful enjoyment of residents or PHA staff.¹⁶

“Lookback” periods, or time frames within which PHAs may consider convictions, are not required by statute. For PHAs that do exercise discretion to create lookback periods for convictions in HCV applications, HUD cites best practice as a one-year lookback period for drug-related criminal activity and a two-year lookback period for violent and other criminal activity.¹⁷ These time frames are not mandatory.

In either scenario, PHAs are subject to the FHA, as well as state and local non-discrimination laws and “fair chance” policies that limit consideration of criminal records. HUD guidance warns PHAs that

¹¹ *Id.* at FN 3.

¹² See: HUD, Notice PIH 2023-13: Guidance on housing individuals and families experiencing homelessness through the Public Housing and Housing Choice Voucher Programs (2023). Available at: <https://www.hud.gov/sites/dfiles/PIH/documents/pih2023-13.pdf>.

¹³ *Id.* at FN 3.

¹⁴ Housing Authority for the City of Austin Housing Choice Voucher Program Administrative Plan (2022), available at: <https://www.hacanet.org/resident-forms/>.

¹⁵ Administrative Plan for the Ann Arbor Housing Commission Housing Choice Voucher Program (2021), available at: <https://www.a2gov.org/departments/Housing/Documents/March%202021%20Admin%20Plan.pdf>.

¹⁶ *Id.* at FN 9.

¹⁷ *Id.* at FN 5.

additional exclusionary factors may violate the Fair Housing Act because of the disproportionate impact of the criminal legal system on people of color.¹⁸

And in all cases, HUD prohibits denial of HCV applicants solely on arrests that did not lead to conviction.¹⁹

Preparing for the HCV Application Process

People with criminal records should strongly consider applying for HCVs, even if they worry that they may not be eligible. Each PHA has their own local rules about eligibility and screening process, so it is worth applying and seeing how the PHA responds. However, people with criminal records should also be prepared to respond to potential barriers that may come up during the application process. Consider the following when preparing for the HCV application:

- **Know the local PHA's screening criteria.** Each PHA has its own screening criteria, so applicants should familiarize themselves with their PHA's discretionary policies regarding denying HCVs to people with criminal records. These policies should be included in the PHA's Administrative Plan. Administrative Plans are public records that may be available on PHA web sites or at main PHA branch offices but if not, should be provided upon request.
- If an applicant's criminal records history is somehow related to a disability, they may want to **request a reasonable accommodation** to a PHA rule that would otherwise exclude them.
- **Survivors of intimate partner abuse** or violence, sexual assault, or stalking with criminal records directly related to their past abuse (like an assault in self-defense) should consider explaining this connection as a **mitigating factor**. Survivors may also want to invoke the Violence Against Women Act's prohibition on discriminating against survivors based on criminal records directly related to their abuse.²⁰
- **Correct background check errors.** PHAs use law enforcement background checks, not third-party tenant screening, to obtain criminal record histories.²¹ However, these records can still be inaccurate. To get ahead of errors, obtain official Records of Arrests and Prosecutions ("RAP sheets") and ensure that expunged or sealed records are not revealed, and that missing information (like dismissals and acquittals) is documented.²² **Check the status of state automatic expungement laws**²³ and take advantage of record sealing relief.²⁴
- If the background correction takes too long, **dispute the accuracy** of the record during the HCV application process. PHAs are required to provide a copy of the record they looked at and an opportunity to clarify errors on the RAP sheet *before* admission based on the record is denied.²⁵
- **Gather mitigating information.** HUD permits PHAs to consider relevant circumstances when making admissions decisions, "such as the seriousness of the case, the extent of participation or

¹⁸ *Id.* at FN 6 (HUD, *Office of Fair Housing & Equal Opportunity Memorandum*).

¹⁹ *Id.* at FN 5.

²⁰ For more information, see: <https://www.hud.gov/VAWA#close>.

²¹ 24 C.F.R. §§ 5.901-905.

²² In California, people have the right to review their criminal history summary records for accuracy. Low- or no-income individuals may request waiver of the \$25 fee. For more information, see: <https://oag.ca.gov/fingerprints/record-review#:~:text=Access%20to%20criminal%20history%20summary,review%20for%20accuracy%20and%20completeness>.

²³ Some states have authorized automatic expungement and may be in various stages of implementation. For example, California recently cleared 2 million records: <https://www.publicnewsservice.org/2023-07-10/criminal-justice/11-million-ca-criminal-records-expunged-in-first-6-months-of-new-law/a85285-2>.

²⁴ See: *50-State Comparison: Expungement, Sealing, and Other Record Relief*, available at: <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside-2/>

²⁵ *Id.* at FN 5. This is also required by law. 24 C.F.R. §§ 960.204 part 5, subpart J.

culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure.”²⁶ Applicants should gather documentation showing any mitigating circumstances, such as letters from supportive family members, religious leaders, employers, and social service providers along with program completion certificates and post-conviction educational degrees to include with the application. Ideally, an applicant should have mitigating information ready to submit in advance of a denial.

- PHAs must include written information about the reasons for denial, which may help narrow down the mitigating information required to reverse the denial.²⁷ HCV applicants have the **right to appeal**.
- **Advocate for policy changes.** With some exceptions, PHAs are required to submit annual and five-year Administrative Plans to HUD after a public engagement process, including a hearing before the PHA’s Board of Commissioners.²⁸ The standards for the drug and alcohol related categories and any local discretionary disqualifications can be modified during this time. HUD is currently engaged in a national review of policies regarding participation of people with criminal records in federally assisted housing programs and may soon request comment from the public on proposed regulations.²⁹

Links to Key HUD and Homebase Resources

- HUD, Notice 2023-13: *Guidance on housing individuals and families experiencing homelessness through the Public Housing and Housing Choice Voucher Programs* (2023).
- 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* (2022).
- HUD, “*Reentry Housing Letter*” from Secretary Marcia L. Fudge to Public Housing Authorities, Continuums of Care, Multifamily Owners, and HUD Grantees (2021).
- HUD, *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* (2016).
- HUD, Notice PIH 2015-19: *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions* (2015).
- HUD and U.S. Department of Justice, Joint Statement: *Reasonable Accommodations Under the Fair Housing Act* (2004).
- Homebase, *The Fair Housing Act and Criminal Background Checks: What Housing Providers and Case Managers Need to Know* (2022).

²⁶ 24 C.F.R. § 982.552(c)(2).

²⁷ 24 C.F.R. § 982.554.

²⁸ 42 U.S.C. § 1437c-1(f). See also: https://www.hud.gov/program_offices/public_indian_housing/pha.

²⁹ See: HUD, *Eliminating Barriers That May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Programs* (2022), available at: https://www.hud.gov/sites/dfiles/Main/documents/Memo_on_Criminal_Records.pdf.