

DENYING RENTAL HOUSING BECAUSE OF A PROSPECTIVE TENANT'S CRIMINAL RECORD MAY BE DISCRIMINATION

Mr. Richard Fader of Ft. Lee, New Jersey asks: "Is it true that denying rental housing because of a prospective tenant's criminal record may be discrimination?" Well Mr. Fader, the Department of Housing and Urban Development ("**HUD**") is indeed making it easier for people with criminal records to find housing.

According to HUD, as many as 100 million U.S. adults - or nearly one-third of the population - have a criminal record of some sort. When individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful re-entry to society. Yet many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encounter significant barriers to securing housing, including public and other federally-subsidized housing, because of their criminal history. In some cases, even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest.

In response to that dynamic, on April 4, 2016, HUD's Office of General Counsel issued its findings styled "Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions" in which it concluded that:

The Fair Housing Act (or Act) prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin. HUD's Office of General Counsel issues this guidance concerning how the Fair Housing Act applies to the use of criminal history by providers or operators of housing and real-estate related transactions. Specifically, this guidance addresses how the discriminatory effects and disparate treatment methods of proof apply in Fair Housing Act cases in which a housing provider justifies an adverse housing action - such as a refusal to rent or renew a lease - based on an individual's criminal history."

Consequently, HUD is now making it easier for people with criminal records to find housing. People with criminal records aren't a protected class under the Fair Housing Act, and the guidance from HUD's general counsel says that in some cases, turning down an individual tenant because of his or her record can be legally justified. But blanket policies of refusing to rent to anybody with a criminal record are de facto discrimination, the department says - because of the systemic disparities of the American criminal justice system.

HUD's new policy warns that landlords could be breaking the law when they refuse to rent to people with criminal records - even if they have no intention to discriminate - because such a policy would likely have a disproportionate impact on African-American and Hispanic

applicants. This seemingly implies that the disproportionate impact on African-American and Hispanic applicants would similarly apply to anybody with a criminal record, though HUD has not expressly addressed this issue.

Importantly, the HUD policy is not without limitations. HUD notes that whether an individual landlord's policy has a discriminatory impact will need to be determined on a case-by-case basis. That doesn't mean landlords are completely barred from considering criminal records - but they'd have to prove that their policy legitimately serves to protect safety or property. According to the HUD report:

In most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal conduct. But housing providers that apply a policy or practice that excludes persons with prior convictions must still be able to prove that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. A housing provider that imposes a blanket prohibition on any person with any conviction record - no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then - will be unable to meet this burden [¶] A housing provider with a more tailored policy or practice that excludes individuals with only certain types of convictions must still prove that its policy is necessary to serve a "substantial, legitimate, nondiscriminatory interest." To do this, a housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not. [¶] A policy or practice that fails to take into account the nature and severity of an individual's conviction is unlikely to satisfy this standard. Similarly, a policy or practice that does not consider the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy this standard, especially in light of criminological research showing that, over time, the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense. [¶] Accordingly, a policy or practice that fails to consider the nature, severity, and recency [*sic*] of criminal conduct is unlikely to be proven necessary to serve a "substantial, legitimate, nondiscriminatory interest" of the provider. The determination of whether any particular criminal history-based restriction on housing satisfies step two of the discriminatory effects standard must be made on a case-by-case basis.

Mr. Fader, you will be well served by developing and implementing a written "best practices" complying with the HUD report.