Criminal Records Barriers to Housing

October 24, 2019
Housing Action Illinois Conference
641,000 people leave prison every year in the U.S. (roughly the population of Washington, D.C.), and on their first night out, the question is “Where will I sleep tonight?”
The Problem

**Reentry Housing**
Cost and discrimination were the top barriers to finding housing after release.

- **79%** of survey participants were either ineligible for or denied housing because of their own or a loved one’s conviction history.

- **58%** of survey participants were currently living with family members while only **9%** were living in transitional housing.

- **1 in 10** survey participants reported family members being evicted when loved ones returned.

[whopaysreport.org]
Barriers due to Discrimination

African American Tester

"I have a conviction on my record from years ago."

TESTERS

AGENT

"Anyone with a felony on their record will be declined."

AGENT

"It depends, we can probably work something out."

White Tester

Rent
Impact on Families

• Living with family is one of the most affordable, stable, and commonly-used housing options available to justice-involved individuals.

• Restrictions on where they can live mean that many of them are living in the shadows rather than out in the open, especially in federally subsidized housing.

• A young father described his experience in this way: “I was living like I was on the run. The feeling that if I get caught there, my wife will lose her apartment, that she’s taking that risk for me – that weighed so heavy on my heart.”
Shriver Center Report On Criminal Records

*When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing (2015)*, found that owners/PHAs are:

- Creating exhaustive lists of criminal activity (e.g., civil disobedience);
- “Misdemeanor or felony, on or off the property”;
- Using the fact of incarceration, regardless of offense or conviction, as the basis of denial (pre-trial detention, debtor’s prison);
- 100 year look back;
- Using arrests as a basis to deny admission.
HUD recognizes “the troubling relationship between housing barriers for individuals with criminal records and homelessness”

An arrest, without a subsequent conviction, is **insufficient proof of “criminal activity”** and therefore cannot be the basis of a denial of admission.

But an arrest record can trigger an inquiry into whether the criminal activity took place. According to HUD, acceptable evidence includes:

- Police report detailing the circumstances of the arrest
- Witness statements
Limits on Discretion: Reasonable Time

- “Reasonable time” must be defined in written admissions policies.
- No definitive word from HUD
  - “While HUD considers that five years may be a reasonable period for serious offenses,” PHAs and owners are free to disagree.
  - Best practice: 12 months for drug-related criminal activity; 24 months for violent criminal activity and criminal activity that threatens health, safety and right to peaceful enjoyment by others.
Limits on Discretion: The Fair Housing Act

Lifetime Likelihood of Imprisonment

- All Men: 1 in 9
- White Men: 1 in 17
- Black Men: 1 in 3
- Latino Men: 1 in 6
- All Women: 1 in 56
- White Women: 1 in 111
- Black Women: 1 in 18
- Latina Women: 1 in 45

April 2016 OGC Guidance on Fair Housing and Criminal Records

• Applies to all housing covered by the FHA and their use of criminal histories in housing transactions;

• Applies Discriminatory Effect/Disparate Impact Test and Discriminatory Treatment/Intent Test to Criminal Records practices and policies;

• Cannot use Arrests Alone to Deny Admission.
Exclusions Because of Prior Conviction

• Record of conviction will generally serve as sufficient evidence to prove person engaged in criminal conduct;
• Notes however those conviction records may be erroneous (i.e. expunged, downgraded);
• Conviction ban policies must still be able to prove that the policy is necessary to serve a substantial, legitimate, and nondiscriminatory interest.
Blanket Bans

Providers with blanket bans on any person with a conviction, no matter when it occurred, the underlying conduct, or what the person has done since the conviction “will not be able to meet this burden.”
Policies or Practices Must Consider the Nature, Severity, and Recency of the Criminal Conduct to serve a substantial, legitimate, nondiscriminatory interest of the provider.
Less Discriminatory Alternative

If housing provider proves the policy is necessary to achieve a substantial, legitimate, nondiscriminatory reason, the burden shifts back to plaintiff to prove such interest could be served by another practice with a less discriminatory effect.
Timing of Considering Criminal History

HUD suggests first considering a person’s financial and other qualifications, in order to “minimize any additional costs that such individualized assessment might add to the applicant screening process.”
807(b)(4) Exemption of the FHA

- FHA does not prohibit conduct against a person because of a conviction for the illegal manufacture and distribution of a controlled substance;
- No liability for discriminatory effect.
- Only applies to disparate impact claims on the basis of convictions, not arrests.
- Only applies to manufacturing and distribution convictions, not possession.
Intentional Discrimination

- Differential treatment because of race, etc., in the use of criminal history.
- Rejecting a Hispanic applicant due to criminal record but admitting White applicant with comparable record.
- No convictions policy but exceptions for whites.
- Leasing agent aiding a white applicant with a record but not a African American applicant.
- Discouraging African American applicants from applying due to criminal records but not discouraging White applicants.
Limits on Discretion: Reasonable Accommodation

- Persons with disabilities may request a reasonable accommodation.
- Includes persons who are recovering from addiction and have successfully completed or are undergoing substance abuse treatment.
  - But not current users of illegal substances
  - But not persons who are a direct threat to health and safety of others
  - But not persons whose tenancy would result in substantial physical damage to the property of others
Selected Resources

• Shriver Center, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing* (2015),
• Merf Ehman, *Fair Housing Disparate Impact Claims Based on the Use of Criminal and Eviction Records in Tenant Screening Policies* (2015),
Contact Information

Kate Walz
Vice President of Advocacy
Shriver Center on Poverty Law
katewalz@povertylaw.org
(312) 368-2679