



Fair Housing, Fair Screening

By Kathy Danforth / Published December 2016

A housing or employment practice which is apparently neutral but negatively

affects a protected class and cannot be justified by business necessity has been considered discrimination by “disparate impact” since the 1960s. This standard has applied to such job criteria as education, testing, or seniority requirements that had no proven relevance to job performance but adversely affected black or female employees. In April 2016, the U.S. Department of Housing and Urban Development (HUD) issued guidance regarding the possible disparate impact on minorities from considering criminal history in approval of housing.

Almost one-third of U.S. adults have a criminal record of some sort. Those who are arrested, convicted, or incarcerated may face additional hurdles in obtaining jobs and housing. Since African-American males are imprisoned at approximately three times the rate of white males, any barriers based on a criminal record will impact this group more severely.

Helen R. Kanovsky, HUD General Counsel, notes, “While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability). Additionally, intentional discrimination in violation of the Act occurs if a housing provider treats individuals with comparable criminal history differently because of their race, national origin, or other protected characteristic (i.e., disparate treatment liability).”

Many associations have included criminal background checks, most with no intent to target a racial group, and may need to assess their practices because of this unintended consequence. Ramon Palacio, attorney with Association Law Group, explains, “In the past, associations have used criminal convictions as a basis for inferring the individual poses a risk to safety and welfare of the residents. HUD has said you can no longer use the presumption that people with a criminal background, even multiple convictions, pose a threat to the community. One exception is for drug trafficking, the one criteria they use in public housing. They don’t deny that people trafficking in drugs present a risk in housing and have grandfathered that in, while taking the position that other types of convictions in and of themselves pose no risk.

“I don’t know that there has been a formal study that people with a criminal background have been a problem in condominiums,” notes Palacio. “However, anecdotally, when a problem has arisen in a condominium, more often than not those that had a problem also had a criminal past.”

According to Palacio, “In my experience, at least 25–50 percent of associations do some type of background check, particularly the higher-end associations. Some of the older communities, and perhaps condominium conversions, may not, but it varies widely. Condominiums are more impacted by screening because they have a unique situation of people living in close proximity. People are more spread out in a homeowners association and are not as impacted by their neighbors.”

“Most of our condominium and homeowner association clients with the right to approve or disapprove of purchases and leases within their community have been using some sort of criminal record criteria in their decision making,” relates Roberto Blanch, attorney with Siegfried, Rivera, Hyman, Lerner, De La Torre, Mars & Sobel, P.A. “Probably 60–65 percent have some sort of approval rights, which could differ for renters versus buyers. Precedent provides greater restrictions on peer approval rights regarding the sale of a home as opposed to leasing. For newer communities, though, perhaps due to a developer’s interest in facilitating the issuance of FHA financing for the purchase of homes or units located therein, we tend to find that they often don’t have rights to approve or disapprove sales, and in some cases leases either, FHA guidelines frown upon such approval rights, and developers want to make the community’s governing documents friendly to investors, purchasers, and lenders.”

“I have seen some boards that feel any criminal record is suspect. Think about the ramifications: criminal records showing a history of traffic infractions, petty theft, or smoking a joint could be considered by such boards to present a bar to housing,” comments Blanch. “Then there may be some association boards that are motivated to exclude certain groups; for example, they might not want Section 8 government-assisted rentals or people making below a certain income living in their community. You have this tug of war created when trying to balance the perceived benefits of screening prospective residents versus exercising such right legally—some proponents of greater approval restrictions might have negative intentions while others with good intentions may need to be reminded of how to legally exercise such a right.”

Blanch points out another criterion that also may not pass muster. “We warn communities that use of credit scores alone can also create the basis of discrimination claims based upon disparate impact—it’s a slippery slope.”

David Podein, attorney with Haber Slade, observes, “I can’t say that one type of community uses criminal background checks most, but in my sample, the practice is not as pervasive as one might presume. I have never seen the practice abused as a back door to discriminate.” He does note, “Here in Miami, diversity is embraced.”

“With the HUD statement, it appears we now have some guidance from the federal government as to what should and shouldn’t be done and some potential consequences, so we can point this out to boards,” says Blanch. “It appears HUD has not completely eliminated reference to background checks as one of the aspects to look at; they’ve just commented to what degree you can look at a criminal record. If an association has a very general policy of denying residency based on any criminal background, it may be open to a challenge based on discrimination due to disparate impact. However, if the plan is refined as to what type of activity or record may play a part, you may get out of the dangerous area. There might be some slam-dunk decisions

for denial based upon criminal record if you have a habitual criminal offender, but unfortunately, most scenarios fall into gray areas.”

In evaluating the use of criminal background checks, **Podein** states, “Any time an association is reviewing this type of policy, the first question is whether they have the proper authority under the documents to run background checks as part of an approval process. Not all associations have the right to approve buyers and renters, and sometimes they think they have approval rights when they don’t. It sounds basic, but sometimes you’d be surprised.

“The second important consideration is to tie screening to a justified reason and apply it in a uniform fashion,” says **Podein**. “The number one way to get in hot water with this or any similar issue is if procedures are not uniformly followed. Examples of variation would be if for one applicant we didn’t give a reason but for another one we did, or if only one board member looked at an application in an instance.

“The third recommendation is to have a three-pronged test for screening: Is this necessary to achieve a substantial, legitimate, and nondiscriminatory interest of the community? With that in mind, the guidance suggests review on a case-by-case basis, but it can be impossible to put up the floodgates against subjectivity.”

Blanch advises, “To the extent you want to consider criminal background as a component for a decision, the criteria should be tailored to the greatest extent possible in compliance with HUD recommendations. I don’t think that even an absolute reliance on recidivism rates is fair. You need criteria for evaluation and also a discussion with legal counsel.

“We have worked with clients to make sure criteria are consistent with HUD recommendations,” notes Blanch. “One criterion is the time period since the occurrence of the suspect criminal activity—for instance, keeping it within the last 3–5 years.

Another issue is the frequency; was this an isolated instance, or has this individual been convicted time and time again? And, the gravity of the offense is a major consideration—there are misdemeanors and felonies and various degrees of both. We recommend focusing on convictions, as opposed to arrests, for crimes at the greater end of the spectrum. If someone has 40 speeding tickets in two years, maybe he shouldn’t have a license to drive, but perhaps that should not mean he can’t live in a house within your community.”

Blanch points out another aspect requiring special consideration: “When foreigners have a record, how reliable is the data, assuming you can even retrieve it? In South Florida we have a big mix, so we see that a lot.

“I can’t imagine that the intent of HUD was to ban the use of criminal background information to protect known assassins and pedophiles, and that’s not my interpretation,” comments Blanch. “But if you do use screening, be careful that you are not flirting with or engaging in discrimination.”

Palacio points out, “In the past, communities denied an application for tenancy based not just on a conviction but if the applicant lied on the application by failing to disclose information. Now, an applicant may be able to fully disclose convictions and not be denied housing, yet if they fail to disclose and it’s found, the association is within its rights to deny an application because of lying. The law is too new for criminals to respond yet, but as word gets out, criminals may see there is more disadvantage to

hiding their background than providing it.”

Blanch observes, “As this is publicized, more claims of discrimination by realtors and prospective buyers and renters are likely.” And, in his experience, communities without screening have not had more criminal problems than those with it. However, for those who are using a criminal background check, his advice is, “Always have a good relationship with qualified community association legal counsel. Hire someone who knows the laws in your jurisdiction so you can just pick up the phone and get an easy answer nine times out of ten. You can save money and headaches.” Fairness and good intentions are fine, but sometimes it takes keeping up with the rules to keep on the right side of the law.

Contributors

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