

# FAIR HOUSING: LIMITATIONS ON THE USE OF CRIMINAL RECORDS IN HOUSING DECISIONS

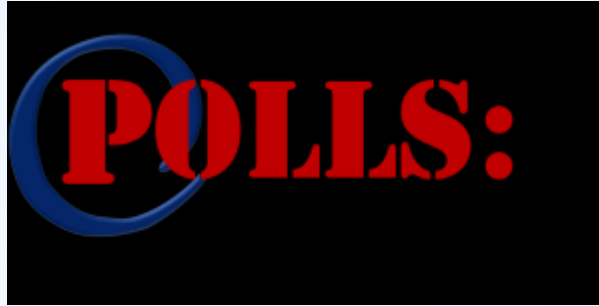


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Poll 1: Who are you?

Poll 2: Current understanding of this topic?

# DISCLAIMER

I am not an attorney and not licensed to practice law.

This webinar does not constitute legal advice; it is intended only as helpful information.

You should consult a licensed attorney regarding current or anticipated legal actions.



# HANDOUTS ATTACHED

- This PowerPoint
  - Also will be on our website, along with webinar recording, next week
- HUD Guidance issued April 4, 2016
- National Ass'n of Realtors summary of that guidance
- NAEH/NLIHC summary of that guidance
- HUD guidance issued for Public Housing Authorities in 2015 on similar topic



# THE FAIR HOUSING ACT BASICS

This federal statute *prohibits discrimination* in the *sale, rental, or financing* of housing on the basis of race, color, religion, sex, disability, familial status, or national origin (“*protected classes*”).

Applies to *virtually all* housing and housing decisions.



# GUIDANCE FROM HUD OFFICE OF GENERAL COUNSEL (OGC) APRIL 4, 2016

- Addresses how discrimination can be shown in Fair Housing Act cases when an adverse housing action is based on a person's criminal history.
- Attached as a handout to this webinar
  - Summaries of the Guidance are also attached to this webinar (National Ass'n of Realtors, NAEH/NLIHC)
- Available at  
[https://portal.hud.gov/hudportal/documents/huddoc?id=HUD\\_OGC\\_GuidAppFHASandCR.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGC_GuidAppFHASandCR.pdf)



# HUD OGC APRIL 2016 GUIDANCE: BASICS (PART 1)

- *Does not* make those with a criminal record a new “protected class”
- *Does not* prohibit housing providers, landlords, etc., from considering criminal records when making housing decisions

# HUD OGC APRIL 2016 GUIDANCE: BASICS (PART 2)

- Does prohibit housing providers from using arrest records alone as the sole basis of a housing decision
- Does prohibit blanket, broad-based housing policies based on criminal records (e.g., “we don’t rent to anyone with a felony”)
- Does prohibit housing providers from using criminal records:
  - As a pretext for *intentional discrimination*
  - In a way that results in an *unjustified discriminatory effect* on a protected class, with limited exception





# HUD OGC APRIL 2016 GUIDANCE:

## APPLICABILITY

- Applies to a wide range of housing decisions including, but not limited to, tenant screening for initial rental decisions, evictions, and non-renewal of leases.
- Applies to virtually ALL housing – *including* private market rentals.
  - Applies to, but not limited to, Public Housing Authorities, other government-funded/operated housing, or other “affordable housing” (e.g., properties funded by the Florida Housing Finance Corporation).
  - There are a few minor exceptions – check with your Fair Housing agency or Legal Aid/Services attorney.



# THE LEGAL FRAMEWORK IN OGC APRIL 2016 GUIDANCE

Primary purpose of the OGC Guidance is to explain the legal framework in place.

- Reiterates that *intentional* discrimination against protected classes is unlawful. Housing providers are prohibited from using criminal records as a pretext for discrimination. Referred to as “disparate treatment” liability.
- Explains that it is also unlawful to have policies that result in decisions that have a *discriminatory effect*, even if not intentional. Referred to as “discriminatory effects” or “disparate impact” liability.
- Describes the methods of proof that apply in the legal contexts for those two types of cases.



# FIRST CASE EXAMPLE:

## DISPARATE TREATMENT & DISCRIMINATION

Facts of the legal case: Individual A is a member of a protected class and was denied a rental unit. The housing provider says the denial was due to A's criminal record.

Evidence to show disparate treatment discrimination: Individual B, a "similarly situated" person not a member of a protected class, was rented a unit by this housing provider, even though B and A had a comparable criminal records.

Note: This is the long-standing, typical type of housing discrimination case. Nothing new here.



## SECOND CASE EXAMPLE: DISCRIMINATORY EFFECTS & DISCRIMINATION (1)

Facts of the legal case:

A housing provider has a “facially neutral” (doesn’t appear discriminatory on its face) policy such as refusal to rent to anyone with any record of drug-related crimes.

Individual A, a member of a protected class, has a record of drug possession.

She/he is denied a rental unit based on her/his criminal record.



## SECOND CASE EXAMPLE:

### DISCRIMINATORY EFFECTS & DISCRIMINATION (2)



Evidence to show discrimination in this legal case:

1. Complainant must show that the policy has a disparate impact on her/his protected class, using local or national data.
2. Housing provider must show that the policy has some legitimate justification – e.g., show that the conduct addressed would pose a substantial risk to other residents' safety or health, or to property. (No stereotypes or assumptions here – must have data and evidence.)
3. Complainant then must show that there is a less discriminatory alternative to accomplish the goals of protecting resident safety and property, other than the policy that currently exists.

But the courtroom is not the natural arena for most people on this webinar, so let's move past the legal methods of proof etc.



For you –  
housing providers and housing navigators -  
what are the day-to-day practical  
implications of the HUD OGC April 2016  
guidance?



# UNJUSTIFIABLE POLICIES

- Housing decisions based on arrest records only
- Blanket bans on any/all convictions (e.g., a blanket policy that individuals with felonies cannot be tenants)

# EXCEPTION TO RULE ABOUT “NO BLANKET OR OVERLY BROAD POLICIES”

Housing providers ARE allowed to deny housing on the basis of conviction for *manufacturing* or *distributing (selling) drugs*, even though discriminatory effects might be proven.

This is permissive, not mandatory.

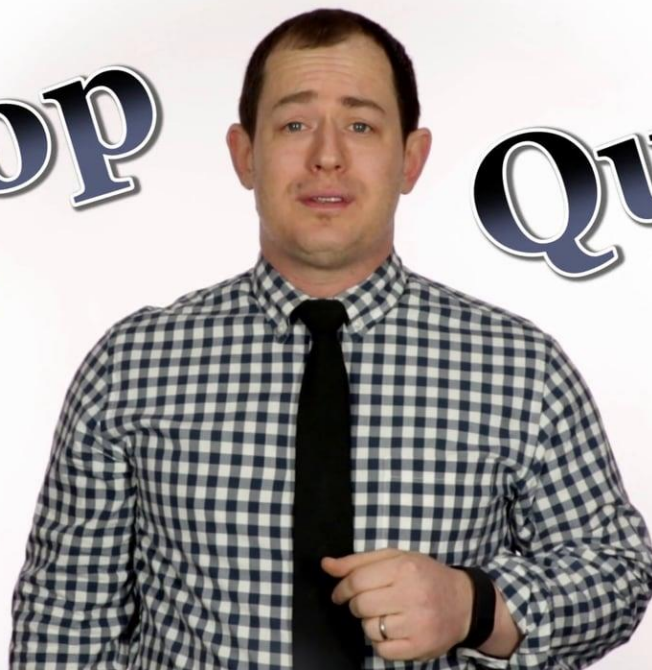
Not included in this exception: Other drug-related activity, such as possession.

Not included in this exception: Arrest, in the absence of conviction, for drug manufacturing or distribution.



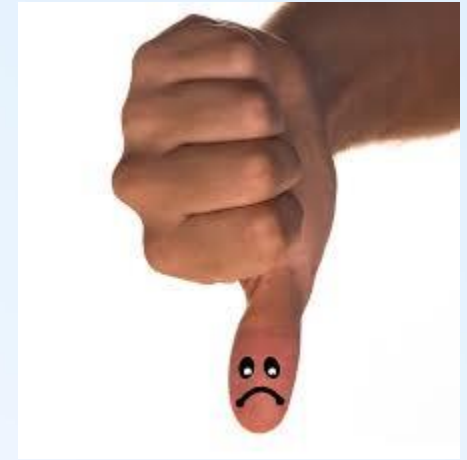


# Pop Quiz!



Poll 3: Which of these policies is acceptable?

# WHAT'S A GOOD HOUSING PROVIDER TO DO? (1)



First, get rid of the bad.

1. Throw out all policies related exclusively to arrests.
2. Throw out all policies that are blanket bans on convictions. No categorical exclusions.

# WHAT'S A GOOD HOUSING PROVIDER TO DO? (2)

Then, create the good.

Craft written policies (with training for employees) that take into account the following factors, and providing for *individualized assessments and applicant input* when appropriate.

- Does the *nature, severity, and recency* of the conduct underlying the conviction create a demonstrable risk to the safety of residents and property? (If not, do *not* consider at all in housing decision.)
- Facts surrounding the criminal conduct
- Age of the individual when the conduct occurred
- Length of time since the conduct and/or release from incarceration
- Mitigating evidence that the individual will be a good tenant (e.g., good rental history, good employment history, recommendation letters, case worker information)
- An opportunity for the applicant/tenant to be heard prior to a decision and appeal a decision afterward





## WHAT'S A GOOD HOUSING PROVIDER TO Do? (3)

When crafting policies, include specific guidance around:

- Nature –
  - examples of categories: crimes against person, crimes against property, crimes against society
  - for each individual offense, consider whether the conduct threatens residents and property
- Severity – felony or misdemeanor
- Recency – establish a “look back period”



# EXCERPT FROM SAMPLE POLICY

If evidence of a conviction for “**Assault and Battery**,” a **misdemeanor** conviction will not be considered relevant to any housing decision.

If evidence of a conviction for “Assault and Battery,” a **felony** conviction will be subject to further investigation, but only if the conviction occurred within the **past three years or less than one year** has passed since release from incarceration. Beyond that look-back period, the conviction will not be considered relevant to any housing decision.

**Further investigation** will consider mitigating factors and evidence of rehabilitation (e.g., facts related to the conduct itself, age of applicant at time of conduct, tenant history, employment history, recommendation letters).

**Red** – nature

**Green** – severity

**Blue** – recency

**Purple** – mitigating factors and individualized assessment



## CRIMINAL HISTORY-BASED HOUSING POLICIES AND PRACTICES

<u>Do's</u>	<u>Don'ts</u>
✓ Create tailored criminal history-based policies/practices.	× Don't create arbitrary or overly-broad criminal history-based policies/practices.
✓ Be sure to have clear, specific reasoning for the criminal history-based policy/practice that can be supported by evidence.	× Don't maintain a policy/practice, or any portion thereof, that does not serve a substantial, legitimate, nondiscriminatory interest.
✓ Exclude individuals only based on criminal convictions that present a demonstrable risk to resident safety or property.	× Don't create exclusions based on <u>arrest</u> records alone.
✓ Consider the nature and severity of an individual's conviction before excluding the individual based on the conviction.	× Don't create a blanket exclusion of any person with any conviction record.
✓ Consider the amount of time that has passed since the criminal conduct occurred.	× Don't provide inconsistent explanations for the denial of a housing application.
✓ Consider criminal history uniformly, regardless of an individual's inclusion in a protected class.	× Don't use criminal history as a pretext for unequal treatment of individuals of a protected class.
✓ Treat all applicants for housing equally, regardless of protected characteristics.	× Don't use comparable criminal history differently for individuals of protected classes.
✓ Conduct individualized assessments that take into account mitigating factors, such as facts and circumstances surrounding the criminal conduct, age at the time of the conduct, evidence of good tenancy before/after conduct, and rehabilitative efforts.	× Don't make exceptions to a policy or practice for some individuals, but not make the same exception for another individual based on the individual's inclusion in a protected class.
✓ Housing providers may exclude persons convicted of the illegal <u>manufacture</u> or <u>distribution</u> of a controlled substance. <sup>2</sup>	× Don't include a blanket prohibition against individuals convicted of drug <u>possession</u> .

Source: National Association of Realtors Legal Affairs Department, April 2016, "Fair Housing Act: Criminal History-Based Practices and Policies" (included as a handout to this webinar)





# WHAT'S A GOOD HOUSING NAVIGATOR TO DO? (1)

- Manage the messaging
  - Focus on educating and advocating
  - Provide standard printed materials to landlords so it won't feel as personal or accusatory
  - Refer to the federal Fair Housing Act, not HUD
- Collaborate with local fair housing agencies, legal aid/services, etc.
  - They can provide training, materials
  - They can help you assess the local situation
- Recognize the limitations too
  - Landlords still have the right to use credit history requirements, income requirements, and similar factors that may serve as barriers to housing



# WHAT'S A GOOD HOUSING NAVIGATOR TO DO? (2)

- Pick your battles



- If a battle is too costly – either to you organization or your clients – move on.
- If you choose to go to battle, make sure you're on solid legal ground.
- PHAs, other HUD-funded housing providers, and FHFC-funded housing providers should be the most interested in compliance. And, if they are not, you have an oversight authority to engage.







KEEP CALM

AND

ASK FOR TECHNICAL ASSISTANCE

FROM THE FLORIDA HOUSING COALITION

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