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# CRIMINAL BACKGROUND AND TENANT SCREENING: WHICH WAY TO TURN?

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## Fair Housing Act—Background

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### Disparate Impact

- Definition: a policy or practice which is neutral on its face but has a statistically significant negative effect on a group of persons protected by the non-discrimination law
- Need not show intent for disparate impact claims
- Claims based on statistics and expert analysis that suggest a rental housing policy has a discriminatory effect on a protected class



## Background and History: Employment

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- Disparate impact analysis of the use of arrests and convictions under Title VII, the employment discrimination law, is longstanding
  - Green v. Missouri Pacific Railway, 523 F.2d 1290 (8<sup>th</sup> Cir. 1975)
  - Consideration of a conviction as an absolute bar to employment was rejected because it had a disproportionate impact based on race.
    - Consider a criminal conviction as a factor if taking account of:
      - The nature and gravity of the offense or offenses
      - The time that has passed since the conviction and/or completion of sentence, and
      - The nature of the job for which the applicant has applied



## Employment: Don't Consider Arrests

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- Equal Employment Opportunity Commission has issued guidance on the arrest and conviction issue (2012)
  - Arrests may not be relied on for adverse employment decision making
    - Arrests are not proof of criminal conduct
    - Arrest records are not reliable evidence of conduct
    - Arrest records do not reliably report the final outcome
    - Innocent until proven guilty



# Employment: Convictions Considered with Limitations

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- Convictions may be evidence that triggers further inquiry
  - Convictions generally are evidence that the person engaged in the conduct
  - Conviction evidence may not reflect final outcomes
  - Conviction consideration must be related to the employment in question and demonstrate some connection to a risk in the job in question



## Employment: Individualized Assessment

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- Individualized assessment that considers
  - The nature of the crime
  - The time elapsed and
  - The nature of the job



## Housing: One Strike

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- HUD One Strike guidance upheld by the Supreme Court
  - HUD v. Rucker, 535 U.S. 125 (2002), upheld one strike statutory provisions
  - “Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.”



## Housing: Concerns with One Strike

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- Concerns
  - Note that one strike is about current criminal activity that threatens others and drug related activity and authorizes the entire household to be evicted if one resident or guest engages in the activity. It doesn't address past activity. The Court did not discuss the civil rights implications of this issue.
  - Criticized because a policy under this provision may cause the eviction of innocent family members and contribute to homelessness.
  - PHAs were permitted to apply one strike only to the person engaging in criminal activity; some did and some did not.





# Housing: HUD Addresses Criminal Background Issues

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- HUD encourages easing of criminal background barriers and expresses re-entry concerns
  - Letters from Secretary Shaun Donovan and former Assistant Secretaries Sandi Henriquez and Carol Galante encouraging easing of criminal background barriers in public housing (2011) and HUD assisted housing (2012)



# Housing:

## Public Housing and Assisted Housing Exclusions

- Federal statutes and regulations permit certain exclusions by PHAs and other federally assisted housing (24 CFR § 960.203(c)(3) and 960.204). PHAs are required to prohibit admission of families with members:
  - Who have been evicted from federally assisted housing for drug related criminal activity for three years following the date of eviction (unless the family can demonstrate that the person who engaged in the drug related activity has been rehabilitated or is no longer a member of the household)
  - Who are currently engaging in illegal use of a drug
  - Who have shown a pattern of use of illegal drugs that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents
  - Who are subject to a lifetime registration requirement under a State sex offender registration program
  - Whose abuse of alcohol or pattern of abuse of alcohol would interfere with the health, safety or right to peaceful enjoyment of the premises by other residents
  - Who have ever been convicted of drug-related criminal activity for manufacture of methamphetamine on the premises of federally assisted housing.



## Housing: Public and Assisted Housing: Recent HUD Guidance

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- HUD's Public Housing Agency guidance, Notice 2015-19, November 2, 2015
  - Reliance on arrests is insufficient to deny housing; decision must be made on conduct that indicates that person is not suitable for tenancy
  - Due process requires that PHAs provide public housing, project-based Section 8, and Section 8 HCV applicants with notification and the opportunity to dispute the accuracy and relevance of a criminal record *before* admission or assistance is denied on the basis of such record
  - One strike is not mandatory



## Housing: Public and Assisted Housing

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- Decisions on use of criminal background may consider a range of factors including:
  - the seriousness of the offending action;
  - the effect that eviction of the entire household would have on family members not involved in the criminal activity;
  - the extent to which the leaseholder has taken all reasonable steps to prevent or mitigate the criminal activity;
  - for drug related offenses, whether or not the individual has successfully completed a rehabilitation program



## Housing: Public and Assisted Housing

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- In March 2016 HUD issued FAQs on its Notice
  - An arrest may trigger a further inquiry
    - police reports that detail the circumstances of the arrest
    - witness statements not part of the police report
    - whether formal charges were filed
    - whether charges were withdrawn, abandoned, dismissed or resulted in acquittal
    - other evidence that the applicant engaged in the disqualifying criminal activity
- [http://portal.hud.gov/hudportal/documents/huddoc?id=FAQ\\_Exclude\\_Arrest\\_Records.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=FAQ_Exclude_Arrest_Records.pdf)



## Housing: All Housing-Fair Housing Act

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- In April 2016, HUD issued an opinion on arrests and convictions under the Fair Housing Act; tracks to a great extent EEOC's guidance for employment
- HUD was influenced by external and internal advocacy, adverse consequences of one strike application, interest in reentry issues, lack of housing choices for persons with criminal history to move deeper into criminal background area in housing. EEOC guidance was considered in its analysis.



## Housing: All Housing-Fair Housing Act

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- The opinion:
  - Evaluates both arrests and convictions
  - Confirms that a blanket ban on arrests cannot be justified
  - Confirms that a blanket ban on convictions also cannot be justified



# Housing: All Housing-Fair Housing Act

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- Considerations by housers:
  - A housing provider with a policy or practice that excludes persons with certain types of convictions must show that the policy excludes conduct by addressing a demonstrable risk to resident safety or health
  - The policy or practice must consider the nature, severity, and recency of criminal conduct and show a relationship to risk to resident safety or health
  - An individualized assessment of particular circumstances is likely to be a less discriminatory alternative; more likely to be upheld than categorical exclusions based on type of conviction
  - Delay of consideration of conduct until after other screening has occurred
  - Mitigating circumstances can be considered in the individualized assessment





## Housing: Mitigating Circumstances

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- HUD's guidance strongly suggests consideration of mitigating circumstances as part of a case by case assessment triggered by evidence of conduct that poses a demonstrable risk to others
- Relevant individualized evidence might include:
  - the facts or circumstances surrounding the criminal conduct;
  - the age of the individual at the time of the conduct;
  - evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct;
  - evidence of rehabilitation efforts



## Housing: Mitigating Circumstances

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- Other factors should include (if not incorporated into a policy):
  - The nature and severity of the criminal conduct and how it relates to a demonstrable risk to resident health or safety
  - How long since the conduct or the conviction



## Housing: Reasonable Accommodations

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- For persons who are identifiable as having a disability, reasonable accommodations should also be considered
  - How do you identify disability?
    - If person is observed, observation (if the disability is obvious, may not request back up information)
    - Information about source of income or type of benefits that identify person as disabled
    - If person self-identifies as a person with a disability
  - Fair Housing Act requires reasonable accommodations “in rules, policies, practices, or services, when the accommodations may be necessary to afford ... person(s) [with disabilities] equal opportunity to use and enjoy a dwelling.”



## Housing: Disabled Persons and Direct Threats

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- The Act does not protect an individual with a disability whose tenancy would constitute a "direct threat" to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by a reasonable accommodation.
- If a person with a disability, must assess conduct to determine whether it presents a "direct threat"
- Then determine whether the threat can be eliminated or significantly reduced by a reasonable accommodation
  - Typical reasonable accommodations
    - Medication and/or counseling will reduce or eliminate the risk
    - Circumstances leading to the threat have been eliminated
    - Warning and/or last chance agreement
    - Examples from case law



## Housing: Disabled Persons and Direct Threat

- Direct threat defense only comes into play when there is no reasonable accommodation that could ameliorate the situation sufficiently to protect the health, safety, and property of others



## Housing: Where Does This Leave Us?

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1. This issue is not about disparate impact, it's about bad conduct by a person which makes him or her unsuitable tenant
2. "One Strike" should not be used based only on an arrest; likely to be challenged as having a disparate impact unless additional evidence is gathered.
3. The "bad conduct" concern exists whether or not there is an arrest, a conviction, a past bad experience with another landlord, or other current or past bad behavior.
4. A single policy should focus on conduct, not solely on arrests or convictions.
5. The conduct should relate to unsuitability to be a tenant, including whether the conduct presents a risk to the health or safety of others or the property of others



## Housing: Where Does This Leave Us?

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6. How long ago counts: A single policy should focus on exclusions for recent bad conduct, with longer time frames for exclusion for worse conduct
7. Some conduct may be so bad that it can be the basis for lifetime exclusion absent consideration of reasonable accommodations or mitigating circumstances (but should it be?)
8. A second look (and a second chance) should be available, considering mitigating circumstances and reasonable accommodations, and that decision should be made, to the extent possible, by a single person, to help ensure uniformity of application
9. Provide notice and an opportunity for a second look.
10. Use strategies that exclude the bad actor, not her or his whole family.



## Housing: Try This for a Policy

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- Consider any conduct within the past three-five years that presents a direct threat to the health or safety of others or which caused substantial damage to the property of others or other conduct that is likely to cause the person to be a poor tenant, such as negative landlord references, repeated late rent payments, evictions
- Do not consider arrests without more evidence; convictions may be considered as evidence that the conduct occurred.
- Consider the statutory and/or regulatory exclusions, which are required for HUD funded housing
- Before excluding, give written notice and a chance to be heard
  - Best if this review is done by a single point of contact
  - In phone, in writing, in person
- Consider mitigating circumstances
- Consider reasonable accommodations for people who can be identified as persons with disabilities





# Questions?

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