

Housing and People with Criminal Records

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Homeliness Likelihood

Formerly incarcerated individuals are 10 times more likely to experience homelessness than the general population. The likelihood is higher:

- For women
- For Black and Latinx individuals
- As a person ages
- The more times a person is incarcerated
- During the period immediately after release

People with Disabilities and the Criminal Legal System

- People with disabilities are overrepresented in the criminal legal system.
- Nearly 2 in 5 (38%) state and federal prisoners had at least one disability in 2016.
- The most commonly reported type of disability among both state and federal prisoners was a cognitive disability (23%), followed by ambulatory (12%) and vision (11%) disabilities.
- Among all prisoners, 24% reported that a doctor, psychologist, or teacher had told them at some point in their life that they had an attention deficit disorder.
- Nearly a quarter of all prisoners reported participating in special education classes (24%).
- State and federal prisoners (38%) were about two and a half times more likely to report a disability than adults in the U.S. general population (15%).
- ***Bureau of Justice Statistics:** <https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf>

People of Color and the Criminal Legal System

- A Black person is 5x more likely to be stopped without just cause than a White person.
- 5% of illicit drug users are Black, yet Black people represent 29% of those arrested and 33% of those incarcerated for drug-related offenses.
- Black and White Americans use drugs at similar rates, yet Black Americans are almost 6x more likely to be imprisoned for drug-related offenses.
- 32% of Americans are African-American or LatinX, and represent 56% of those incarcerated.
- Native Americans are jailed at nearly 2x the rate of White and LatinX Americans. In states with large Native American populations, Native Americans are incarcerated at up to 7x the rate of White Americans. (Bureau of Justice Statistics).
- **NAACP Criminal Justice Fact Sheet**

Barriers for People with Criminal Records

- Nearly 50,000 legal restrictions against people with arrest and conviction records block access to jobs, housing, and educational opportunities; this contributes to higher rates of interaction with the criminal legal system, including recidivism. (NAACP Criminal Justice Fact Sheet).

Housing Barriers For People With Disabilities Re-entering The Community

- Limited Community Supports & Services
- Criminal Record/Activity Bans
- Long look-back periods for criminal history
- Refusal to consider whether the activity was connected to a disability and provide appropriate accommodations.
- Crime-Free/Nuisance Ordinances
- Lack of Affordable Housing
- Lack of Accessible Housing

Federally Subsidized Housing

Mandatory Bans

Public housing authorities and project owners MUST deny admission to:

1. Anyone who has been convicted of manufacturing methamphetamine on federally assisted property;
2. Anyone subject to lifetime registration for a sex offense;
3. Current users of illegal drugs, abusers of alcohol, or pattern interfering with health, safety, peaceful enjoyment; or
4. Anyone who, *within the last 3 years*, has been evicted from federal housing for drug-related criminal activity *unless* (1) drug rehabilitation or (2) circumstances leading to eviction no longer exist.

Discretionary Bans

Public housing authorities and project owners MAY consider denying admission, evicting or terminate assistance for:

1. Drug-related criminal activity – manufacture, sale, distribution, use, or possession;
2. Violent criminal activity – use of or threatened use of physical force that will cause serious bodily injury or property damage;
3. Other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing employees.

Note that this last category is not a catch-all.

Limits on Discretion

Public housing authorities and project owners' discretion subject to two additional, important limits:

1. Civil Rights Laws, including federal Fair Housing Act
2. Time – Criminal activity must have occurred during a “reasonable time” before the screening takes place. 42 U.S.C. §13661(c)(2012).

HUD Notices PIH 2015-19/H 2015-10

- One Strike is not required.
- Arrests alone cannot justify denial of admission or eviction.
- Applicants and tenants have due process rights.
- Criminal records screening must comply with civil rights laws.
- Best practices

Tips for Representing Clients Before PHAs & Other Housing Providers

- Familiarize Yourself with Applicable HUD Guidance
- Research Any State and Local Protections (e.g., CA's FEHA Regulations)
- Advocate for better policies in local PHA plans (e.g., Administrative Plan, Administrative and Continued Occupancy Plan)
- Hold Housing Authorities Accountable to their Own Rules (e.g., Lookback Periods)

Emergency Housing Vouchers

- Vouchers to help individuals and families who are homeless, at-risk of homelessness, fleeing, or attempting to flee, domestic violence, dating violence, sexual assault, stalking, or human trafficking, or were recently homeless or have a high risk of housing instability
- Public housing authorities cannot deny vouchers based on drug-related criminal activity.
- Public housing authorities can deny vouchers if an applicant has engaged violent criminal activity and other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing employees. The time period is limited to the last 12 months.

Low Income Housing Tax Credit

- Largest source of financing for affordable housing
- Administered by Treasury, but HUD's 2016 criminal record guidance applies
- Some LIHTC properties also have HUD subsidies attached, such as project-based Section 8, which triggers HUD regulations.
- Tenant selection policies can be egregious (99 years) and hard to obtain.
- Some states have successfully advocated for their state housing finance agency for guidance and policies that promote housing opportunities for people with records. (examples: Georgia, Ohio)

Tips for LIHTC Advocacy

- Make sure to obtain the tenant screening policies from the property manager or opposing counsel.
- For example, working with a tenants' union, we discovered this in a building's admissions criteria:

Criminal History

Any individual who is convicted of a felony and/or misdemeanor or any individual, who may constitute a direct threat to the health and safety of other individuals, the complex, or the property of others, will be denied.

Any individual who was convicted of any felony and/or misdemeanor(s) that occurred more than three (3) years ago must provide all supporting legal documentation, which will be reviewed by staff for Management approval.

FAIR HOUSING ACT

The Fair Housing Act

prohibits discrimination because of race, color, national origin, religion, sex, familial status, and disability in the sale and rental of housing

FAIR HOUSING AND CRIMINAL RECORDS

- **Criminal records status not a protected class**
- **But use of criminal records may violate the Fair Housing Act:**
 - **Disparate Treatment – intentionally treating different protected classes differently**
 - **Disparate Impact – practices which have unjustifiable disproportionate negative effects on a protected class**

HUD 2016 CRIMINAL RECORDS GUIDANCE

- **Applies Fair Housing Act analysis to use of criminal records**
- **Currently focuses on race but also applicable to disability**
- **Big takeaways:**
 - **Generally, no use of arrests without convictions**
 - **Generally, no blanket bans on convictions**

CRIME FREE NUISANCE ORDINANCES

Ordinances which require landlords to abate “nuisances” associated with property under threat of punishment

- **“Nuisance” examples:**

- **Too many calls to police re property**
- **Arrest/conviction of household member**
- **Violation of crime-free lease addendum**

HUD 2016 GUIDANCE RE CRIME FREE NUISANCE ORDINANCES

- **Focuses on survivors of domestic violence**
- **But analysis also applies to disability, race, other protected classes**
 - **Disparate treatment**
 - **Disparate impact**

State and Local Examples

- California's Department of Fair Employment and Housing has implemented disability-specific regulations regarding:
- Reasonable Accommodations;
- The Interactive Process;
- Establishing that a Requested Accommodation Is Necessary;
- Denial of a Reasonable Accommodation; &
- Assistance Animals

State and Local Examples (1)

- On January 1, 2020, California's Department of Fair Employment and Housing implemented regulations regarding the use of criminal history in housing. 2 California Code of Regulations Article 24
- Intentional Discrimination Is Not Required; Unjustified Discriminatory Effect on Protected Class Violates the Law
- No Blanket Bans
- Housing Providers May Still Run Lawful Criminal History Checks
- Denial of Housing Must Be Based on "Directly-Related*" Convictions
- Does not apply to evictions filed before the CARES Act rules were put in place.
- Housing providers may not deny housing based on: arrests that did not lead to conviction; diversion programs or DEJ; sealed, dismissed, or expunged convictions; juvenile criminal records.

State and Local Examples (2)

2 CCR § 12266(e) Mitigating information means credible information about the individual that suggests that the individual is not likely to pose a demonstrable risk to the achievement of the identified interest. Credible information is information that a reasonable person would believe is true based on the source and content of the information. Mitigating information includes:

- (1) Whether the individual was a minor or young adult at the time of the conduct upon which the criminal conviction is based;
- (2) The amount of time that has passed since the date of conviction;
- (3) Evidence that the individual has maintained a good tenant history before and/or after the conviction;

State and Local Examples (3)

(4) Evidence of rehabilitation efforts, including a person's satisfactory compliance with all terms and conditions of parole and/or probation; successful completion of parole, probation, mandatory supervision, or Post Release Community Supervision; a Certificate of Rehabilitation under Penal Code section 4852.01; or other conduct demonstrating rehabilitation, such as maintenance of steady employment;

(5) Whether the conduct arose from the individual's status as a survivor of domestic violence, sexual assault, dating violence, stalking, or comparable offenses against the individual;

(6) Whether the conduct arose from the individual's disability, or any risks related to such conduct, which could be sufficiently mitigated or eliminated by a reasonable accommodation; or

(7) Other relevant facts or circumstances surrounding the criminal conduct and/or conduct after the conviction.

State and Local Examples (4)

- On January 1, 2020, California's Department of Fair Employment and Housing implemented regulations regarding the unlawful use of nuisance ordinances.
- Deems practices that require action against people in protected classes for "nuisance activities," to be unlawful.
- Finds nuisance laws that have a discriminatory effect on protected classes, without legally sufficient justification, to be unlawful.
- Outlaws the enforcement of laws that mandate the initiation of eviction proceedings against tenants/occupants that are arrested or convicted of crimes.

Overview of Law on Reasonable Accommodations In Housing

Reasonable Accommodation

- If a tenant has an obstacle to obtaining or maintaining housing because of a disability, the tenant can **request a reasonable accommodation**. 42 U.S.C.A. §3604(f) ; 29 U.S.C.A. §794 ; 42 U.S.C.A. §§ 12131.
- A reasonable accommodation is a **change** in a rule, policy, practice, or service that may be necessary to allow a person with a disability the equal opportunity to use and enjoy a dwelling. 42 U.S.C.A. §3604(f).

When must a housing provider grant a reasonable accommodation request?

- When a **person with a disability** makes a request that is:

- **NECESSARY + REASONABLE =**

- **MUST GRANT ACCOMMODATION**

Necessary + Reasonable

- Necessary to use and enjoy the dwelling—affirmatively enhances the tenant’s quality of life by ameliorating the effects of the disability. *Bronk v. Ineichen*, 54 F.3d 425, 42 (7th Cir. 1995).
- Reasonable—no **undue financial or administrative burden**. Cannot **fundamentally alter** the nature of the program. 24 C.F.R. §8.11.
- But landlord can assert that the individual constitutes a **direct threat** to the health and safety of others or significant damage to the property that cannot be reduced by a reasonable accommodation.

Advocacy Tips:

Denial of Admission Hypo

- Evan's application for a Project-Based Section 8 unit was denied due to his prior criminal activity. Evan has several convictions on his record including for assault, indecent exposure, and disturbing the peace. His most recent conviction occurred nine years ago. Evan experiences severe depression and substance dependence. Evan alleges that all his prior criminal activity is related to alcohol and drug abuse.

Advocacy Tips:

Denial of Admission Issues

- What kind of housing is this?
- Look-Back Period: When did the criminal activity occur?
Evidence of disability at the time?
- Did the owner consider mitigating circumstances?
- Reasonable accommodations?
- Nature and Severity of Crime(s)
- Relationship to tenancy
- Legal Status of Individuals In Recovery from Substance Abuse Under the FHAA, Section 504, and ADA

Advocacy Tips:

Denial of Admission Issues (cont.)

- Process—Did the housing provider notify Evan of his right to review the denial, or his right to request a reasonable accommodation?
- Nexus—causal link between disability and incident.

Advocacy Tips:

Denial of Admission Example

- Former Substance Abuse: explain to housing provider that substance abuse is a disability.
- “Nothing...shall be construed to exclude as an individual with handicaps an individual who—(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (III) is erroneously regarded as engaging in such use, but is not engaging in such use.” 29 U.S.C. §705(20)(C)(i).

Some cases

- Negative: *Evans v. UDR, Inc.*, 644 F. Supp.2d 675, 677 (E.D.N.C 2009)
- Positive and rejecting Evans: *Simmons v. T.M. Assocs. Mgmt., Inc.*, 287 F. Supp. 3d 600, 601 (W.D. Va. 2018)
- Landlord "posits that a housing provider may issue blanket denials of housing to those with convictions, regardless of an applicant's disability status, and even if the criminal conduct derived from the applicant's disability. This theory is mistaken."
- Many more positive cases in the eviction context.

Advocacy Tip: Expungement Clinics

- Partnering with expungement projects to outreach to unstably housed individuals to access more stable housing or employment.
- Can be an empowering process – instead of being reactionary it is proactive.
- Getting record can allow people actually see their whole record, which is not otherwise common.

TENANT SCREENING COMPANIES

- **Conduct tenant background checks, including criminal history**
- **Often provide a score/recommendation**
- **Problems: Inaccurate, incomplete, opaque**

LEGAL REMEDIES

Fair Credit Reporting Act

- Right to information used against you
- Dispute inaccurate information

Fair Housing Act – HUD Criminal Records Guidance may apply to screening companies (esp. if they make recommendation) - *see Conn. Fair Hous. Ctr. v. Corelogic Rental*, 369 F. Supp. 3d 362, 371-75 (D. Conn. 2019).

Resources

- [National Housing Law Project, An Affordable Home on Reentry: https://www.nhlp.org/wp-content/uploads/2018/08/Rentry-Manual-2018-FINALne.pdf](https://www.nhlp.org/wp-content/uploads/2018/08/Rentry-Manual-2018-FINALne.pdf)
- Charles Francis, Thomas Coyne, and Katie Herman, The Council of State Governments Justice Center, Melville Charitable Trust, Reducing Homelessness for People with Behavioral Health Needs Leaving Prisons and Jails: <https://www.cdcr.ca.gov/ccjbh/reducing-homelessness-for-people-with-behavioral-health-needs-leaving-prisons-and-jails/>

Resources, cont.

- Shriver Center on Poverty Law, When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing, <https://www.povertylaw.org/article/when-discretion-means-denial/>
- Shriver Center on Poverty Law, Screened Out: How Tenant Screening Reports Undermine Fair Housing Laws and Deprive Tenants of Equal Access to Housing in Illinois, <https://www.povertylaw.org/report/tenant-screening-report/>
- National Consumer Law Center, Broken Records Redux, <https://www.nclc.org/issues/rpt-broken-records-redux.html>