

Criminal History-Based Housing

The Asset Management Department oversees MFA’s portfolio of affordable properties located across the state. Our portfolio of over 260 multi-family properties – over sixteen thousand units – secures quality housing for seniors, families, persons with disability and the special needs housing community. Specifically, the Department performs long-term compliance monitoring for a wide-range of housing programs. Our monitoring functions include the physical inspection of properties, onsite resident file auditing and compliance auditing of property operations, and financial analysis of the property as a sustainable asset. Currently, the Department oversees and monitors for:

- Low Income Housing Tax Credit Program (LIHTC),
- Tax Credit Assistance Program (TCAP),
- Tax Credit Exchange Program (TCEP),
- HUD Section 8 Project-Based Program,
- HUD HOME Program,
- HUD 542c Risk Share Program,
- FDIC/RTC and
- Rural developments 538 program.

The Fair Housing Act was passed at the urging of President Lyndon B. Johnson. Congress passed the federal Fair Housing Act (codified at 42 U.S.C. 3601-3619, penalties for violation at 42 U.S.C. 3631), Title VIII of the Civil Rights Act of 1968, only one week after the assassination of Martin Luther King, Jr. The primary purpose of the Fair Housing Law of 1968 is to protect the buyer/renter of a dwelling from seller/landlord discrimination. Its primary prohibition makes it unlawful to refuse to sell, rent to, or negotiate with any person because of that person's inclusion in a protected class.

In United States federal anti-discrimination law, a **protected class** is a characteristic of a person which cannot be targeted for discrimination. The following characteristics are considered "Protected Classes" by Federal law:

- Race
- Color
- Religion
- Sex
- National Origin
- Disability
- Family Status

While persons with criminal records are not a protected class under the Act, HUD stresses that criminal history-based barriers to housing have a statistically disproportionate impact on minorities, which *are* a protected class under the Act, and as such, creating arbitrary or blanket criminal-based policies or restrictions could violate the Fair Housing Act ("FHA" or "Act"). To be clear, HUD's guidance does not preclude housing providers from crafting criminal history-based policies or practices, but the guidance makes evident that housing providers should create thoughtful policies and practices that are tailored to serve a substantial, legitimate, and nondiscriminatory interest of the housing provider, such as resident safety or the protection of property.

Pursuant to 24 CFR Parts 5.903, 960 and 982, PHAs are authorized to obtain and use the criminal records to screen applicants for admission to public housing and HCV programs, and for lease enforcement or eviction of families residing in public housing or receiving HCV assistance. The Department of Housing and Urban Development (HUD) has issued guidance restricting the use of criminal background checks to screen prospective residents. The guidance warns property owners that a blanket policy rejecting residents solely because they have a criminal record may violate the Fair Housing Act, because it could have a discriminatory impact on minorities.

Criminal History-Based Housing Policies and Practices	
Do's	Don'ts
✓ 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 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 arrest records alone
✓ Consider the nature of severity of an individual's conviction before excluding the individual based on the conviction	× Don't create a blanket exclusion of any persons 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 applicant.
✓ 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 characteristic	× Don't use comparable criminal history differently for individuals of a protected class
✓ 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 individuals inclusion in a protected class
✓ Housing providers may exclude persons convicted of the illegal manufacture or distribution of controlled substance.	× Don't include a blanket prohibition against individuals convicted of a drug possession
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Tenant Selection Plan For Section 8 Project Based Program

For those properties that receive Section 8 funding, Owners must develop and make public written tenant selection policies and procedures that include descriptions of the eligibility requirements and income limits for admission. The restriction or preference must cite the supporting documentation to ensure nondiscrimination in the selection of tenants. The contents of the plan also must be consistent with the purpose of improving housing opportunities and be reasonably related to program eligibility and an applicant's ability to perform the obligations of the lease.

Required Criminal and Drug Screening Standards

Tenant selection plans must contain screening criteria that includes standards for prohibiting admission of those who have engaged in drug related or criminal activity. The plan may, under certain circumstances, include additional provisions that deny admission to applicants for other drug and criminal activity.

Owners must establish standards that prohibit admission of:

- Any household containing a member(s) who was evicted in the last three years from federally assisted housing for drug-related criminal activity.
- A household in which any member is currently engaged in illegal use of drugs or for which the owner has reasonable cause to believe that a member's illegal use or pattern of illegal use of a drug may interfere with the health, safety, and right to peaceful enjoyment of the property by other residents;
- Any household member who is subject to a state sex offender lifetime registration requirement; and
- Any household member if there is reasonable cause to believe that member's behavior, from abuse or pattern of abuse of alcohol, may interfere with the health, safety, and right to peaceful enjoyment by other residents. The screening standards must be based on behavior, not the condition of alcoholism or alcohol abuse.

Owners may establish additional standards that prohibit admission if the owner determines that any household member is currently engaging in, or has engaged in, the following activities during a reasonable time before the admission decision:

- Drug-related criminal activity. The owner may include additional standards beyond the required standards that prohibit admission in the case of eviction from federally assisted housing for drug related criminal activity and current drug use.
- Violent criminal activity.
- Other criminal activity that threatens the health, safety, and right to peaceful enjoyment of the property by other residents or the health and safety of the owner, employees, contractors, subcontractors, or agents of the owner.