



DISPARATE IMPACT

HUD Guidance may make you take a second look at your criminal history criteria.

IN FEBRUARY 2013, HUD published a rule with respect to the implementation of the Fair Housing Act's discriminatory effects standard, otherwise known as disparate impact. On June 25, 2015, the United States Supreme Court ruled in a case entitled *Texas Department of Housing and Community Affairs, et al v. Inclusive Communities Project, Inc. et al* that a policy with a discriminatory effect (rather than a discriminatory intent) can be a violation of the act. On April 4, HUD published its Guidance to address how the discriminatory effects and disparate treatment methods of proof apply in cases in which housing providers justify an adverse housing action, such as a refusal to rent or renew a lease, based on an individual's criminal history. The disparate impact analysis provided in the Guidance is not new or surprising. However, the Guidance gives you HUD's viewpoint of how disparate impact analysis applies to the use of criminal records in determining eligibility for rental.

Disparate Impact

The Guidance provides that a housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate. Under this standard, a facially neutral policy or practice that has a discriminatory effect violates the act if it is not supported by a legally sufficient justification.

When a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race, national origin or other protected class, such policy or practice is unlawful under the Fair Housing Act if: (i) it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider; or (ii) such interest could be served by another practice that has a less discriminatory effect.

Three-step Burden-shifting Analysis

In its rules, HUD outlines a three-step burden-shifting analysis to determine whether a policy or practice violates the Fair Housing Act. The Guidance discusses this three-step process in connection with a policy that denies applications based upon a person's criminal history.

Step 1: In the first step, a complainant must prove that the criminal history criteria has a discriminatory effect. That is, that the criteria results in a disparate impact on a group of persons in a protected class, such as race or national origin. This burden is satisfied by presenting evidence that proves the challenged practice actually or predictably results in a disparate impact.

The Guidance notes that African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate in comparison to the general population.

Regardless of the data, determining whether a policy or practice results in a disparate impact is ultimately effect-specific and case-specific.

Step 2: In the second step, the burden shifts to the housing provider to prove that the challenged policy or practice is justified. That is, that the policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider.

According to the Guidance, the interest proffered by the housing provider may not be hypothetical or speculative, meaning the housing provider must be able to provide evidence proving both that the housing provider has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest.

Although the specific interests that underlie a criminal history policy or practice will no doubt

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vary from case-to-case, the Guidance notes some landlords and property managers have asserted the protection of residents and property as a reason for such policies or practices. However, HUD states, bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record, are not sufficient to satisfy this burden.

The Guidance notes:

a. A housing provider with a policy or practice of excluding individuals because of prior arrests cannot satisfy its burden.

b. A housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden.

c. A housing provider with a more tailored policy or practice that excludes individuals with only certain types of convictions must still prove that its policy is necessary to serve a substantial, legitimate, nondiscriminatory interest. To do this, a housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to residents' safety or property and criminal conduct that does not.

Step 3: In the third step, the burden shifts back to the complainant to prove that a housing provider's interest could be served by another practice that has a less discriminatory effect. This step is applicable only if a housing provider successfully proves that its criminal

history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest.

The identification of a less discriminatory alternative will depend on the particulars of the criminal history policy or practice under challenge. An individualized assessment of relevant mitigating information beyond what is contained in an individual's criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. HUD suggests relevant individualized evidence might include: (i) the facts or circumstances surrounding the criminal conduct; (ii) the age of the individual at the time of the conduct; (ii) evidence that the individual has maintained a good tenant history before or after the conviction or conduct; and (iv) evidence of rehabilitation efforts.

What You Can Do

1. Evaluate your criminal history criteria to determine whether it could have a discriminatory effect, even if it does not have a discriminatory intent. Consider the statements in the Guidance regarding that African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate in comparison to the general population.

2. Be able to articulate your substantial, legitimate, nondiscriminatory interest in whatever criminal history criteria you choose to determine eligibility for rental. In addition to what the Guidance suggests regarding the protection of other residents and their property, you might consider potential liability if you rent to persons with certain criminal histories. A new Texas law that went into effect Jan. 1 provides that the law does not preclude a cause of action for negligence in leasing a unit to residents convicted of certain offenses listed in the Code of Criminal Procedure. These offenses include murder, indecency with a child, sexual assault, offenses requiring sex offender registration and other serious offenses.

3. Consider addressing your substantial, legitimate, nondiscriminatory interest by specifying certain felonies that would warrant automatic rejection (such as those offenses identified in the new Texas law) and certain other offenses that would warrant rejection if the offense occurred within a certain period of time. In this regard, the Guidance cites a paper reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record.

4. Note that the Guidance identifies a provision of the Fair Housing Act that does not prohibit conduct against a person because the person has been convicted of the illegal manufacture or distribution of a controlled substance under the federal Controlled Substances Act. In other words, the housing provider will not be liable under the Fair Housing Act for excluding individuals because they have been convicted of one or more of the specified drug crimes, regardless of any discriminatory effect that may result from such a policy.

5. Also note that the Supreme Court, in the Texas Department of Housing and Community Affairs case, held that a disparate impact claim that relies on a statistical disparity fails if the claimant cannot point to the provider's policy as causing the disparity. In other words, even though a policy may have a discriminatory effect on the general population, a disparate impact claim should fail if there is no evidence that the particular policy had a discriminatory effect with respect to your property.

In light of the Guidance, I would not be surprised to see an increase in enforcement activity by HUD, the Texas Workforce Center and local agencies. Be prepared. Review your criminal history rental criteria to address the issues discussed in the Guidance. 



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