

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

SUPPORTING OLDER ADULTS
AFTER INCARCERATION SERIES

Fair Housing Protections for Formerly Incarcerated and Justice- Involved Older Adults

As the overall population ages, the prison and jail population is aging too. Older adults reentering our communities are disproportionately older adults of color, especially Black men. The unique and significant disadvantages caused by structural racism in the criminal justice system and throughout their lives follow individuals well beyond the prison and jail walls. As a result, older adults leaving prison and jail are at risk of being unable to access health care, housing, and a range of health and economic security benefits that could help them transition smoothly and live securely in the community.

With support from AARP Public Policy Institute, Justice in Aging is releasing a series of issue briefs to ensure advocates and service providers are aware of the unique challenges older adults reentering the community after incarceration face and to provide the tools they need to connect their older adult clients to the safety net benefits they need.

This third issue brief in the series outlines protections for people with criminal records under the federal Fair Housing Act (FHA) and is meant to help advocates identify potential fair housing issues in cases where older adults are denied housing based on previous involvement with the justice system.

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INTRODUCTION

Housing discrimination is one of the biggest barriers that older adults with criminal records face when trying to secure housing. Housing providers – from traditional landlords to nursing homes – widely conduct criminal background checks and reject applicants based on criminal records even though criminal history is not a reliable predictor of housing success.¹ This issue brief outlines protections for people with criminal records under the federal Fair Housing Act (FHA) and is meant to help advocates identify potential fair housing issues in cases where older adults are denied housing based on previous involvement with the justice system.

Note About Federally Assisted Housing

This issue brief will not cover specific rules concerning criminal history and admission into federally assisted housing programs (public housing, the Housing Choice Voucher program, etc.).² However, advocates should note that, contrary to some common misperceptions, many people with felony convictions can be eligible for federally subsidized housing.³ Advocates should also be aware that within a few months of this issue brief's publication date, the U.S. Department of Housing and Urban Development (HUD) is expected to issue a Notice of Proposed Rulemaking with proposed changes to its regulations to prevent unnecessary denials of housing assistance for justice-involved people.

THE FAIR HOUSING ACT FOR JUSTICE-INVOLVED INDIVIDUALS

The FHA applies to most private and subsidized housing and prohibits housing discrimination based on several protected characteristics: race, color, religion, national origin, sex (including gender identity and sexual orientation), disability, and familial status.⁴ While having a criminal record is not a federally protected characteristic, housing providers may violate the FHA by using an individual's criminal history to deny housing to people who belong to protected classes, such as people of color or people with disabilities. HUD has acknowledged that people of color and people with disabilities are overrepresented in the criminal justice system due to systemic biases.⁵

Housing exclusions based on criminal history can violate the FHA under three legal theories of discrimination:

1. Disparate treatment (intentional discrimination)
2. Disparate impact (facially neutral policies or practices with unjustified discriminatory effects)
3. Refusal to make reasonable accommodations (for cases in which criminal history is connected to disability)

Note About State and Local Fair Housing Protections

State and local fair housing laws may provide additional protections for justice-involved individuals. For example, some jurisdictions now have "fair chance" ordinances with specific rules limiting landlords' use of criminal records when screening prospective tenants.⁶

1. Disparate Treatment

An FHA violation may occur when a housing provider intentionally treats people with similar criminal histories differently based on protected characteristics, using criminal records as a pretext for discrimination. For example,

a housing provider may have a practice of denying applicants with misdemeanor convictions if they are Black but accepting applicants with similar convictions if they are white.

2. Disparate Impact

A housing provider's policies or practices around criminal history, even if they appear neutral on their face, can violate the FHA if they have an unjustified disparate impact on one or more protected classes. Housing policies or practices that have a disproportionate impact on protected classes may only be valid under the FHA if they are necessary to achieving a "substantial, legitimate, nondiscriminatory interest" of the housing provider. In the context of criminal records, the nondiscriminatory interest at issue is usually the safety of the property and other residents.⁷

In its 2016 guidance on the FHA and criminal records, HUD highlighted two policies or practices in particular that are likely illegal under the FHA: 1) exclusions based on prior arrests that did not result in convictions; and 2) blanket bans based on prior convictions.

Exclusions Based on Prior Arrests Not Resulting in Convictions: If a housing provider excludes people because of prior arrests – but the arrests did not result in convictions – these exclusions likely violate the FHA. Not only will these exclusions almost certainly have a disparate impact on protected classes, but they also will never be justified because an arrest indicates nothing more than the individual was once suspected of having committed a crime. Therefore, the mere fact of an arrest (without conviction) provides no information relevant for housing decisions.

Blanket Bans Based on Prior Convictions: Housing providers that impose blanket bans on people with convictions (automatically denying anyone with a conviction history without considering the type of conviction, the length of time that has elapsed since the criminal conduct, and other mitigating factors) are also likely violating the FHA. Like exclusions based solely on arrests, these bans almost certainly have a disparate impact on protected classes and cannot be justified. Although convictions (unlike arrests) generally serve as sufficient evidence of criminal conduct, blanket bans fail to accurately distinguish between people who may pose a risk to the safety of residents and the property and those who do not. Other similarly problematic policies may include bans involving broad categories of convictions and the use of unreasonably long lookback periods for criminal records screenings.

Statutory Exemption for FHA Liability for Criminal History Exclusions Based on Illegal Manufacture or Distribution of a Controlled Substance

Section 807(b)(4) of the FHA permits, but does not require, housing providers to exclude individuals based on convictions for the illegal manufacture or distribution (but not possession) of a controlled substance. These exclusions cannot be challenged under the FHA even if they result in unjustified disparate impacts on protected classes.

Importance of Individualized Reviews

Rather than relying on overbroad exclusions, housing providers should evaluate people's criminal histories on a case-by-case basis and conduct individualized reviews. As HUD explains, "individualized assessment of relevant mitigating information beyond that 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."⁸

What kind of factors should housing providers consider in individualized reviews? Examples of relevant information include:

- Nature and seriousness of the criminal conduct
- Amount of time elapsed since the conduct
- Mitigating factors, such as disability or age, when the conduct occurred
- Tenant history before and since the conduct
- Evidence of rehabilitation, such as completion of treatment and positive references

The central question in individualized reviews should be: ***Based on objective evidence, does this person actually pose a risk to the property or to resident safety?***

Example Involving Blanket Bans on People with Criminal Records

In 2017, the Louisiana Fair Housing Action Center (LFHAC) filed an administrative fair housing complaint with HUD against a New Orleans housing provider, alleging housing discrimination based on race due to a blanket ban on people with criminal records. Through fair housing testing, LFHAC found that the housing provider had a practice of discouraging applications from prospective tenants with criminal records by making comments such as, “anything on a criminal background check would automatically disqualify [you]” and “if you’ve been arrested, you’re going to be denied.”⁹

[The case settled in 2022](#), and the housing provider agreed to pay \$35,000 in damages and adopt a new policy on criminal history screenings. This new policy specified that the housing provider would only consider certain types of felony convictions that had occurred within the past five years and would conduct individualized assessments for people with relevant criminal records, taking into account when the convictions had occurred; the nature of the underlying conduct; whether the conduct occurred at a prior residence; whether the conduct related to the applicant being a domestic violence survivor; and evidence of post-conviction rehabilitation.

3. Refusal to Make Reasonable Accommodations

In cases where criminal conduct is connected to an individual’s disability, a housing provider may need to provide a reasonable accommodation in the form of modifying its policies or practices around criminal records. When requesting a reasonable accommodation, individuals should explain how their disability contributed to the criminal conduct.¹⁰ They should also provide evidence of rehabilitation and/or other mitigating information showing they do not pose a threat to the safety of other residents or to the property. A housing provider’s denial of a reasonable accommodation request may constitute a fair housing violation.

Example Involving Reasonable Accommodations for Disability-Related Convictions

In *Simmons v. TM Associates Management*, 287 F. Supp. 3d (W.D. Va. 2018), a federal district court held that the FHA sometimes requires accommodating persons with disabilities who have criminal convictions. *Simmons* involved a mother and adult son who filed suit after the mother’s apartment

complex – which had rejected the son’s application due to his criminal conviction – denied their request for the complex to reconsider his application as a reasonable accommodation. The son, who had schizoaffective disorder, had a conviction for indecent exposure after an incident in which he removed his clothes in public while off his medication. He had since received treatment, and his condition had stabilized. Because the son’s disability caused the conviction, he and his mother requested that the apartment complex disregard the conviction and reconsider his application as a reasonable accommodation. The complex refused and argued that the FHA does not require accommodating criminal convictions for persons with disabilities.

The court rejected this argument, pointing out that the mother and son were “not seeking an accommodation of a conviction, but rather an accommodation of a disability by mitigating its effects (i.e., disregarding the conviction).” In its decision, the court determined there was no “ironclad rule” that disability anti-discrimination statutes do not allow for accommodation for disability-related convictions.¹¹

ASSISTED LIVING FACILITIES’ AND NURSING HOMES’ DENIAL OF APPLICANTS BASED ON CRIMINAL HISTORY MAY ALSO VIOLATE THE FHA

The FHA generally applies to the full continuum of housing in which older adults live, including assisted living facilities (ALFs) and nursing homes.¹² ALFs and nursing homes are increasingly conducting criminal background checks and denying admission to justice-involved people who need and want long-term care in these settings. This problem has led some states to build nursing homes specifically for formerly incarcerated older adults who need high levels of care but are unable to find other long-term care facilities willing to accept them.¹³

Just like other housing providers covered by the FHA, ALFs and nursing homes should not screen people out based on prior arrests or impose blanket bans on people with criminal records. While resident safety considerations in particular may be different or heightened in long-term care settings, ALFs and nursing homes should still consider mitigating factors and conduct individualized reviews of criminal history to avoid housing discrimination. Advocates should know that they may be able to use the FHA to challenge ALFs’ and nursing homes’ admissions denials based on criminal history.

WHAT ADVOCATES SHOULD DO ABOUT HOUSING DENIALS BASED ON CRIMINAL HISTORY

Advocates helping older adults who have been denied housing (including admission into ALFs and nursing homes) due to prior justice-system involvement should consult fair housing experts to evaluate whether any denials potentially violate the FHA. Clients who have faced housing discrimination can file an administrative fair housing complaint with HUD up to one year from the date of the last act of discrimination, and/or file a lawsuit up to two years from that date.¹⁴ Justice in Aging is also available to provide case consultations and technical assistance on these issues. Contact Justice in Aging at info@justiceinaging.org.

ENDNOTES

- 1 HUD Office of Policy Development and Research (PD&R), “Tenant Screening With Criminal Background Checks: Predictions and Perceptions Are Not Causality” (May 2022), available at <https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-051722.html>.
- 2 “Federally assisted housing” includes public housing, the Housing Choice Voucher program, project-based Section 8, Section 202, Section 811, and other programs. 42 U.S.C. § 13664.
- 3 See the National Center on Law & Elder Rights’ [Frequently Asked Questions: HUD-Subsidized Housing for Older Adults with Criminal Records](#) for more discussion and resources about criminal-history related restrictions in federally assisted housing. See also Justice in Aging’s issue brief, [“Reducing Barriers to Reentry for Older Adults Leaving Incarceration.”](#)
- 4 42 U.S.C. § 3601. HUD also clarified in a [2021 memo](#) that the FHA’s sex discrimination provisions prohibit discrimination because of sexual orientation and gender identity.
- 5 HUD, “Implementation of the Office of General Counsel’s Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions” (June 2022), available at <https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf>.
- 6 For more information about fair chance ordinances, see the National Housing Law Project’s [Fair Chance Ordinances: An Advocate’s Toolkit](#).
- 7 HUD, “Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions” (April 2016), available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.
- 8 *Id.*
- 9 National Fair Housing Training Academy, “New Orleans Housing Provider Settles Criminal Background Discrimination Complaint” (September 2022), available at <https://www.hudexchange.info/programs/nfhfta/fair-housing-highlights/4/>.
- 10 Reasonable accommodation requests must involve a nexus between the requested accommodation and the individual’s disability. For more information on reasonable accommodations, see the [Joint Statement on Reasonable Accommodations Under the Fair Housing Act](#) by HUD and the U.S. Department of Justice.
- 11 *Simmons v. T.M. Assocs. Mgmt., Inc.*, 287 F. Supp. 3d 600, 603-04 (W.D. Va. 2018).
- 12 Courts have consistently found that assisted living facilities and nursing homes are covered under the FHA. See, e.g., *Montano v. Bonnie Brae Convalescent Hosp., Inc.*, 79 F. Supp. 3d 1120 (C.D. Cal. 2015) (holding that a nursing home violated the FHA when it failed to reasonably accommodate plaintiff’s disability); *Fair Hous. Just. Ctr., Inc. v. Cuomo*, No. 18-CV-3196 (VSB), 2019 WL 4805550 (S.D.N.Y. Sept. 30, 2019) (assuming the FHA applied to assisted living facilities).
- 13 See, e.g., The Appeal, “Why Elderly Incarcerated People Struggle to Find Care After Prison” (July 2022), available at <https://theappeal.org/elderly-prison-population-nursing-eldercare/>; ThinkProgress, “Ever Committed a Crime? Good Luck Finding a Place to Grow Old” (July 2014), available at <https://archive.thinkprogress.org/ever-committed-a-crime-good-luck-finding-a-place-to-grow-old-f5151341a095/>.
- 14 Advocates can contact their local [Fair Housing Initiatives Program](#) (FHIP) for assistance and more details. FHIPs will be aware of regional best practices for filing fair housing complaints with HUD and state agencies.