

# Reevaluating Criminal Background Policies

2016 Annual Housing Conference

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# Disclaimer



# Fair Housing Act – Disparate Impact

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

# Background in Employment Law

Analysis of disparate impact of arrests and convictions under employment discrimination law is longstanding

- Consideration of a conviction as an absolute bar to employment 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

# HUD Office of General Counsel Memo

- OGC are the internal attorneys for HUD
- Issued a memo on April 2016
  - not a rule or regulation
  - tracks to EEOC's guidance for employment
- HUD was influenced by
  - external and internal advocacy
  - adverse consequences of one strike application
  - interest in reentry issues
- Started with statistics on relative experience in the criminal justice system



**100 million**  
U.S. adults

or nearly one-third of the population—have a criminal record of some sort



The U.S. prison population of  
**2.2 million**

adults is by far the largest in the world. As of 2012, the United States accounted for only about five percent of the world's population, yet almost **one quarter of the world's prisoners were held in American prisons**



Since 2004, an average of  
**over 650,000**

individuals have been released annually from federal and state prisons, and **more than 95 percent of current inmates will be released** at some point.



In 2013, African Americans were arrested at a rate  
**more than double**  
their proportion of the general population



Prison Population

Hispanic individuals comprising approximately  
**22 percent**  
of the prison population, but only about  
**17 percent**  
of the total U.S. population.



Prison Population

In 2014, African Americans  
comprised approximately  
**36 percent**

of the total prison population in the United States, but only about **12 percent** of the country's total population



U.S. Population

Non-Hispanic Whites comprised approximately

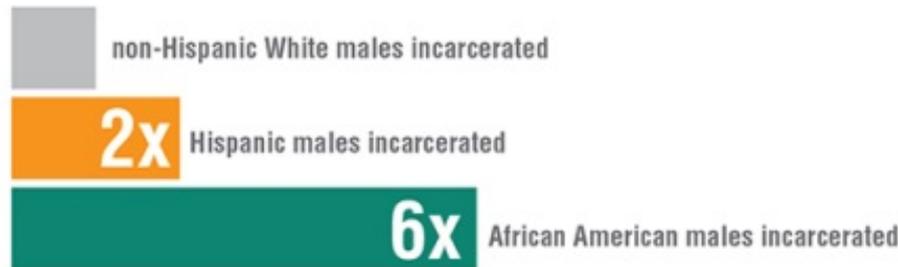
**62 percent**

of the total U.S. population but only about

**34 percent**

of the prison population in 2014

### Imprisonment rate across all age groups



Source: Novogradac & Company LLP, 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 4, 2016

# HUD Office of General Counsel Memo

- Is the policy or practice necessary to achieve a substantial, legitimate, nondiscriminatory interest?
- Cannot be hypothetical or speculative: landlord must prove interest and connection to the policy
- Prior arrests do not prove conduct and so cannot be the basis of a decision
- Exclusions due to prior conviction should consider nature, severity, and recency of conduct
  - cannot be a blanket ban
  - after 7 years, offenders are no more likely to commit a crime than those without a record

# Mitigating Circumstances

- HUD strongly suggests consideration of mitigating circumstances as part of a case by case assessment
- Relevant individualized evidence might include:
  - the age of the individual at the time of the conduct;
  - good tenant history before and/or after the conviction;
  - evidence of rehabilitation efforts

# Suggested Best Practices

1. Have a clear written policy.
2. The issue is bad conduct which makes for an unsuitable tenant, including whether the conduct presents a risk to the health, safety, or property of other residents.
3. Limit requested information from applicant to just what is needed to make a legitimate decision.
4. Criminal background should be considered after other critical information has been reviewed, such as basic eligibility questions.

# Suggested Best Practices

5. Don't rely on arrests as basis for denial of admission or eviction.
6. Don't have a blanket ban on those with criminal records.
7. How long ago counts; a policy should focus on exclusions for recent bad conduct, with longer time frames for worse conduct.
8. Use strategies that exclude the bad actor, not her or his whole family.

# Reasonable Accommodations

- Fair Housing Act requires reasonable accommodations “in rules, policies, practices, or services, when the accommodations may be necessary to afford ... [PWD] equal opportunity to use and enjoy a dwelling.”
- The Act does not protect an individual with a disability whose tenancy would constitute a
  - "direct threat" to the health or safety of others, or
  - result in substantial physical damage to property
- Unless the threat can be eliminated or substantially reduced by reasonable accommodation

# Reasonable Accommodations

- First determine whether conduct presents a “direct threat”
- Then whether the threat can be eliminated or significantly reduced by a reasonable accommodation
  - Medication and/or counseling will help
  - Circumstances leading to the threat have been eliminated
  - Warning and/or last chance agreement
- Direct threat defense only applies when no reasonable accommodation could ameliorate the situation

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