





# Fair Housing & Criminal Background Checks

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(Opinions expressed are not official views or opinions of the Attorney General or the Office of the Attorney General)



# Today's agenda

- \* Attorney General's Office - Wing Luke Civil Rights Unit
  - Who are we?
  - What do we do?
- \* Housing and Tenant Screening
  - Civil Rights 101
  - Disparate Impact
  - Criminal Background Checks
- \* Questions



# The Attorney General's Office: Wing Luke Civil Rights Unit

- \* **ENFORCE** the Washington Law Against Discrimination, the Consumer Protection Act, and federal civil rights laws
- \* **REPRESENT** the Washington Human Rights Commission
- \* **EDUCATE** the public at large about state and federal laws regarding discrimination



# The Attorney General's Office: Relevant laws

- \* **Washington Law Against Discrimination (RCW 49.60.030)**  
The right to be free from discrimination because of race, creed, color, national origin . . . is recognized as and declared to be a civil right.
  
- \* **Federal Fair Housing Act (42 U.S.C. 3604)**  
It shall be unlawful to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, . . . or national origin.
  
- \* **Consumer Protection Act (RCW 19.86.020)**  
Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.



# Civil Rights 101



- \* Discrimination is often illegal when based on a trait we can't change
  
- \* Two Basic Theories
  - \* **Disparate treatment** is treating someone differently than someone else
  - \* **Disparate impact** is adopting a policy that affects people differently based on who they are.



# Disparate Impact and Housing: Case Law

***Texas Dep't of Housing  
and Community Affairs v.  
Inclusive Communities  
Project, Inc., 135 S.Ct.  
2507 (2015)***

Plaintiff sued state agency for allocating tax credits for low-income housing in predominantly black inner-city areas and too few in white suburban neighborhoods. Plaintiff argued the tax credit scheme had a disparate impact on African-Americans. Justice Kennedy authored majority opinion, confirming that disparate impact claims may be made under the federal Fair Housing Act.



# Disparate Impact and Housing: Example

## *Other Policies*

- Non-citizen needs to provide a current and legitimate Work Visa and then be reviewed based on criteria above.
- Cosigners/Guarantors will only be considered if recommendation is accepted.
- Cosigners/Guarantors will be required to make 4 times the monthly rent individually.





# Civil Rights 101



## **Disparate Impact: Burden Shifting**

1. Proof of Disparate Impact
2. Housing Provider's Justification
3. Less Discriminatory Alternative



# Disparate Impact and Housing: HUD Guidance

## Step One: Disparate Impact

- One-third of the population has a criminal record of some sort.
- Nationally, African Americans are arrested, convicted and incarcerated at rates disproportionate to their share of the general population.
- In Washington, the disproportionality is even worse.

A photograph of a "REQUEST FOR CRIMINAL BACKGROUND CHECK" form. The title is in large, bold, black capital letters. Below the title, there is a form with several fields. A black pen is resting on the form, pointing towards the "Given Name(s)" field. The fields visible include "Given Name(s)", "Middle Name", "City", "State", "Home Phone Number", and "Alternate Phone Number". The form is white with black text and lines.



# Disparate Impact and Housing: HUD Guidance

N.Y.U. Journal of Legislation and Public Policy  
**QUORUM**



MERF EHMAN & ANNA REOSTI

## TENANT SCREENING IN AN ERA OF MASS INCARCERATION: A CRIMINAL RECORD IS NO CRYSTAL BALL

March 3, 2015

**Abstract:** This article focuses on Washington landlord liability in the tenant screening context and increasing housing access for rental applicants with criminal records. Part I examines the concept of foreseeability as it pertains to potential landlord liability for renting to an applicant with a criminal record whose actions harm another tenant. Part II surveys the relevant sociological research on the relationship between a criminal record and the ability to meet the obligations of tenancy. Based upon this review, we conclude that there is no empirical evidence establishing a relationship between a criminal record and an unsuccessful tenancy. Part III posits that since research demonstrates that a criminal record is not a reliable indicator for future tenant behavior, it should not serve as a proxy to determine future tenant dangerousness. Washington landlords should not be liable for future harm to tenants based solely upon renting to an applicant with a criminal record. Refusing to hold landlords liable in this way, would increase housing opportunities for this population which in turn will reduce recidivism thereby increasing public safety and promoting the rehabilitation of people with a criminal history.

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## Step Two: Is the policy justified?

- Criminal records may not be a reliable indicator for future tenant behavior



# Disparate Impact and Housing: Attorney General's Recent Testing

## **Testing**

Statewide testing of housing providers that advertised a criminal background check

## **Results**

Five of the 50 housing providers tested applied a blanket ban on any person with a felony.

Other housing providers that simply advertised a blanket ban were sent letters advising them of the likely violation.



# So, how should housing providers use criminal backgrounds?

## Step Three:

- \* Consider whether the criminal background policy is necessary
- \* Consider less discriminatory alternatives
- \* Consider relevant “individualized evidence”





# What is relevant “individualized evidence”?

- \* Facts or circumstances surrounding the criminal conduct
- \* Age of the person at the time of the conduct
- \* Evidence the person has maintained a good tenant history **before** the conviction or conduct
- \* Evidence the person has maintained a good tenant history **after** the conviction or conduct
- \* Evidence of rehabilitation



# Disparate Impact and Housing: Other Litigation

**Fortune Society v. Sandcastle Towers  
Housing Dev't Fund Corp., Case No. 1:14-  
CV-6410 (E.D.N.Y. 2015)** – Lawsuit filed  
prior to HUD guidance, alleging  
discriminatory impact of criminal records  
bars. Pending summary judgment motion.

**Alexander v. Edgewood Management  
Corp., Case No. 1:15-CV-01140-RCL  
(D.D.C. 2016)** – Lawsuit filed alleging  
discriminatory impact of criminal records.  
Defendants' motion to dismiss denied.

**Markeletta Wilson v. Rentgrow, Inc., Case No.  
13-2-15514-1 SEA (King Cnty. Sup. Ct. 2013)** –  
Class action against consumer reporting agencies  
by issuing consumer reports containing criminal  
records that antedate the report by more than 7  
years (RCW 19.182.040). Settlement Agreement  
pays \$400 for each of the 273 individuals affected.



# Disparate Impact and Housing: Some Caveats

## **Public Housing Authorities**

Lifetime bans allowed for –

- Persons who have manufactured or produced meth in federally assisted housing
- Sex offenders subject to a lifetime registration

Other permissible bans –

- Person's currently engaged in illegal drug use
- Person's drug or alcohol use threatens the health and safety of other residents
- Person's evicted from federally assisted housing for drug-related crimes

## **Other Housing Providers**

Permissible bans –

- Persons convicted of illegal manufacture or distribution of drugs





# Can housing providers consider criminal backgrounds at all? Yes.

- Fair housing law does not treat criminal records as a protected class.
- Fair housing law only prohibits housing providers from using criminal records:
  1. As a pretext for intentional discrimination OR
  2. In a way that causes an unjustified discriminatory impact on a protected class



# Disparate Impact and Housing: Historical Background

## A little bit of history...

June 17, 2011 – HUD Secretary Shaun Donovan encourages public housing authorities (PHAs) to allow ex-offenders to rejoin their families, when appropriate.

April 25, 2012 – EEOC issues guidance on criminal background checks

November 2, 2015 – HUD issues guidance, prohibiting PHAs from using arrest records as a basis for denying admission or evicting tenants

April 4, 2016 – HUD issues guidance on criminal background checks



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC 20410-0500

April 4, 2016

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

### I. Introduction

The Fair Housing Act (or Act) prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin.<sup>1</sup> HUD's Office of General Counsel issues this guidance concerning how the Fair Housing Act applies to the use of criminal history by providers or operators of housing and real-estate related transactions. Specifically, this guidance addresses how the discriminatory effects and disparate treatment methods of proof apply in Fair Housing Act cases in which a housing provider justifies an adverse housing action – such as a refusal to rent, sell, or finance – based on an individual's criminal history.



# Disparate Impact and Housing: “Crime-Free” Housing Programs

We Have Joined The:  
**SURPRISE CRIME FREE  
MULTI-HOUSING  
PROGRAM**



*Keeping Illegal Activity  
Out of Rental Property*

## Beware . . .

- This is not a get-out-of-jail free card
- Police departments are not trained in fair housing laws



# Disparate Impact and Housing: Summary

- ✓ Do not advertise a blanket criminal history ban
- ✓ Do not reject applicants based on an arrest record
- ✓ Do not reject applicants based on a blanket criminal history ban
- ✓ Consider “individualized evidence”



# QUESTIONS?

<http://www.atg.wa.gov/wing-luke-civil-rights-unit>