



FAIR HOUSING COACH[®]

TRAINS YOUR STAFF TO AVOID COSTLY DISCRIMINATION COMPLAINTS

JUNE 2016

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► LET'S BEGIN

Expect increased attention by government agencies and advocacy groups on the common practice of screening applicants based on their criminal history.

Q&A on HUD's New Guidance on Criminal Background Checks

In this lesson, *Fair Housing Coach* reviews HUD's latest guidance on the use of criminal background screenings—and what it means for your community.

In April 2016, HUD released new guidance on how federal fair housing law applies to the use of criminal records in both conventional and assisted housing communities. The new guidelines spell out how HUD will evaluate fair housing complaints in cases where a community refuses to rent or renew a lease based on an individual's criminal history.

The new guidance stirred up quite a fuss in the media and a lot of questions about whether—and when—criminal background checks may be used when screening applicants for multifamily housing. With the help of our fair housing experts, we'll answer those questions—and separate fact from fiction when it comes to criminal background checks. The bottom line: It's not illegal to conduct criminal background checks when screening applicants; it's how you do it—and what you do with the results—that can trigger fair housing trouble.

It will take some time to see how the new rules play out, but one thing's for certain: You can expect increased attention by federal, state, and local enforcement agencies—and advocacy groups—on the common practice of screening applicants based on their criminal history. In announcing the new guidance, HUD Secretary Julián Castro promised that “HUD will use the full force of the law to protect the fair housing rights of folks who've been arrested or who're returning to their communities after serving time in jail or prison.”

In this lesson, we'll review HUD's new guidance and offer tips from our experts about how to comply with the new rules to reduce the risks of a fair housing housing complaint based on your criminal background policy.

WHAT DOES THE LAW SAY?

The federal Fair Housing Act (FHA) bans housing discrimination based on race, color, religion, sex, familial status, national origin, and disability. In general, the FHA makes it unlawful to refuse to rent to certain people—or to treat them differently than others—because of their race, color, religion, sex, familial status, national origin, and disability.

The vast majority of fair housing cases are for intentional discrimination, also known as “disparate treatment,” in which the community is accused of purposefully treating people differently because of their race, color, religion, sex, national origin, familial status, or disability. In disputes such as these, the focus is on intent—why the community acted the way it did. If, for example, an applicant accuses you of intentionally discriminating against him by refusing to rent to him based on his race or other protected class, the community may defend itself by proving that it rejected his application for a legitimate, nondiscriminatory reason—for example, the applicant didn’t satisfy its standard screening criteria, which were consistently required of all applicants.

But you could face a fair housing claim when the policies themselves come under attack for having a *discriminatory effect* on minorities or other people protected under fair housing law. That’s what the Supreme Court decided last year—and what HUD and the courts have said all along: Communities may be liable for what’s known as “disparate impact” discrimination—that is, housing practices

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FAIR HOUSING COACH [ISSN 1520-3093 (PRINT), 1938-3142 (ONLINE)]
is published by Vendome Group, LLC, 216 East 45th St., 6th Fl., New York, NY 10017.

Volume 18, Issue 12

SUBSCRIPTIONS/CUSTOMER SERVICE: To subscribe or for assistance with your subscription, call 1-800-519-3692 or go to our website, www.FairHousingCoach.com. Subscription rate: \$345 for 12 issues. **TO CONTACT THE EDITOR:** Email: hstone@vendomegrp.com. Call: Heather Ogilvie Stone at (212) 812-8436. Fax: (212) 228-1308. **TO PLACE AN ADVERTISEMENT:** Please contact Heather Ogilvie Stone at hstone@vendomegrp.com or call (212) 812-8436.

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Immediately revise your criminal background policies to remove any language that denies housing based solely on arrest records.

that appear to be neutral, but have an unjustified discriminatory effect on members of protected classes, even if there's no intent to discriminate.

In contrast to claims for intentional discrimination, disparate impact cases focus on the effect of your actions and housing policies—not your intent. Most discriminatory effects claims rely on statistical evidence to show that the policy has a significantly adverse or disproportionate effect on members of a protected class. Since the focus is on the effects of the policy—not its intent—the community may be liable for adopting or enforcing a policy that has a discriminatory effect against minority applicants, even if there was no intent to discriminate based on race or other protected class.

Take our example of an applicant's claim that you refused to rent to him because he's a member of a protected class. If you can prove that you rejected his application because he failed to meet your screening standards and you applied the standards consistently to all applicants, his claim for intentional discrimination would probably fail. Even in the absence of any intent to discriminate, however, he could still pursue a disparate impact claim by arguing that the screening policy itself is discriminatory—if he can back it up with statistical evidence that the policy has an unjustified discriminatory effect on members of protected classes.

Q&A ON HUD'S NEW GUIDANCE ON USE OF CRIMINAL RECORDS

Q: What's the New HUD Guidance All About?

A: The guidance is HUD's answer to questions about how the FHA applies to use of criminal records by housing providers, including both market-rate and government-assisted housing communities. Specifically, the guidance explains how HUD will analyze complaints against communities for adverse actions—such as refusal to rent or renew a lease—based on an individual's criminal history.

Though the guidance addresses intentional discrimination, its primary focus is on the disparate impact—or discriminatory effect—of criminal background screening policies on minority applicants and residents. HUD previously issued formal regulations on disparate impact discrimination—what it termed the “discriminatory effects standard”—but held off on addressing criminal background checks until now.

The guidance comes at a time when many have raised concerns about the discriminatory effect of exclusionary policies based on criminal history against minorities in employment and housing. The issue has gained traction on the employment side with federal regulations from the Equal Opportunity Employment Commission and the growing movement to adopt “Ban the Box” legislation on the federal, state, and local level to protect job seekers from having to disclose criminal history on job applications.

Communities with a blanket ban against allowing anyone with any kind of criminal record are likely to face a fair housing claim.

The HUD guidance aims to address the problem in the housing market. HUD cites statistics showing that as many as 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 the largest in the world. Roughly 650,000 individuals are released annually from prisons and jails, but many face significant barriers to securing safe, secure, and affordable housing, which is critical to their successful reentry. Even those who were convicted but not incarcerated, or arrested but not convicted, face difficulty in securing housing based on their criminal history, according to the guidance.

Across the nation, African Americans and Hispanics are arrested, convicted, and incarcerated at disproportionately higher rates than whites with respect to their share of the general population. As a result, the guidance states that barriers to housing based on criminal records are likely to have disproportionate impact on minority home seekers.

HUD acknowledges that having a criminal record is not a protected class under fair housing law, but the guidance states that restrictions based on criminal history violate the FHA if, without justification, their burden falls more often on applicants of one race or national origin over another. In other words, a housing provider can face liability under fair housing law if its criminal history policy, without justification, has a disparate impact—or discriminatory effect—on minority applicants.

The guidance also addresses claims for intentional discrimination if communities treat individuals with comparable criminal history differently because of their race, national origin, or other protected characteristic.

Q: Does the New Guidance Mean that Communities Must Stop Criminal Background Screening?

A: No, HUD's new guidance does not prevent communities from setting reasonable, nondiscriminatory screening standards before approving occupancy and signing a lease. The most common rental requirements are good employment and income, rental history, credit, and, very often, having a satisfactory criminal background.

In general, a community may establish its own policies on who may live there, as long as it doesn't discriminate against applicants based on race, color, religion, sex, familial status, national origin, disability—or any other characteristic protected under state and local law. Generally speaking, that means setting reasonable, objective screening criteria related to the community's legitimate business interests—and applying them consistently to all applicants, regardless of race and any other protected characteristic under fair housing law.

When it comes to criminal background screenings, communities generally have a legitimate business interest in: (1) protecting their property and the safety and property of their residents; (2) ensuring that the applicant or resident will have the ability to pay the rent; and (3) keeping other good residents who may be

fearful if a person with a criminal record is allowed to live in the community. Fair housing law specifically excludes individuals who pose a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. That's where criminal background screenings often come in—many communities have incorporated criminal background checks into screening standards on the theory that it helps prevent crime and ward off potential liability from residents injured by the criminal acts of others.

The guidance doesn't change that—but it does clarify how HUD will analyze discrimination complaints based on criminal background policies under federal fair housing law. Among other things, the guidance includes a step-by-step analysis for evaluating when a criminal background policy would violate fair housing law because of its disparate impact based on race, national origin, or other protected characteristic.

Q: How Will HUD Evaluate Disparate Impact Claims Based on Use of Criminal History?

A: In general, HUD explains that a housing provider may be liable for policies that have an unjustified discriminatory effect, even if it has no intent to discriminate. Under this standard, a neutral policy that has a discriminatory effect violates fair housing law if it is not supported by a legally sufficient justification. If a criminal background policy restricting access to housing has a disparate impact on individuals of a particular race, national origin, or other protected class, then the policy is unlawful under the FHA if it's not necessary to serve a substantial, legitimate, nondiscriminatory interest of the community, or if that interest could be served by another practice that has a less discriminatory effect, according to HUD.

In the guidance, HUD spells out the three questions to ask to analyze whether a community's use of criminal history to deny housing opportunities results in a discriminatory effect in violation of fair housing law:

1. Does the policy have a discriminatory effect?
2. Is the policy necessary to achieve a substantial, legitimate, nondiscriminatory interest?
3. Is there a less discriminatory alternative?

Q: When Does a Policy Have a Discriminatory Effect?

A: In the first question of the analysis, HUD says that the individual (or whoever files the fair housing complaint) must show that the criminal history policy has a discriminatory effect—that is, that it results in a disparate impact on a group of people because of their race or national origin. In general, that means presenting evidence—usually in the form of statistics—that shows that the policy actually or predictably results in a disparate impact. So, for example, if over the course of the last year a significantly larger number of African Americans

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You must distinguish between criminal conduct that indicates a risk to resident safety or property, and criminal conduct that does not.

and Hispanics had their rental applications denied than similar white applicants because of having a criminal record, that might indicate a biased or discriminatory effect.

The guidance states that national statistics showing higher arrest and conviction rates for African Americans and Hispanics provide grounds for HUD to investigate complaints challenging criminal history policies. Nationally, racial and ethnic minorities face disproportionately higher rates of arrest and incarceration, according to HUD, citing statistics that African Americans were arrested at a rate more than double their proportion of the general population—and incarcerated at a rate of nearly three times the proportion of the general population. Hispanics were similarly incarcerated at a rate disproportionate to their share of the general population. In sum, the imprisonment rates for African-American males is almost six times greater than for white males, and for Hispanic males, it's over twice that for non-Hispanic males.

Whether national or local statistics may be used to evaluate a discriminatory effect at the first step depends on the nature of the claim and the facts of the case. While state or local statistics should be used when available and appropriate based on the community's market area or other facts particular to a given case, HUD says that national statistics on racial and ethnic differences in the criminal justice system may be used where, for example, state or local statistics are not readily available and there is no reason to believe they would differ markedly from the national statistics.

HUD says that additional information, such as applicant data, tenant files, census demographic data, and localized criminal justice data, may be relevant to determine whether local statistics are consistent with national statistics and whether there is reasonable cause to believe that the challenged policy causes a disparate impact. HUD says that communities may offer evidence to refute claims that their policies cause a disparate impact on one or more protected classes.

Regardless of the data used, HUD says that determining whether a policy results in a disparate impact is ultimately fact-specific and case-specific inquiry.

COACH'S TIP: Our experts predict this to be a bone of contention in future disparate impact claims involving criminal background checks. There are likely to be courtroom battles over whether national or local statistics may be used in disparate impact claims—and the accuracy of whatever statistics are used. It's much more difficult—and costly—to assemble local statistics that prove that a community's policy actually or predictably results in a disparate impact in its particular geographical area.

Q: Is the Policy Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest?

A: In this second question of the analysis, the inquiry shifts over to the community to prove that its criminal history policy is justified—that is, that it's necessary to achieve its substantial, legitimate, nondiscriminatory interests.

HUD warns that the reasons offered for the policy may not be hypothetical or speculative: The community will need evidence to prove both that it has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest.

Often, owners and managers say that the reason for criminal background policies is to protect other residents and their property. The guidance acknowledges that ensuring resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate—assuming it's the actual reason for the policy or practice. But, HUD warns, the community must be able to prove through reliable evidence that its policy of making housing decisions based on criminal history actually assists in protecting resident safety and property. 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 enough to satisfy this burden, HUD says.

So, a blanket policy of denying the application of anyone with a criminal conviction record will not be legal under HUD's guidance, says Atlanta-based attorney Robin Hein. The rental policy will have to be adjusted to take into account the severity of the crime committed, how long ago it occurred, and whether the applicant has been convicted of other crimes within a period of time since the last conviction or release from jail or prison.

Q: Does the Community Have a Legitimate Reason to Exclude Applicants Because of an Arrest Record?

A: No, according to the guidance, the community cannot deny someone's application simply because there was an arrest without a conviction. Housing providers with policies excluding individuals because of one or more prior arrests (without conviction) cannot show that such policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest.

An arrest, on its own, doesn't mean that the person did anything wrong, since the law presumes the defendant is innocent until proven and found guilty by a court or a jury. And arrest records are often incomplete because they don't show whether an individual was prosecuted, convicted, or acquitted of the charges, since many arrests do not result in prosecution or conviction, and the case may be dismissed. For these reasons, HUD says that the fact of an arrest is not a reliable reason to determine whether a particular individual poses a potential risk to safety or property. Consequently, communities with policies that deny housing based solely on an arrest without conviction cannot prove that the policy actually assists in protecting resident safety or property, according to the guidance.

For many years, our fair housing experts have warned against using arrest records as part of criminal background screenings. With the new guidance, they now urge communities that currently do so to immediately revise criminal background policies to remove any language that denies housing based solely on arrest records.

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The older the conviction, the less likely it may reflect whether the applicant currently poses any risk to the community.

If a criminal background screening turns up an arrest, Hein says that communities may inquire into the underlying facts that resulted in the arrest. If the applicant admitted committing a crime, or if the police or other witnesses can provide reliable and admissible information showing that a crime was committed, then those proven facts may be used to deny the application even though the arrest has not yet resulted in a conviction (or conclusive and final finding of guilt), he says.

COACH'S TIP: In a separate notice issued late last year, HUD clarified that arrest records may not be the basis for denying admission, terminating assistance, or evicting residents from public and other federally assisted housing. The community is allowed to ask the applicant if he was charged with the arrest that's showing up on the background check and ask for his explanation of what occurred and who can verify the facts he provides.

Q: When Can Applicants Be Excluded Because of a Prior Conviction?

A: In most cases, a record of conviction (which is a conclusive and final determination of guilt, as opposed to an arrest which is based only on a suspicion that the defendant committed a crime) is evidence that an individual engaged in criminal conduct. But HUD says that communities with policies excluding people with prior convictions must still be able to show that the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. A community that imposes a blanket ban on anyone with any conviction record—no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then—can't meet that standard, according to HUD.

Communities with a more tailored policy that excludes people with only certain types of convictions must still prove that it's necessary to serve a substantial, legitimate, nondiscriminatory interest. To do this, the community must show that its policy accurately distinguishes between criminal conduct that clearly poses a risk to resident safety or property—and criminal conduct that doesn't.

A policy that fails to consider the nature and severity of an individual's conviction—or how much time has passed since the conviction—is unlikely to prove necessary to serve a substantial, legitimate, nondiscriminatory interest. A determination of whether any particular restriction based on criminal history satisfies a substantial, legitimate, nondiscriminatory interest must be made on a case-by-case basis.

Our experts are watching how this all unfolds, but for now, they warn: Communities with a blanket ban against allowing anyone with any kind of criminal record or “any felony” are likely to face a fair housing claim. In a case currently pending in federal court, a social services agency has sued the owners and managers of a New York City community, alleging that the community has a blanket ban against applicants with any convictions, which effectively rejects applicants

whose infractions are decades old or relatively minor. Lawyers for the social services agency say that HUD's new guidance supports its position that blanket bans on applicants with criminal histories probably violate fair housing law. In a statement, the law firm says that its lawsuit and the HUD guidance shine a bright light on pervasive practices around the country that disproportionately exclude African American and Latino applicants from the rental market.

Meanwhile, civil rights advocates are conducting a nationwide investigation into the use of criminal background screening practices by private communities. In the first phase of the investigation, the Lawyers' Committee for Civil Rights Under Law sent inquiries to 13 private communities across a dozen states believed to impose "blanket ban" policies that prohibit renting to anyone with a criminal history, investigating the use of criminal background screening practices. The screening policies implemented by these landlords reflect the more widespread practice of barring applicants with criminal histories from renting apartments and houses, including people who have committed only minor offenses, according to the Lawyers' Committee.

In a statement, the Lawyers' Committee said that its investigation revealed a widespread practice of imposing bans on persons with criminal records, regardless of the nature of the offense or the time that had elapsed since the offense occurred. Rejecting applicants simply because they have had contact with the criminal justice system has a disproportionate impact on African Americans and Latinos, who are more likely than their white counterparts to be arrested and incarcerated, according to the group.

Q: How Can a Community Tailor Its Criminal Background Policy?

A: In light of the HUD guidance, you should review your criminal history policies—in consultation with your attorney, third-party screening company, and other advisors—to ensure that it's tailored to meet your community's substantial, legitimate, nondiscriminatory interests. The HUD guidance is clear on what your policy shouldn't say—that you shouldn't base decisions on arrests or apply blanket bans on anyone with a criminal record—so communities with such policies are urged to make changes to address those issues as soon as possible to avoid fair housing trouble.

Beyond that, you'll need to get into the specifics to determine the criteria used to determine what type of criminal conduct will—or won't—pass muster under your criminal background policy. One reason for using criminal background checks is to screen out anyone who, based on his criminal history, would be likely to pose a risk to your community's property and the safety or property of your residents. To meet that goal, HUD says that you'll need to distinguish between criminal conduct that indicates a risk to resident safety or property, and criminal conduct that does not.

To make that distinction, you'll need to consider the nature and severity of the criminal conduct, along with the date of conviction. One thing to consider is

Conviction of mere possession of a controlled substance may not be sufficient by itself to deny a rental application.

whether your policy will exclude only those convicted of felonies—as opposed to lesser charges like misdemeanors. You’ll also need to make distinctions based on the nature of the criminal activity, which may range from crimes against persons, such as murder or assault, to crimes against property, like theft or shoplifting, to white-collar crimes like fraud. You’ll also have to consider how far back to go—the older the conviction, the less likely it may reflect whether the applicant currently poses any risk to the community.

Q: Is There a Less Discriminatory Alternative to a Policy?

A: Even when the community can show that its criminal history policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest, it’s not the end of the inquiry. In the third question of HUD’s analysis, the burden shifts back to the individual challenging the policy to prove that the community’s interest could be served by another practice that has a less discriminatory effect.

In general, HUD suggests that an individualized assessment should be part of the process. According to the guidance, communities with policies allowing for an individualized assessment of factors beyond what’s contained in an individual’s criminal record would have a less discriminatory effect than an absolute exclusion that doesn’t take any additional information into account. In an individualized assessment, the community could consider relevant mitigating information, such as:

- The circumstances surrounding the criminal conduct;
- The individual’s age at the time of the conduct;
- Evidence that the individual has maintained a good tenant history before or after the conviction or conduct; and
- Evidence of rehabilitation efforts.

All this would probably add additional costs to the screening process. To reduce those costs, the guidance suggests that communities could wait to check an applicant’s criminal history until after his financial and other qualifications have been verified. That’s roughly the approach used in “Ban the Box” legislation—banning employers from including a box on job applications about criminal history, which effectively prevents employers from considering an applicant’s criminal history until after reviewing his other qualifications for a job. The guidance doesn’t require communities to do the same, but HUD suggests it should help communities to minimize any additional costs that an individualized assessment of an applicant’s criminal history might add to the applicant screening process.

Q: Can the Policy Exclude Applicants with Convictions for Certain Kinds of Drug Crimes?

A: Yes, in some circumstances. The FHA specifically excludes coverage for actions taken against people because they were convicted of the illegal manufacture or distribution of specified controlled substances. As a result, HUD says

To reduce screening costs, wait to check an applicant's criminal history until after you've verified his financial and other qualifications.

that communities won't be liable for excluding individuals because they've been convicted of one or more of the specified crimes, regardless of any discriminatory effect that may result from such a policy.

Nevertheless, the guidance says the exclusion is limited because it applies only to convictions—not arrests—on those charges. It's also limited to drug manufacturing or distributing convictions—not for other drug-related convictions, such as drug possession. HUD's guidance says that conviction of mere possession of a controlled substance may not be sufficient by itself to deny a rental application.

Q: Can Communities Face Liability for Intentional Discrimination Based on Use of Criminal History?

A: Yes, if the community treats applicants differently because of race, national origin, or other protected characteristic. In cases like these, HUD says that the use of criminal history information as a pretext for unequal treatment based on race or other protected characteristic is no different from the discriminatory application of any other rental criteria. The guidance offers some examples:

- The community rejects an Hispanic applicant based on his criminal record, but admits a non-Hispanic white applicant with a comparable criminal record;
- The community has a policy against renting to people with certain convictions, but makes an exception for white, but not African-American, applicants;
- A leasing agent helps a white applicant to get his application approved despite his potentially disqualifying criminal record, but doesn't provide the same assistance to an African-American applicant.

In addition, HUD says that discrimination may occur before an individual applies for housing. An example: When responding to inquiries from prospects, a property manager tells an African American that her criminal record would disqualify her from renting at the community, but doesn't similarly discourage a white prospect with a comparable criminal record from applying.

To avoid problems like these, our fair housing experts stress the importance of employee training on what your criminal background policy says. You don't want an employee answering the phone to tell someone that the community doesn't allow anyone with a criminal record to live there. Most communities do not have blanket bans on applicants with criminal histories, and a relatively inexperienced leasing consultant may not understand fully the exceptions and details of the community's rental policies. With all the attention on criminal background policies, chances are even that the caller may be a fair housing tester.

It'll also be necessary to stress the importance of applying the policy consistently to avoid any suggestion that it's being used to screen out applicants of a particular race or national origin. If something turns up in a criminal background screening, you may have to go to the next step—to conduct an individualized

AT A GLANCE**Key Takeaways from New HUD Guidance**

Fair housing law prohibits both intentional discrimination and housing practices that have an unjustified discriminatory effect based on race, national origin, and other protected characteristics. Because of widespread racial and ethnic differences in the U.S. criminal justice system, restrictions on housing based on criminal history are likely to disproportionately affect African Americans and Hispanics.

- ◆ The FHA does not prohibit communities from appropriately considering criminal history information when making housing decisions.
- ◆ The discriminatory effect of a policy that denies housing to anyone with a prior arrest or any kind of criminal conviction (a blanket denial) cannot be justified, so it would violate fair housing law.
- ◆ Policies that exclude people based on criminal history must be tailored to serve the community's substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of crime and the length of the time since conviction.
- ◆ Where a policy excludes people with only certain types of convictions, the community must still prove that any discriminatory effect caused by the policy is justified. That determination must be made on a case-by-case basis.
- ◆ Selective use of criminal history as a pretext for unequal treatment of people based on race, national origin, or other protected characteristic violates fair housing law.

assessment of factors beyond what's contained in the applicant's criminal record—but you should have the same review process available for all applicants, regardless of their race, national origin, or other protected class.

Even when an application is denied using a well thought-out criminal background check policy, it might be best for the property manager or a senior manager to look at why the applicant was denied and then talk to the applicant to get his explanation of the circumstances involved, Hein says. Such a final review may ensure that the criminal background policy set by the community was followed properly in running the background check.

COACH'S TIP: The exclusion for drug manufacture or distribution convictions doesn't apply to claims of intentional discrimination, according to the guidance. By definition, intentional discrimination claims are based on treating people differently because of their race or other protected characteristic, not because of the drug conviction. For example, HUD says that the exclusion wouldn't protect a community from a claim that it rejects only African-American applicants with convictions for

distribution of a controlled substance, while admitting white applicants with such convictions. Such a policy would be considered intentional discrimination against blacks and in favor of whites who were similarly situated.

- Fair Housing Act: 42 USC §3601 *et seq.*
- *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 Notice PIH 2015-19: Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, Nov. 2, 2015.*

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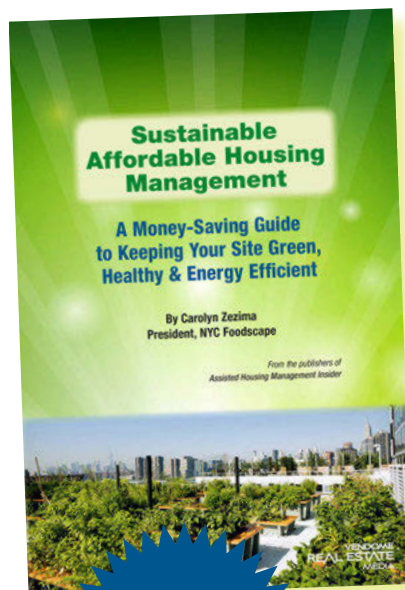
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