

Guidance for Homeless Providers on the Use of Criminal History of Rental Applicants by Landlords

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Resources

- www.cofha.com/rental and www.mvfhc.com/rental

Click on “Links to HUD Policies”

This presentation does not include information on the need to conduct individual assessments for families with children and the best practices to conduct individual assessments for people from other countries.

For information on these topics at the above websites, Click on the “Keating Memorandum” and “Tools for working with Immigrants.”

Fair Housing Laws utilize named protected classes

Federal

- Color
- Race
- Religion
- Sex
- Familial Status
- Disability
- National Origin

State/Local

- Ancestry - Ohio
- Military Status - Ohio
- Age (many Ohio cities)
- Marital Status (many Ohio cities)
- Sexual Orientation & Gender Identity/Expression (many Ohio cities)
- Source of Income (5 cities in Ohio)

Fair Housing Laws have specific Prohibitions

- Refuse to sell or rent
- Discriminate in the terms, conditions
- Discriminate in advertising
- Misrepresent the availability of housing
- Engage in blockbusting or steering
- Refuse people w/disabilities accommodations
- Discriminate in making loans, insurance policies, appraisals, & other real estate transactions
- To coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of a fair housing right
- Racial or sexual harassment

Individualized Assessments are necessary to comply with Fair Housing, especially with:

- Families with children
- People with criminal histories
- People with Disabilities
- People from other countries
- Victims of Domestic Violence and
- Other people in need of emergency services
- People needing help contending with harassment in residential housing

Background for guidance on the use of criminal history when screening rental applicants - 2011

- In 2011, former HUD Secretary Shaun Donovan issued a letter to public housing authorities (PHAs) across the country emphasizing the importance of providing “second chances” for formerly incarcerated individuals.
- HUD implemented demonstration projects

Notice PIH 2015-19 – November 2015

- Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions
- Found at <http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>

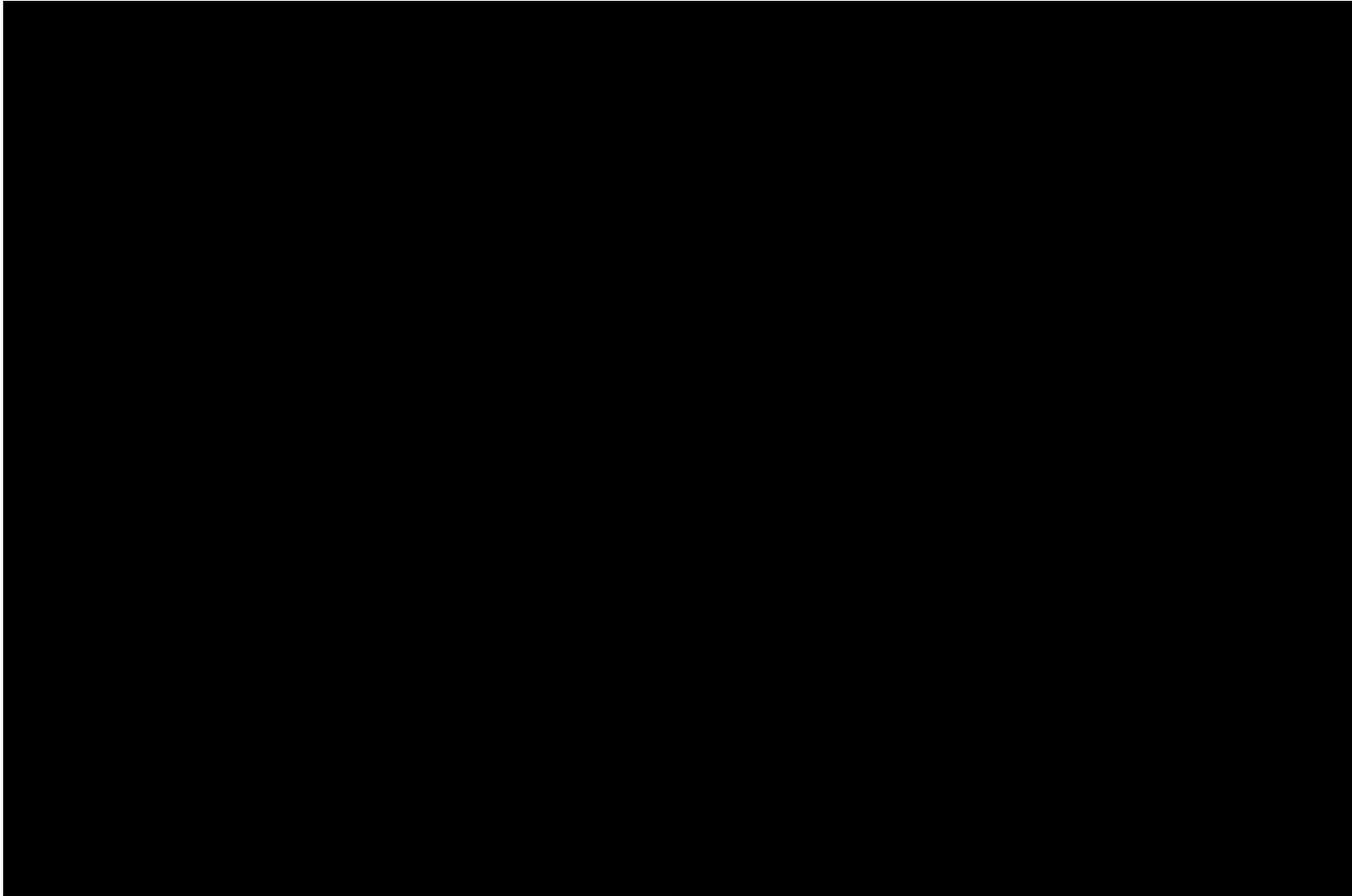
Purpose of Public Housing (PHA) Guidance

- Arrest records may not be the basis for denying admission, terminating assistance or evicting tenants,
- HUD does not require PHAs and owners adopt “One Strike” policies,
- Remind PHAs and owners of their obligation to safeguard the due process rights of applicants and tenants,
- Reminder of civil rights obligations under fed., state, local laws and,
- Provides best practices and peer examples for PHAs and owners to review



HUD issues guidance for all housing providers April 4, 2016

- “ While having a criminal record is not a protected characteristic under the Fair Housing Act, **criminal history-based restrictions** on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability).
- Additionally, intentional discrimination in violation of the Act occurs **if a housing provider treats individuals with comparable criminal history differently because of their race**, national origin or other protected characteristic (i.e., disparate treatment liability).”



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FAIR HOUSING

Background – traditional types of discrimination recognized in courts

- **Differing Treatment** – treating someone of a protected class differently than others
- **Disparate Impact** – using a neutral policy or procedure that has a **disproportionately negative impact** on a protected class

Fair Housing Discrimination

treatment

- is a result of treating or behaving differently toward someone because they are a member of a protected class.



Fair Housing Discrimination

different impact

- is due to a policy or procedure that has a different impact on persons of protected classes.



Prohibited Practices Activity

1. Failure to accept or consider a bona fide offer to lease an apartment home from a member of a protected class.



2. Refusal to lease an apartment home to any member of a protected class.



3. Use of different qualifying criteria, rental standards, or procedures that are different from normal with any member of a protected class.



Prohibited Practices Activity

16. Expressing a preference for or a limitation of any resident in a protected class



17.



Selecting media or advertising that leaves out particular segments of the housing market regarding housing opportunities.

18. Indicating through words or conduct to a protected classification that an apartment home which is available for leasing has been rented



Statistics can be used to show disparate impact:

- Nationwide, 40% of prisoners are African-American (compared to 13% of the total population).
- In Louisiana, 66% of prisoners are African-American (compared to 32% of the population)\
- In New Orleans, 87% of the prisoners in Orleans Parish are African-American (compared to 60% of the total population)

Statistics and disparate impact:

- 53% of New Orleanians rent, rather than own, their homes.
- 60% of African-American men in New Orleans have been arrested
- **43% of African-American men have been convicted of a crime**
- 17% differential between arrests and convictions!

Therefore

- If an apartment complex has rules denying persons with an arrest record an application or admittance based solely on that arrest record, it has a **disproportionately negative impact** on African American men who have never been convicted of a crime in that area.

HUD's Guidance supports this study with this entry: *Exclusions Because of Prior Arrest*

- As the Supreme Court has recognized, “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.”
- Therefore: “an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual.”

Example of disparate impact when excluding all people with a felony – from an email

- I have a question for you. We had a phone call today from a woman that has a felony. We do not approve people with felonies. She proceeded to tell us that hers is a unique circumstance. She lived in a state where having “gay relations” is against the law. She was charged with a “Crime against Nature”. She wanted to know if we would deny her for that since Ohio does not have that law. I have heard of states with this law, but I have never had an applicant with this charge on their record. Just wanted to run this by you.





Differing Treatment guidance

- Some Landlords use criminal backgrounds as a tool to commit racial and/or gender discrimination intentionally which results in **differing treatment**. **The HUD guidance says:**
 - “Additionally, intentional discrimination in violation of the Act occurs **if a housing provider treats individuals with comparable criminal history differently because of their race**, national origin or other protected characteristic (i.e., disparate treatment liability).”

Fair Housing Testing of private landlords in the New Orleans area showed African-American testers faced discrimination 50% of the time :

- Leasing agents and Landlords:
 - Provided inconsistent information about the criminal background policies to minority testers
 - Coached white testers on how to appeal a negative admission decision, and on how to obtain definitive answers about their eligibility before submitting applications and fees.
 - Made exceptions for whites
 - to stated criminal background policies and
 - waived stated standard fees

HUD's Guidance supports this study with this entry:
Intentional Discrimination exists when:

- Housing provider rejected an Hispanic applicant based on his criminal record, but admitted a non-Hispanic White applicant with a comparable criminal record.
- Housing provider has a policy of not renting to persons with certain convictions, but makes exceptions to it for Whites but not African Americans,



Advice to landlords from HUD's Guidance

- **By delaying consideration of criminal history until after an individual's financial and other qualifications are verified**, a housing provider may be able to minimize any additional costs that such **individualized assessment** might add to the applicant screening process.
- Policies that exclude persons based on criminal history must be tailored to serve the housing provider's substantial, legitimate, nondiscriminatory interest and **take into consideration** such factors as the type of the crime and the length of the time since conviction.

Individualized considerations Landlords might include when screening an applicant with a criminal history:

- the facts or circumstances surrounding the criminal conduct;
- the age of the individual at the time of the conduct;
- evidence that the individual has maintained a good tenant history before and/or after the conviction;

Individualized considerations Landlords might include when screening an applicant with a criminal history:

- evidence of rehabilitation efforts (drug/alcohol treatment, community supervision completion);
- community ties/support (is an applicant in a family re-unification project or a re-entry program?);
- employment/training history.

Best Practices include but are not limited to:

- Abandoning a blanket policy that a “business does not accept felons” or “refuses an applicant based solely on an arrest record.”
- Implement a policy that your business conducts criminal background checks in order to make **informed decisions** about applicants suitability.
- Keep this policy: Management reserves the right to refuse any applicant who poses a health or safety threat to other residents

Note to Advocates - Reentry Clients should be trained on:

- Fair Housing
- Landlord Tenant Rights and Responsibilities
- Readiness training on the documents that might help tell their story
 - Letters from a pastor, family, former landlord, a current or past employer, documents related to a re-unification program, reentry program or rehab.
- Proof of income
- Appearance and interviewing – as important as interviewing for a job!

Note to consumers – HUD Guidance is not a tool to get every person into every unit they desire

“In most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal conduct.”

Advice from HUD's Guidance: *Exclusions Because of Prior Conviction*

- A housing provider with a more tailored policy or practice that excludes individuals with 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 resident safety and/or property and criminal conduct that does not.
- Note: this applies to those businesses that have stated criteria such as this phrase: “**Possession – At least 2 years old**” or “**No current offenses or warrants (Traffic not included).**”

Advice from HUD's Guidance on *Drugs*

- A housing provider will not be liable under the Act for excluding individuals because they have been convicted of one or more of the specified drug crimes...
 - the exemption is limited to disparate impact claims based on drug *manufacturing or distribution* convictions
- and does not provide a defense to disparate impact claims based on other drug-related convictions, such as the denial of housing due to a person's conviction for drug *possession*.

Suggestions for policy discussions in the community that will help implement new guidance

- Help landlords institute *Quality checks* of criminal background reports received– for example, if the person disputes a background report,
 - how can we help landlord’s check it out?
 - What tools are available?
- Can we help landlords, in a streamlined fashion, become more knowledgeable about convictions and **learn what contributes to public safety?**

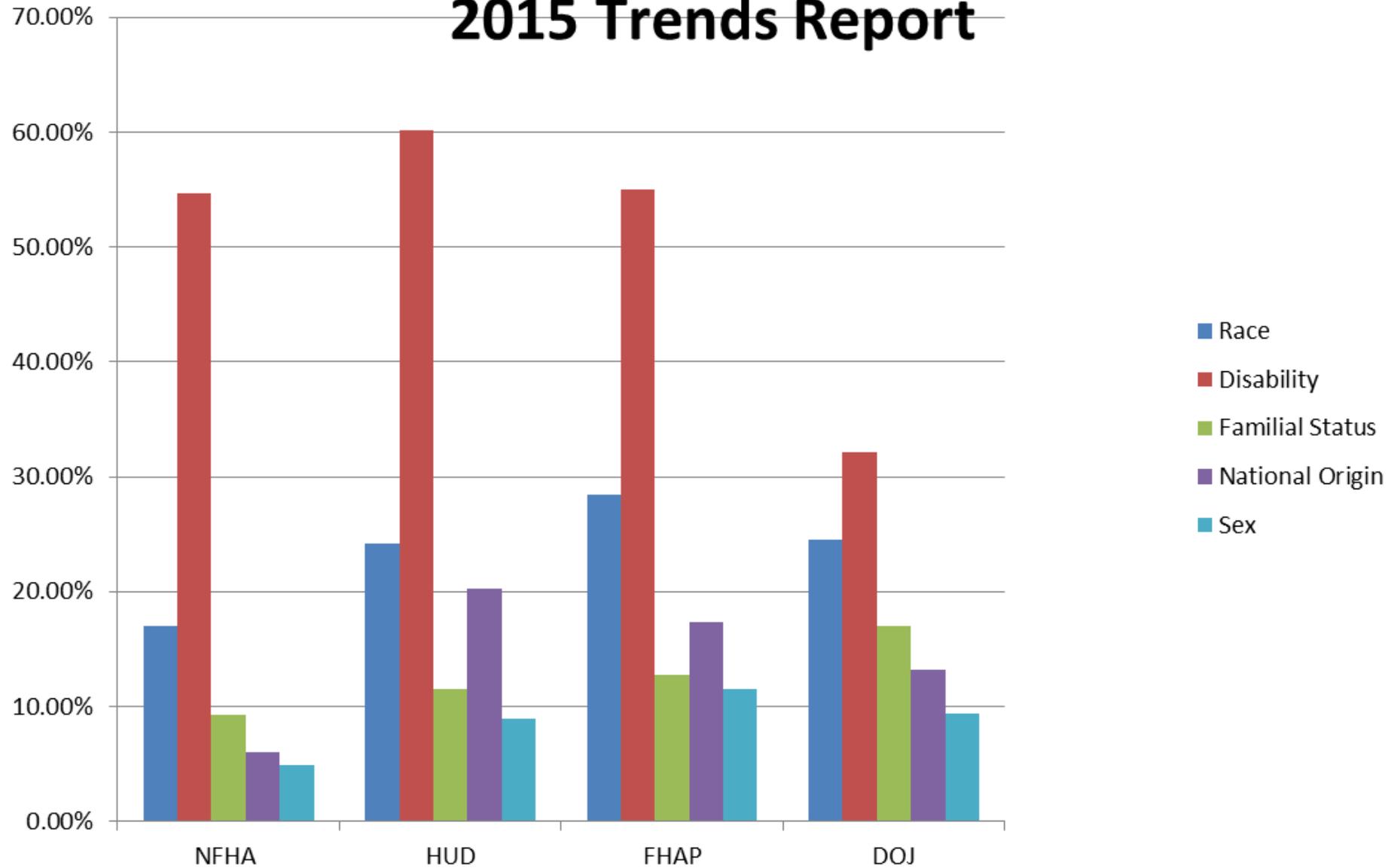
Suggestions for policy discussions in the community that will help implement new guidance

- Reworking of the screening processes to be more holistic in evaluating applicants with conviction histories including:
 - Individualized review of all applicants with records rather than automatic denial;
 - Shorten look-back periods;
 - Share acceptance criteria with all callers and people who actually view the unit giving them a notice “to be heard” and “policy of applying reasonable accommodations” to the screening process.
- Notice to be heard is one that stresses that your prospects will be treated like individuals and if they have special circumstances, they will have the opportunity “to be heard.”

Guidance Related to theme of Disparate Impact



2015 Trends Report



FHAA of 1988: Defining Disability

Definition affirmed by ADA in 1990 that both laws have comparable definitions 28 C.F.R. §35.104

- A person who has any physical or mental impairment that substantially limits one or more major life activities.
- A person with a record of such physical or mental impairment.
- A person regarded as having such an impairment.

Reasonable Modification

- A change to the physical characteristics of a residence or to the common areas of a building including:
 - Installing a ramp.
 - Installing grab bars.
 - Widening doorways.
 - Installing a lift.



Reasonable Accommodation

- Changes in rules, services, practices or policy that do not change the nature of the program such as:
 - Overlooking past tenancy, credit, and/or criminal issues if the issues are related to the person's disability and have been or will be mitigated
 - Allowing a co-signer or third-party payee
 - Allowing a assistance animal.
 - Providing a payment reminder.
 - Providing reserved accessible parking.
 - Using oral presentation or providing large print written material for the vision impaired.
 - Providing an interpreter or having closed caption available for the hearing impaired.

Policy on Reasonable accommodations

- In some cases, a housing provider must consider alternative criteria as a reasonable accommodation to enable an applicant with a disability to establish eligibility.
- Some applicants may have special needs due to their disabilities, so simply treating them the same as others may not ensure that they have an **equal opportunity to use and enjoy the housing** which is a cornerstone of fair housing best practices.

During tenancy, what information can landlords request from agencies that provide case management to the tenants?

- The disclosure of any therapeutic or disability–related information should be made only with the tenant’s authorization and on a need-to-know basis.
- To effectively work through problems that arise, tenants may want landlords to share notices and tenancy-related information with their case managers.
- Tenants participating in a case management program may sign a **Release of Information** to allow this sharing of documents and information.

What can a landlord request from a case management service?

- Rental history, including shelter and transitional housing program history and references
- Credit history
- Criminal history
- Income
- Verification of housing subsidy/assistance
- Participation in money management and rental responsibility classes
- Repayment agreements for past debts

Landlords should not ask the following questions about the applicants:

- Are you disabled? (*unless necessary to establish eligibility for housing for people with disabilities or to process a request for a disability that is not readily apparent*)
- What is your disability and How did you become disabled?
- Are you receiving treatment?
- Do you take medication?
- Why are you getting SSI?
- Is your service animal trained to perform a function?

Post a “Notice to be Heard” to reinforce your anti-harassment policies.

- Notice to be heard is one that stresses that your prospects and current renters will be treated like individuals and if they have special circumstances, they will have the opportunity “to be heard.”
- For example, one might have on an application or in rules and regulations a statement that says something like:
 - **“If you have a special situation which you need to share with management, know that our policy is to always be available to hear what you have to impart to us.”**

Harassment in Housing from Supplement - Final Rule

Third Party and/or Neighbor on Neighbor Harassment in
Market Rate and Subsidized Housing

Major Elements, as proposed to be defined,

- “quid pro quo harassment” occurs when a person is subjected to an unwelcome request or demand because of the person's protected characteristic
- “hostile environment harassment” occurs when, because of a protected characteristic, a person is subjected to unwelcome conduct that is sufficiently severe or pervasive such that it interferes with or deprives the victim of his or her right to use and enjoy the housing or to exercise other rights protected by the Act.

Neighbor on Neighbor Harassment

- Corrective actions must end the harassment
- “HUD has reworded the provision in the final rule. Proposed § 100.7(a)(1)(iii) stated that a person is directly liable for “failing to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct.
- The duty to take prompt action to correct and end a discriminatory housing practice by a third-party derives from an obligation to the aggrieved person created by contract or lease (including bylaws or other rules of a homeowner’s association condominium or cooperative),”

HUD encourages housing providers

- to create safe, welcoming, and responsive housing environments by:
 - regularly training staff,
 - developing and publicizing anti-discrimination policies, and
 - acting quickly to resolve complaints once sufficient information exists that would lead a reasonable person to conclude that harassment was occurring.
- Best Practices: encourage housing providers to have a procedure in place called “Notice to be Heard”.

Unwelcome Conduct can be:

- written, verbal, or other conduct and does not require physical contact.
- threatening imagery (*e.g.*, cross burning); damaging property;
- physical assault;
- threatening physical harm to an individual, family member, assistance animal or pet; or
- impeding the physical access of a person with a mobility impairment
- could be spoken or written, such as requests for sexual favors.

Unwelcome Conduct may include

- gestures, signs, and images directed at the aggrieved persons.
- use of racial, religious or ethnic epithets,
- derogatory statements or expressions of a sexual nature,
- taunting or teasing related to a person's disability, or
- threatening statements.
- the use of email, text messages, or social media.

Fair Housing Act Standards and Enforcement of Local Nuisance Ordinances and Crime-Free Housing Ordinances

(HUD's) Office of General Counsel issues this guidance

- to ensure that the growing number of **local nuisance ordinances** and **crime-free housing ordinances** do not lead to discrimination in violation of the Fair Housing Act.
- This guidance primarily focuses on the impact these ordinances may have on **domestic violence victims** and to those in need of emergency services who may be subjected to discrimination prohibited by the Act due to the operation of these ordinances.

Example

- For, a woman in Norristown, Pennsylvania who had been subjected to domestic violence by her ex-boyfriend was warned by police that if she made one more 911 call, she and her young daughter would be evicted from their home pursuant to the local nuisance ordinance.
- The ordinance operated under a “three strike” policy, allowing her no more than two calls to 911 for help.
- As a result, the woman was too afraid to call the police when her ex-boyfriend returned to her home and stabbed her. Rather than call for an ambulance, she ran out of her house in the hope she would not lose her housing. A neighbor called the police and, due to the serious nature of her injuries, the woman was airlifted to the hospital.
- A few days after she returned home from the hospital, she was served with eviction papers pursuant to the local nuisance ordinance.

A. Nuisance Ordinances

- local governments are enacting a variety of nuisance ordinances defined as conduct affecting the appearance of the property – such as
 - littering,
 - failing to tend to one's lawn or
 - abandoning a vehicle to
 - disorderly or disruptive conduct including
 - criminal activity on or near a property

Nuisance Ordinances

- Defines nuisance as conduct affecting the use of emergency services such as
 - an “excessive” number of calls for emergency police or
 - ambulance services,
 - and is typically defined as just a few calls within a specified period of time by a tenant, neighbor, or other third party, whether or not directly associated with the property.

Nuisance Ordinances have problems

- For example – some jurisdictions exclude victims of violence but
 - police and other emergency service providers may not log the call as domestic violence,
 - instead **categorizing it incorrectly** as property damage, disturbing the peace or another type of nuisance conduct

Nuisance Ordinances vary

- The ordinances generally require housing providers either to **abate** the alleged nuisance via eviction of the tenant or
 - **risk penalties**, such as fines, loss of their rental permits, condemnation of their properties etc.

Nuisance Ordinances vary

- Some ordinances may require the housing provider to
 - evict the resident after a **specified number** of alleged nuisance violations—often quite low—within a specific timeframe.
 - These vary: 3 calls for EMT's in a month to 2 calls in a year

Procedures not clear-cut

- While local governments might not explicitly require eviction as the primary nuisance abatement method in their ordinances,
- **in practice**, governments and police departments, may indicate that eviction is the only acceptable nuisance abatement method.

B. Crime-Free Lease Ordinances & Crime-Free Housing Programs (Crime Free Lease Addenda)

- Some operate like nuisance ordinances and penalize housing providers who fail to evict tenants when a tenant has:
 - **allegedly engaged in a violation** of a federal, state and/or local law, regardless of whether the tenant or resident was the victim of the crime at issue.
 - (Keep in mind the **guidance on the use of arrest records** in housing decisions)

Crime-free lease addenda

- Often do not provide exceptions for cases where the tenant is the victim of domestic violence or another crime.
- **Where exceptions do exist**, victims of domestic violence and other crimes may be mistakenly categorized and face eviction despite the exception.
 - For example, police often arrest both the victim and the perpetrator under **“dual arrest”** policies when a victim has defended herself or himself from the perpetrator.

Guidance Recommends

- In conducting their assessments of fair housing (AFH), state and local governments should assess their nuisance ordinances, crime-free housing ordinances and related policies or practices, including
 - the processes by which nuisance ordinance and crime-free housing ordinances are enforced, and
 - consider how these ordinances, policies or practices **may affect access to housing and access to police, medical and other governmental services** based on sex, race, national origin, disability, and other characteristics protected by the Act.

For fair housing information visit
www.cofha.com/rental

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