

Restrictions on the Use of Publicly Available Information in Screening Decisions

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Study Committee on the Use of Tenant Information in Rental Decisions

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This memo offers a guide to another of the potential approaches to regulating the use of tenant information in rental decisions: **restricting the consideration of certain information in the tenant screening process**. Like record-sealing approaches, use restrictions reflect a public policy decision that it is unfair or harmful to use certain kinds of records or information when deciding whether to rent an apartment to a particular tenant. Unlike record sealing, use restrictions make no effort to limit *access* to information but instead focus on which available information a prospective landlord should be allowed to *consider* during the screening process. Regulation of the screening process is becoming more common in housing, as well as in the employment and credit contexts.

I. The Tenant Screening Process and Concerns About Unfettered Screening

There are four types of information that landlords typically use to screen tenants: current finances (including income/employment and assets), credit history, criminal history, and rental history (including references from prior landlords and eviction and other housing case records).¹ Not all landlords review the same information or evaluate it the same way, and it is usually impossible for a tenant to know what information has formed the basis for a rental decision and why the decision was made. The opacity of the decision-making process contributes to the cost of apartment-hunting, with tenants paying hundreds of dollars in fees to apply to apartments they will never get due to the landlord's screening criteria or unknown errors in the tenant's screened information. There are also widespread concerns about whether landlords are in fact screening tenants based on reliable, unbiased information, or whether instead much of the information landlords are using is incomplete, inaccurate, biased, or otherwise unfair and unreliable as a predictor of a tenant's ability to succeed in an apartment. The concerns include:

A. Racially disparate impact of certain screening criteria

1. Criminal records screening

In April 2016, HUD's Office of General Counsel issued guidance on the application of the Fair Housing Act to the use of criminal records in tenant screening.² The guidance compiled the research showing that using criminal records to screen tenants will have a disparate impact on people of color, especially Black and Latinx tenants, and warned that where a disparate impact was shown, a screening policy barring all tenants with arrest or conviction records would likely fail to meet the landlord's burden of establishing a legitimate nondiscriminatory basis for their screening

¹ See, e.g., "Opening the Door: Tenant Screening and Selection," Family Housing Fund and Housing Justice Center (MN) (March 2021), pp. 8-13.

² Guidance on Application of Fair Hous. Act Standards to the Use of Criminal Records by Providers of Hous. & Real Estate-Related Transactions (Apr. 4, 2016)

criteria.³ Further research and litigation since 2016 have underscored the unlawful racially discriminatory impact of outright bans on tenants with arrest or conviction records.

2. Eviction records screening

Matthew Desmond's Eviction Lab at Princeton and other researchers across the country have consistently found that eviction records, like criminal records, are disproportionately common among Black and Latinx renters, with Black women most impacted.⁴ The same fair housing considerations therefore likely apply where, for example, a landlord adopts a blanket policy of rejecting any tenant with an eviction or housing court filing of any kind rather than doing an individualized assessment of the nature of the underlying case or its disposition.

B. Other discriminatory impacts

In some situations, screening criteria can mask or facilitate other forms of unlawful discrimination. Income-to-rent ratios might be used to exclude Section 8 tenants in jurisdictions with source-of-income protections even though, as a practical matter, a voucher holder's income has little to no impact on their ability to pay rent fully and on time. Survivors of domestic violence and tenants with mental disabilities may be more likely to have certain kinds of eviction cases brought against them and may face unlawful discrimination based on those records even where the law required that they be accommodated or held not responsible in the case itself.

C. Questionable predictive value of information

There is little to no empirical support for the predictive value of certain kinds of information regularly used by landlords as a basis for denying rental applications. A study conducted by Wilder Research in collaboration with a group of housing nonprofits, for example, found that 11 out of 17 criminal offense categories had no correlation with housing outcomes, and any correlation that did exist in any categories declined precipitously over time.⁵ Reports have also shown that some landlords refuse to rent to tenants who have any kind of eviction case filed against them for any reason, even if the case was brought for no fault of the tenant (e.g. a desire to rehab

³ *Id.* See also, Kaveh Waddell, "How Tenant Screening Reports Make It Tough for People to Bounce Back from Hard Times," *Consumer Reports* (March 11, 2021), <https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times-a2331058426/>

⁴ See., e.g., ACLU, "Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color," Sophie Beiers, Sandra Park, and Linda Morris, January 10, 2020, <https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color/>; Jane Place Neighborhood Sustainability Initiative (JPNSI) and Davida Finger, "New Orleans' Eviction Geography: Results of an Increasingly Precarious Housing Market (March 2019); Justin Steil, *et al.*, "Evictions in Boston: The Disproportionate Effects of Forced Moves on Communities of Color" (2020), <http://bostonevictions.org>; Community Legal Services of Philadelphia, "Breaking the Record: Dismantling the Barriers Eviction Records Place on Housing Opportunities" (November 2020), <https://clsphila.org/housing/report-eviction-record-policy/>

⁵ Cael Warren, "Success in Housing: How Much Does Criminal Background Matter?" (January 2019) https://drive.google.com/file/d/1HwYOBFI_k98C6TT99w2o7ryk2CnAGvgo/view

the property) or the tenant wins.⁶ This can have a disparate impact based on race and gender, because Black women have been shown to be most likely to have an eviction case filed against them and later dismissed.⁷ Credit scores, too, are based in part on information that is not likely to be relevant to a tenant's ability or willingness to pay rent and are therefore of questionable predictive value. Some argue that if information has no measurable impact on a tenant's likelihood of success in the rental, then it should not be allowed to serve as a barrier to a tenant's access to housing, particularly where a certain criterion correlates with an increased risk of discrimination, even if unintentional, based on a protected category.

II. Examples of Use Restrictions

- In 2019, Cook County (Chicago) enacted a “Just Housing Amendment” to its Human Rights Ordinance. The JHA bars landlords from using arrests, rather than convictions, as a basis to reject a tenant's rental application. It also contains a **lookback period** of 3 years for most criminal convictions and requires an **individualized assessment** in lieu of an absolute bar on rentals to people with more recent convictions, with very limited exceptions. In the individualized assessment process, a tenant has the **right to receive a copy of any criminal background check** used to deny housing, **a right to supply mitigating evidence** (e.g., rehabilitation, a disability-related right to reasonable accommodation), and **a right to dispute the outcome**.
- Seattle's 2017 Fair Chance Housing Ordinance similarly required individual assessment of criminal records. It also **barred landlords from discouraging applicants with criminal histories from applying** by banning advertising about criminal record bans and requiring criminal record disclosures as part of the application process. It also prohibited “steering” of tenants with criminal histories away from units by falsely representing that they were unavailable (a tactic that testing operations often discover as a method of discrimination).
- The 2021 Philadelphia Renters Access Act requires landlords to **give prospective tenants a list of screening criteria before they apply** and to use the same list for all tenants. The law **prohibits rejecting a tenant based solely on a poor credit score or on certain eviction case records**: where the tenant effectively won the case or satisfied the judgment or where the case is older or a result of the pandemic. Tenants have the **opportunity to review the documents the landlord considered** as the basis for any denial and **may dispute the denial**, including by offering additional clarifying or corrective information. A tenants has a **private right of action against a landlord who violates the ordinance**, with damages of up to \$2000.

⁶ See, e.g., Paula A. Franzese, “A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity,” 45 Fordham Urb. L.J. 661 (2018) (documenting blacklisting of tenants even after baseless eviction lawsuits)

⁷ ACLU, supra note 4 (Black women in Massachusetts were more than twice as likely as white women to have a dismissed eviction filing on their record)

- A 2021 District of Columbia law, the Fairness in Renting Amendment Act, that has been in effect since November of 2020, would **prohibit landlords from inquiring about certain previous eviction cases**: those that 1) did not result in a judgment in favor of the landlord 2) were filed more than 3 years ago, or 3) stemmed from a domestic violence, sexual assault or stalking incident. An adverse rental decision (denial or leasing on less favorable terms) may not be based solely on a tenant’s credit score. **Landlords must provide written notice of the adverse action to the prospective tenant**, and the tenant has an opportunity to dispute the information forming the basis of the housing provider’s adverse action.
- A bill introduced in Maine in 2021 (LD913) would bar landlords from considering certain civil court case information during tenant screening, including court records from cases in which the tenant was not accused of any wrongdoing or in which the tenant won or resolved the case by agreement, records from court cases more than 3 years old, and COVID-related eviction case records.

III. Some pros and cons of use-restriction approaches

Use restrictions promote transparency and open access to information by avoiding sealing. At the same time, limitations on landlords’ use of information can be nearly impossible to enforce: while landlords’ stated policies may change, their actual reasons for making rental decisions can easily be disguised or even unintentionally but harmfully unlawful. Similar schemes restricting landlords’ consideration of race or other protected characteristics have been notoriously difficult to enforce without testing (usually funded with HUD fair housing dollars). Use restrictions impose burdens directly on landlords, making them a potentially greater target of political opposition than laws with which landlords – including the most unsophisticated “mom-and-pop” landlords – can easily comply. On the plus side, laws that aim not only to identify prohibited categories of information but also to create infrastructure for deeper conversations between landlords and tenants may at least help to promote more nuanced decision-making, which ultimately benefits landlords and tenants alike.