



# CITY OF IOWA CITY MEMORANDUM

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Date: April 4, 2019  
To: Iowa City Landlords and Rental Property Managers  
From: Kristin Watson, Human Rights Investigator  
Re: Criminal Background Checks

Everyone needs a place to live. Yet formerly-incarcerated people are homeless at a rate that far exceeds that of the rest of the population. A person who has been incarcerated once is more than 6 ½ times more likely to be homeless than a person who has never been incarcerated.<sup>1</sup> People incarcerated more than once are over 13 times as likely to be homeless.<sup>2</sup>

The United States incarcerates more of its population than any other country in the world.<sup>3</sup> Incarceration has a disproportionate impact on communities of color. Black men are over five times more likely, and Hispanic men are almost three times more likely, to have been incarcerated than white men.<sup>4</sup> Similarly, Black women are 5.5 times more likely, and Hispanic women over two times more likely, to have been incarcerated than white women.<sup>5</sup> While “a person with a criminal history” is not a protected class per se, refusing to rent to people who have such histories without individual consideration of their circumstances may lead to successful complaints of discrimination.

## **What is a criminal history?**

It can be more complicated than it appears to determine whether a person actually has a criminal history. Arrests should never be used to disqualify an applicant from consideration. Reports from private database companies should be examined carefully to determine whether convictions listed are truly convictions; that is, landlords should be sure they have not been expunged, sealed, or subject to a successfully completed diversion program.

## **In what ways can using criminal histories be discriminatory?**

The Fair Housing Act can be violated in two ways through use of criminal history.<sup>6</sup> The first is by direct discriminatory treatment. In these cases, a landlord treats an applicant differently because of race, national origin, or other protected characteristic, using the criminal history as a pretext for the discrimination. Examples could include:

- renting to a white applicant with a criminal history, but rejecting a Hispanic applicant with a similar history,
- making policy exceptions for white applicants, but not African-American applicants, with respect to criminal histories,
- treating an old conviction as a youthful indiscretion for a US-born applicant, while treating the same type of conviction as evidence of a criminal nature for an immigrant applicant.

The second type of violation can lead to liability even *without discriminatory intent*. This is called disparate-impact discrimination. Criminal history policies that operate to exclude protected classes from housing may violate the FHA unless they are narrowly tailored to “serve a

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<sup>1</sup> <https://www.prisonpolicy.org/reports/housing.html>

<sup>2</sup> [Id.](#)

<sup>3</sup> [https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm\\_term=.a2381579bace](https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.a2381579bace)

<sup>4</sup> <https://www.sentencingproject.org/publications/trends-in-u-s-corrections/>

<sup>5</sup> <https://www.sentencingproject.org/publications/trends-in-u-s-corrections/>

<sup>6</sup> For a more detailed discussion of this topic, see [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF)

substantial, legitimate, nondiscriminatory interest” that cannot be served by another policy with a less discriminatory effect.<sup>7</sup>

In a disparate-impact situation, statistics, applicant data, tenant files, census data, criminal justice data, etc. will be analyzed to determine if the policy actually or predictably results in a higher burden on a protected group. If so, the landlord may show that the challenged policy is necessary to serve a substantial, legitimate, nondiscriminatory interest. This interest cannot be hypothetical or speculative, and the policy must actually achieve that interest. A common legitimate interest is protection of other residents and protection of both landlord and resident property. However, landlords may not exclude everyone with a conviction of any kind. This is too broad and is not necessary to achieve the interest of safety and property protection. Policies must accurately distinguish between convictions that indicate risk and those which do not. If a landlord’s policy passes this test, it must also pass a second test: whether there is a less-discriminatory alternative. Therefore, landlords should strive for the least-restrictive policy that still achieves the goal of protection of other residents and both landlord and resident property.

### **Are there any offenses landlords can always exclude someone for?**

Yes. According to § 807(b)(4) of the FHA, landlords may exclude persons who have been “convicted ... of the illegal *manufacture or distribution* of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).” Be cautious, because this exception only applies to *disparate impact* claims based on *conviction* for these specific offenses. It does not apply to arrests only, and does not apply to other drug offenses, such as possession. The exception also does not apply to intentional discrimination claims, because in those claims, the drug conviction is only the excuse for conduct actually based upon a protected class such as race or national origin.

### **What are best practices for using criminal histories?**

- Verify other qualifications first. Do not check criminal history unless an applicant passes other benchmarks for eligibility such as credit rating, income level, eviction history, etc. Note that any checks must be done consistently; if a landlord checks one applicant’s credit rating, all applicants must be checked.
- An arrest is never enough to deny a person housing. Arrests have no bearing on whether a person is eventually found guilty of the offense.
- When evaluating a criminal history, be sure to distinguish between convictions and charges that have been dismissed, successfully diverted, expunged, or sealed.
- Determine which offenses actually do threaten the safety of other residents and property. Do engage in some basic research and don’t make assumptions.
- Determine how recent a conviction needs to be to matter. Several 20-year-old assault convictions with no subsequent record may not matter at all, for example, while several assault convictions within the past two years may matter much more.
- Have an appeal process; there should be an opportunity for a person to explain the circumstances and why they should not be considered a threat.
- Record the justification for the policy and keep a record of any consultations and research considered in crafting it.
- Keep criminal record information confidential. Use it only for the purpose intended and share only with those who absolutely need access to it.

The Iowa City Human Rights Office hopes to provide memos to local landlords on a regular basis to assist in providing good outcomes for both landlords and tenants in this community. Please send other fair housing topics you would like to receive guidance on in the future, or inquiries regarding fair housing issues, to [humanrights@iowa-city.com](mailto:humanrights@iowa-city.com).

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<sup>7</sup> 24 C.F.R. § 100.500; *Texas Dep’t. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. \_\_\_\_; 135 S. Ct. 2507, 2535 (2015).