

Background Screenings

Frequently Asked Questions

Doesn't HUD require me to conduct a background check?

The only required screening is for drug-related activity and sex offense registries. The only mandatory denials are:

- ▶ If an applicant has been evicted from federally assisted housing for drug-related criminal activity in the past 3 years.
 - **Note:** This does not refer to all drug activity, evictions for other reasons, or evictions from property that is not federally assisted housing. There is also an exception if the applicant has completed an approved supervised drug rehabilitation program, or if the circumstances for the eviction no longer exist. For example, admission can be granted if the person who engaged in the illegal drug activity is no longer part of the household.
- ▶ If the applicant is currently engaged in illegal drug use.
 - **Note:** "Current" is not defined by HUD, and proof of "current" use is likely necessary to demonstrate cause to deny. This only refers to illegal drug use.
- ▶ If there is reasonable cause to believe that a household member's illegal use or a pattern of illegal use of a drug may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.
 - **Note:** The parameters of this are not defined, and this only refers to illegal drug use.
- ▶ If any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. This includes the State where the housing is located and other States where the household members are known to have resided.
 - **Note:** This is ONLY for people on a lifetime registry, not a general ban on any history of conviction for a sex-related offense.
- ▶ ONLY for public housing: if any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.
 - **Note:** This ONLY applies to public housing, and only if the activity occurred on the premise of federally assisted housing.¹

- No other screening is required by HUD. HUD allows other screening but does not require it. And no other automatic denials are required. If your property wants to abide by HUD standards, the screening should be no more restrictive than the above set of criteria.²

Isn't a background check standard operating procedure for tenancy applications?

No. Many properties do not conduct background checks at all, and their housing outcomes are not demonstrably different than other properties. In fact, background checks are a relatively recent addition to the housing application process. Prior to the past few decades, there was no discussion of conviction history for prospective tenants. Only since the 1990s have background checks become more common.³

Screening for conviction record is not an evidence-based tool. In fact, there are no empirically validated tools to predict the level of risk that a given applicant might pose to other tenants or the property, so conviction history is only used as a proxy, without any evidence it is a good predictor of future performance as a tenant.⁴

Finally, there is widespread concern that **background screening companies and screening software could produce inaccurate and inconsistent results.**⁵ In early 2023, the Consumer Financial Protection Bureau (CFPB) and Federal Trade Commission (FTC) issued a request for information regarding tenant screening procedures and programs, seeking to understand “how the use of criminal and eviction records and algorithms affect tenant screening decisions and may be driving discriminatory outcomes.” Though the follow-up from this request for information has not yet been announced, it is a response to a frequently voiced concern about inaccurate screening reports unfairly excluding prospective tenants from housing opportunities.⁶



Isn't it dangerous to allow someone with a conviction history to live in my building?

There is no empirical evidence connecting conviction history to unsuitability as a tenant and there has been no research proving that an applicant's conviction record has any predictive power in determining fitness for tenancy.⁷ On the other hand, **there is data demonstrating that a tenant's conviction history has no relationship to their performance as a tenant.**⁸

There is also evidence that access to housing reduces the likelihood of reoffending and returning to jail or prison. **Multiple studies have shown that stable housing reduces recidivism (return to jail/prison) while homelessness increases the risk of recidivism.**⁹ The ability to have a stable life starts with having stable housing, but background screenings often limit this opportunity for people with conviction histories. Eliminating barriers to housing improves neighborhood safety for everyone. Conviction history is not predictive of problematic tenancy, but stable housing does help prevent re-offenses, **so it is better for public safety to expand housing access to people regardless of conviction record.**

Doesn't this process violate Fair Housing? If we must treat everyone the same, an individualized assessment puts us at risk of Fair Housing complaints.

The clearest way to ensure background screening does not violate the Fair Housing Act is to not screen for conviction history at all. As they currently exist, background screening policies themselves are often in danger of violating Fair Housing because they can disproportionately exclude people of color, due to overrepresentation of people of color in the justice system. HUD's Fair Housing Guidance states: ***"[H]ousing providers that apply a policy or practice that excludes persons with prior convictions must...be able to prove that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest."***¹⁰

In other words, there must be evidence that the policy is necessary to protect the interest of the property. Further, ***"[b]ald 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 sufficient to satisfy this burden."***¹¹ This guidance also cautions against indefinite lookback periods.¹²

A June 2022 memo from the HUD Secretary for Fair Housing and Equal Opportunity contains similar guidance: ***"policies or practices that fail to consider the nature, severity, and recency of an individual's conduct are unlikely to be necessary to serve a substantial, legitimate, nondiscriminatory interest."***¹³

While it might seem like an individualized assessment introduces opportunity for bias, that does not have to be the case. In fact, HUD encourages this practice: ***“individualized assessment of relevant mitigating information beyond that contained in an individual’s criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account.”***¹⁴ In other words, **a background check with an individualized assessment is a less discriminatory alternative to a background that looks at conviction record alone.**

As long as the individualized assessment process is applied consistently across all applicants, the process itself should not violate Fair Housing. For example, all applicants must have the same opportunity to provide evidence of mitigating circumstances, that evidence should be evaluated using the same parameters, and all processes should be documented uniformly.

HUD offers some best practices for complying with Fair Housing. Housing providers should:

- ***“Ensure they can justify their policy with reliable evidence showing that it actually assists in protecting resident safety and/or property.”***
- ***“Ensure that any policy considers the nature, severity, and recency of criminal conduct.”***
- ***“Avoid the use of third-party screening companies that utilize algorithms that may contain racial or other prohibited bias in their design, have not been shown to reliably predict risk, may produce inaccurate information about the applicant, or make the decision for the housing provider (rather than providing information to the housing provider to make its own determination)”***
- ***“Before making an adverse decision related to an applicant’s criminal involvement, provide the applicant with the criminal record, indicate which specific part of the record may form the basis of an adverse decision, and give the applicant the opportunity to correct inaccurate information or explain extenuating circumstances related to that record.”***
- ***“Consider delaying consideration of criminal history until after an individual’s financial and other qualifications are verified and a conditional offer is made.”***¹⁵

The individualized assessment process sounds very time consuming. Why would I follow it?

The most efficient process for filling your units is to eliminate background checks entirely. If you must conduct a background screening, it is best to significantly reduce the extent of your screening process to enable applicants to move through the system to fill your units as quickly as possible. Engaging in follow up steps, such as an individualized assessment, helps to eliminate bias and ensure equity in access. These best practices can serve to create a more welcoming community in your housing development.

Recent guidance from HUD, released in April 2023, recognizes an individualized assessment as a best practice in tenant screening and encourages all housing providers to utilize this practice. More information from HUD is expected by the end of 2023.¹⁶

My community has a crime free ordinance, so I am required to screen for conviction record. What should I do?

If you must screen for background based upon a crime-free ordinance, implement the bare minimum criteria required by the ordinance. You can also consider advocating for policy change because the presence of deep racial disparities in the justice system mean that these ordinances effectively reduce access to stable housing for people of color.

Will I be held liable if a tenant commits a crime on my property?

Some communities that have adopted legislation limiting background screening have also included protections for housing providers from being held liable for criminal activity by their tenants on the property (For example, the Fair Chance Housing Act in New Jersey.) There are very few examples of cases where landlords are held responsible for tenant activity. The more common reason for landlords being held liable is to maintain the property, not tenant behavior.¹⁷

While illegal activity in any housing property is a serious concern that must be addressed, **there is no clear evidence that a person with a conviction record is more likely to engage in crime than someone without a conviction record.** As discussed above, there has been no research proving a clear, statistically significant link between conviction history and prevalence to engage in crime in the future. While some worry that the presence of people with conviction history in a community makes the community less safe, this is an **assumption** with no empirical evidence behind it. Furthermore, as discussed above, there is evidence that unstable housing or homelessness can lead to crime. Therefore, **the true threat to public safety is denying anyone housing.** Offering opportunity for stable housing supports public safety.

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This document is not intended as legal advice and does not provide a legal opinion as to the matters stated. It is recommended that all parties consult with an attorney that is well versed in fair housing law and local regulations when making decisions regarding tenant selection.

END NOTES

¹ [eCFR :: 24 CFR Part 960 -- Admission to, and Occupancy of, Public Housing](#)

² For more, see CFR § 982.553 [eCFR :: 24 CFR Part 5 Subpart I -- Preventing Crime in Federally Assisted Housing - Denying Admission and Terminating Tenancy for Criminal Activity or Alcohol Abuse](#)

³ [The Rise of Criminal Background Screening in Rental Housing - Thacher - 2008 - Law & Social Inquiry - Wiley Online Library](#)

⁴ [Tenant Screening With Criminal Background Checks: Predictions And Perceptions Are Not Causality | HUD USER](#)

⁵ <https://www.nytimes.com/2020/05/28/business/renters-background-checks.html>

⁶ [FTC and CFPB Seek Public Comment on How Background Screening May Shut Renters out of Housing | Federal Trade Commission](#)

⁷ [Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball \(2015\) - Merf Ehrman & Anna Reosti](#)

⁸ [Success in Housing: How Much Does Criminal Background Matter? \(wilder.org\)](#)

⁹ [THE EFFECT OF HOUSING CIRCUMSTANCES ON RECIDIVISM: Evidence From a Sample of People on Probation in San Francisco - PubMed \(nih.gov\)](#)

¹⁰ Page 6 - [HUD General Council Guidance - April 2016](#)

¹¹ Page 5 - [HUD General Council Guidance - April 2016](#)

¹² Page 7 - [HUD General Council Guidance - April 2016](#)

¹³ Page 7 - [Assistant Secretary for Fair Housing and Equal Opportunity - June 2022](#)

¹⁴ Page 7 - [Assistant Secretary for Fair Housing and Equal Opportunity - June 2022](#)

¹⁵ Page 9 - [Assistant Secretary for Fair Housing and Equal Opportunity - June 2022](#)

¹⁶ [HUD Outlines its Action Plan to Remove Unnecessary Barriers to Housing for People with Criminal Records | HUD.gov](#)

¹⁷ [Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball \(2015\) - Merf Ehrman & Anna Reosti](#)