

Recent developments in fair housing

Liza Cristol-Deman

Brancart & Brancart

lcristoldeman@brancart.com

- Use of **criminal records** in Housing decisions
- Rights of **LGBTQ** individuals in housing
- Discrimination Based on **Source of Income**, including vouchers
- Discriminatory **Appraisals**

Using criminal records to make decisions about applicants and tenants may violate FHA and FEHA

- ▶ HUD GUIDANCE 2016 AND 2022
- ▶ FEHA regulations, 2 CCR § 12264 - 12271
- In all stages of housing transactions and tenancy
 - Screening tenants
 - Evictions
 - Land-use/crime-free/local ordinances

Disparate Treatment - Examples

- ▶ Running a criminal background check on Black applicants **but not** white applicants
- ▶ Rejecting or discouraging Latino applicants based on criminal records **but not** white applicants with similar records
- ▶ Evicting a Black tenant convicted of a crime **but not** white tenant convicted of similar crime
- ▶ Running a criminal background check **after** learning applicant was previously treated for mental health

Disparate Impact

- ▶ Facially neutral policy: Eg, “Reject anyone with criminal history”
 - ▶ Does this policy have a **disproportionate effect** based on race or national origin, or both? (Statistics)
 - ▶ Is this policy **necessary** to achieve a substantial, legitimate, nondiscriminatory interest?
 - ▶ Blanket policies that fail to consider nature, severity and recency of conduct will generally fail this test
 - ▶ Policy of excluding/eviction based solely on arrests also fails this test
 - ▶ If yes, is there a less discriminatory alternative?
 - ▶ **Individualized assessment is generally required** as an LDA to blanket ban

Reasonable Accommodation

- ▶ Housing providers are required to make **changes and exceptions to policies and practices if necessary** to give an individual with a disability equal opportunity to use and enjoy housing
- ▶ Exception to criminal records policy required for individual with disability?
 - ▶ Probably, if disability contributed to criminal conduct, and other factors tend to demonstrate that the individual will be a peaceful, reliable tenant
 - ▶ Any direct threat to health and safety of others or property?

Criminal Records Take-aways

- ▶ Screening policies that reject applicants with **any** criminal history are unlawful
 - ▶ Arrests should not be considered at all
 - ▶ Convicted individuals should be considered on a case-by-case basis
 - ▶ Consider nature, severity, date, disability
- ▶ Policy of evicting tenants for **any** crime is also unlawful
 - ▶ **Case-by-case basis**
- ▶ Using a third-party vendor/screening service does not shield LL from liability

Housing rights of **LGBTQ** Individuals

- ▶ Federal Fair Housing Act
 - ▶ Biden's Exec. Order (Jan. 2021) makes discrimination in housing based on sexual orientation and gender identity a form of sex discrimination
 - ▶ HUD implemented Feb. 2021; scant caselaw
- ▶ California law, FEHA and Unruh Act
 - ▶ Sexual orientation and gender id explicitly covered under **Cal FEHA**, Gov't Code § 12955, and Unruh, Civ. Code § 51

Discrimination based on source of income

- ▶ Historically, private landlords have been free to refuse Section 8/HCV tenants
 - ▶ In many states, they still are
- ▶ 2020 California FEHA Amendments - unlawful to refuse to rent or discriminate because someone is a voucher holder
 - ▶ FEHA regulations, 2 CCR § 12141 - broad range of DHPs
- ▶ Also applies to other sources of income such as private and government subsidies and assistance programs

Minimum income requirements must be based on tenant share of the rent

- ▶ “IT SHALL BE UNLAWFUL... In instances where there is a government rent subsidy, to use a financial or income standard in assessing eligibility for the rental of housing that is not based on the portion of the rent to be paid by the tenant.” Gov’t Code § 12955 (o)

Hypothetical:

- ▶ Minimum income required by LL = 2.5x rent
- ▶ Monthly rent is \$3000
- ▶ Voucher holder share of the rent is \$400; PHA pays \$2600
- ▶ Minimum income requirement is satisfied if voucher holder has \$1000 per month in income (2.5 x 400)