TENANT SCREENING AND THE USE OF CRIMINAL BACKGROUND REPORTS

Housing California
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Panelists

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• Eric Dunn, Litigation Director, National Housing Law Project
• Deborah Thrope (moderator), Supervising Attorney, National Housing Law Project
Housing Policy Fair Chance Belonging In Richmond
Structural Analysis

- Historical context
- Policy analysis
- City reports and documents
- Contemporary housing research
70% of recently released Richmond residents do not have stable housing.
60 percent of Black households and 63 percent of Latino households in Richmond are renters

Source: Housing Policy and Belonging, 2018 https://haasinsttute.berkeley.edu/stayingpower
How it works

- Renters submit their information to a verified third party consumer reporting agency
- The renter pays a one-time fee (~$35-50)
- They receive notification of the completion of their report and are able to view the information
  - If there are any incorrect items, they can move to correct these
- They receive a link that they can share with landlords
- They apply as many times as they would like within 30 days, and give the link to landlords when applying
Source of Income Anti-Discrimination Ordinance

- Prevents landlords from explicitly refusing to rent to Section 8 (or Housing Choice Voucher) holders or any other sources of income.

Reusable Tenant Screening Report Ordinance

- Allows renters to use a single verified background report on rental applications as many times as needed in a 30 day period instead of paying the background check fee with each housing application.
No Way, Computer:
Notes on the struggle for fairness in rental housing admissions

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Tenant screening: why?
Renting an apartment: process

**Back in the Day**
- Written application
- Landlord may check references
- Possible screening fee
- Limited screening
  - Credit report
- Possible criminal history check
- Denial: no written notice

**Nowadays**
- Written application
- Release of information form
- Screening fee
- Detailed screening report
  - Credit, criminal, eviction
  - Reference checks possible
- Score or analysis
- Recommendation*
- Written denial notice
Tenant-screening reports: modern

Rental Score & Decision
A system for performing rapid tenant screening and lease recommendation... includes determining a value for each of said plurality of acceptance criteria [and] a score for each of said plurality of acceptance criteria based on said value [and] combining said scores into one composite score for a tenant by taking a weighted average of scores for said plurality of acceptance criteria according to the expression:

\[ y = \sum_{i} n_i \left( \Pi_2 + (y_i - 7)^2 \right) \]

wherein i represents an index of said plurality of acceptance criteria, pi represents an importance rating for each acceptance criteria, yi represents a score for each acceptance criteria, and y represents said composite score; and determining said recommendation based on said composite score.
• Housing provider enters admission criteria on website

• Software compares applicant data to admission criteria to produce score and decision

• Housing provider follows computer-generated decision
Admission Decisions

• Three typical outcomes:
  • Admit
  • Deny
  • Admit with conditions
    • Extra security deposit
    • Cosigner/guarantor

• Most housing providers routinely defer to screening company’s recommendation
“Tenant screening provides a first line of defense against discrimination complaints. That’s because differences in factors such as an applicant’s income, employment, references, and credit histories can help justify the selection of one tenant over another and thereby help landlords avoid discrimination charges. Here are eight recommendations for using the screening process to keep discrimination lawsuits at bay…

DO choose a “colorblind” screening service. Some services have a scoring system that enables landlords to establish their preferred tenant profile based on specific parameters, such as income, past evictions, and credit score. The software then evaluates each applicant according to the criteria and returns a “recommend” or “not recommend” verdict completely independent of race, religion, or other potentially discriminatory factors. This ensures that applicants are evaluated equally, providing a strong defense, assuming you follow the software’s recommendations…”

- Robbie Cronod, “Do’s & Don’t’s of Screening Tenants Legally,” 
  *Realtor Magazine* (Feb. 13, 2018)
Typical grounds for denial of rental housing

**Sometimes**
- Lots of delinquent debt (non-housing)
- Low credit score (e.g. FICO)
- Dismissed eviction suit
- Old eviction judgment
- Criminal record: dismissed, old, or unrelated to housing
- Negative reference (current or former LL)
- Disfavored income source (e.g., voucher)

**Almost always**
- Insufficient income/resources
- Recent eviction judgment
- Debt to former landlord
- Conviction or pending charge:
  - Violent or destructive behavior or drug-related
  - Dishonesty or theft-related
- Registered sex offender
- Pending bankruptcy petition
Disparate Impact (somewhat) plain English:

A policy or practice that disproportionately excludes people based on race, gender, or other protected characteristic is unlawful unless:

• The practice advances a “substantial, legitimate interest”, and

• There is no other equally effective means for achieving that interest (that has less of a discriminatory effect)
HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 4, 2016)

- Denial or lease termination based solely on arrest (i.e., no conviction) violates Fair Housing Act
- “Blanket” exclusions are highly suspect
- “Individualized review” is recommended
  - Relevant factors: Nature of crime, relationship to housing, time since the offense, evidence of rehabilitation, etc.
Historically disadvantaged groups disproportionately affected

Suspected
- High delinquent debt load
- Low credit score (e.g. FICO)
- Negative reference (current or former LL)
- Disfavored income source (e.g., voucher)
- Application fees

Proven
- Lack of stable employment/resources
- Disfavored income source (e.g., voucher)
- Eviction record
- Criminal record
Recent DI tenant screening opinions:

- **Criminal Records cases:**

- **Other cases:**
A person is vicariously liable for a discriminatory housing practice by the person's agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice, consistent with agency law.”

- 24 C.F.R. § 100.7(b)

“Defendant held itself out as a company with the knowledge and ingenuity to screen housing applicants by interpreting criminal records and specifically advertised its ability to improve ‘Fair Housing compliance.’ … Defendant had a duty not to sell a product to a customer which would unwittingly cause its customer to violate federal housing law and regulations.”

Art. 22, EU General Regulation on Data Protection

“The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

...the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision...”