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CRIMINAL CONVICTION SCREENING POLICIES: Best Practices to Avoid Disparate Impact Liability - A White Paper

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WEBINAR INFORMATION

- To ensure good sound quality, all attendees will be muted during the webinar.
- To ask a question: type your question in to the Question or Chat Box on your control panel. The moderator will review and present your question to the presenter at the end of the presentation as time allows.
- The NMHC/ NAA White Paper entitled “Criminal Conviction Screening Policies: Best Practices to Avoid Disparate Impact Liability,” is available for download on the NMHC and NAA websites.
- Today’s webinar is being recorded and will also be made available on the NMHC and NAA websites.

SPEAKERS



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THE GUIDANCE

April, 2016 – HUD Office of General Counsel (OGC) issues Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing

THE GUIDANCE

Guidance explains how the use of criminal background checks may have a disparate impact on minorities and constitute housing discrimination

- Not mean that using screening is prohibited

FAIR HOUSING ACT—BACKGROUND

Disparate Impact

- Definition: a policy or practice which is neutral on its face but has a statistically significant negative effect on a group of persons protected by the non-discrimination law
- Not need to show intent for disparate impact claims
- Claims based on statistics and expert analysis that suggest a housing policy has an indirect discriminatory effect on a protected class

SIGNIFICANCE OF DISPARATE IMPACT

By definition, disparate impact is used to attack policies or practices that are neutral on their face but that have allegedly disproportionate negative impact on minorities

- Due to socioeconomic realities in US, almost any policy or practice may have a disparate impact on protected classes

HUD DISPARATE IMPACT REGULATION (24 CFR SEC. 100.500)

In 2013, HUD adopted new regulations imposing rules to establish disparate impact liability in Fair Housing Act cases.

Definition:

A practice has a discriminatory impact where

- It actually or predictably results in a disparate impact on a group of persons or
- creates, increases, reinforces, or perpetuates segregated housing patterns
- based on race, color, religion, sex, handicap, familial status, or national origin.

HUD DISPARATE IMPACT REGULATION

Three-Step Burden Shifting Approach:

1. The plaintiff/complainant must make a *prima facie* showing of either a **disparate impact or a segregative effect.**
2. If the discriminatory impact is shown, the burden of proof shifts to the respondent to show a **“legally sufficient justification.”**
3. If the respondent satisfies the burden, then the plaintiff/complainant may still establish liability by proving that these interests could be served by **another practice that has a less discriminatory effect.**

HUD DISPARATE IMPACT REGULATION

“Legally Sufficient Justification”

A practice or policy found to have a discriminatory effect may still be lawful if it has a “legally sufficient justification.”

- A **legally sufficient justification** exists where the challenged practice:
 - is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent; and
 - those interests could not be served by another practice that has a less discriminatory effect.
- A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.

THE GUIDANCE

Guidance uses burden-shifting approach of HUD disparate impact rule:

1. Does Crime Screening have a discriminatory effect?

- State/local data can be used to prove DI if available, but if not, national data can be used to demonstrate a disparate impact if there is no reason to believe national data is different from state/local data
- Citing national data, OGC says minorities face disproportionately higher rates of arrest and conviction
- HUD data shows nothing about actual impact on housing opportunities

THE GUIDANCE

2. **Is Crime Screening necessary to achieve a substantial, legitimate, nondiscriminatory interest?**
 - Housing provider must be able to show that there is a legitimate reason to do what doing, and that the challenged policy actually achieves that interest.
 - Must be able to show the policy actually protects residents and property.
 - Bald assertions without factual proof are not sufficient

THE GUIDANCE

3. Is there a less discriminatory alternative?

- Burden shifts back to HUD or plaintiff to show that same interest could be served by a less discriminatory alternative
- An “individualized assessment” of relevant mitigating factors beyond the person’s criminal record may have a less discriminatory effect than categorical exclusions. The assessment includes:
 - Facts surrounding the criminal act
 - Age of person at time the act occurred
 - Tenant history before and after
 - Evidence of rehabilitation

HOW TO COMPLY WITH GUIDANCE

- Have a clear written policy
- Determine “substantial, legitimate, nondiscriminatory” interests that are basis of policy decisions
- Limit requested information to just what is needed to make legitimate decision
- Document the interests, relationship to the policy and conclusions about legitimate basis

HOW TO COMPLY WITH GUIDANCE

- No policy should have automatic denial for all arrests or all convictions
- Policy must consider the nature of crimes, “severity” and kind of harm inflicted, and the “recency” of crimes

HOW TO COMPLY WITH GUIDANCE

Ignore arrest records? Not prove unlawful conduct so not prove person dangerous

But some arrests important – like pending charges

- Then, arrest record could trigger an inquiry and look at evidence of underlying conduct

(HUD Notice PHI 2015-19 dated November 2, 2015 and FAQs describes using arrest records this way)

Best practice: avoid using arrest records; digging into underlying facts risky

HOW TO COMPLY WITH GUIDANCE

- Criminal convictions – categorize crimes by type of danger and which types are most likely to threaten persons or property
- HUD requires PHAs to screen for certain drug-related crimes and sex offender registrations

HOW TO COMPLY WITH GUIDANCE

Recency of crime and conviction:

More serious crime and screen back over longer duration

Recidivism and how long before chances of committing crime again no greater than anyone else

- Studies old. Many commentaries suggest 7-10 years, HUD suggests 6-7 years

New studies of recidivism to help define the right look-back for recency?

Need relevant local statistics. Studies might have unforeseen results.

HOW TO COMPLY WITH GUIDANCE

- Individual assessments – evaluate for every denial? Allow for mitigating circumstances and evidence of rehabilitation?
- HUD: assessments “likely to have less discriminatory effect than categorical exclusions”
- But introduces subjective decision into the process and greater risk of intentional discrimination claim – if do, use very specific and limited mitigating factors (i.e., identity mistake)

HOW TO COMPLY WITH GUIDANCE:

Other options:

- Delay criminal screening until end of application process

HOW TO COMPLY WITH GUIDANCE

- Approach to your policy: Risk Assessment
 - Must you follow Guidance?
 - How enforceable still to be determined

BASIS OF GUIDANCE

HUD Disparate Impact rule

Rule finalized before SCOTUS decision and not revised since

What did SCOTUS decision do?

TEXAS DEPT. OF HOUS. AND COMM. AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT—DECISION

HIGHLIGHTS OF KENNEDY’S MAJORITY OPINION (5-4)

- Upholds the existence of disparate impact under the Fair Housing Act. . .
- But recognizes that broad application of DI can have **unintended and adverse consequences** that actually result in opposite of what Congress intended and **frustrate legitimate decisions** by government entities and housing providers.
- Recommends “safeguards” to protect “against abusive disparate impact claims”
- Businesses must be given “leeway to state and explain the valid interest served by their policies.”

TEXAS DEPT. OF HOUS. AND COMM. AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT—DECISION

HIGHLIGHTS OF KENNEDY’S MAJORITY OPINION

Safeguards:

- Stresses “Robust Causality Requirement”
- Mere statistical disparity is not sufficient to support disparate impact
- As part of its prima facie case, plaintiff must demonstrate that the challenged practice is the cause of the disparate impact
- Suggests that if multiple causes for disparity, no negative disparate impact
- One time decision to build/not build may not be a “policy” that can be challenged at all

TEXAS DEPT. OF HOUS. AND COMM. AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT—DECISION

HIGHLIGHTS OF KENNEDY’S MAJORITY OPINION

Safeguards:

- A policy is not discriminatory unless it creates “artificial, arbitrary and unnecessary barriers”
- Plaintiff cannot just have different view of the policy or way to approach the goals
- Burden on Plaintiff to show **less discriminatory but equally effective alternative**

HUD DISPARATE IMPACT REGULATION

Where does *Inclusive Communities* leave the HUD regulation? Clear conflicts.

- HUD views SCOTUS decision as basic endorsement of its regulation but not recognize safeguards
- Kennedy is very concerned about need to clearly demonstrate causation and protect housing providers so that legitimate and “profit-motivated decisions” are not second-guessed – not see in HUD rule
- HUD rule and much less burden on plaintiff with statistical proof and much greater burden on defendant with sufficient justification
- HUD rule not satisfy Kennedy’s “robust causality requirement”
- HUD rule required defendant to show no less discriminatory practice to be legitimate but Court put burden on plaintiff

HUD DISPARATE IMPACT REGULATION - CHALLENGES

Property Casualty Insurers v. HUD (N.D. Ill)—

- HUD disparate impact rule did not consider insurance industry concerns during rulemaking
- Federal law: states are to regulate insurance
- Court found HUD acted arbitrarily and capriciously in ignoring insurance issues, remand to HUD

American Insurance Assn. v. HUD (D.C. Dist.)

- Same kind of allegations
- Previously scathing criticism of HUD
- HUD states that ICP decision just confirmed disparate impact
- HUD argues that defendant must justify its policy and justify how the means are the most effective — a heavier burden
- This case result in decision to strike HUD rule?

HOW COURTS USE THE GUIDANCE

Not law or regulation to be strictly enforced

If claims are made, Courts will weigh thoroughness of consideration, validity of reasoning, consistency with other pronouncements and the power to persuade before giving deference to HUD Guidance

HOW COURTS USE THE GUIDANCE

HUD Guidance will be the basis of claims but probably little or no deference because . . .

- Underlying disparate impact rule probably defective
- HUD Guidance based on unsupported national statistical information
- Prior Court decisions have repeatedly accepted screening
- Title VII employment cases accept screening
- Prior HUD pronouncements inconsistent with this Guidance

RIGHT NOW, THERE ARE NO SPECIFIC ANSWERS

HUD likely to issue more guidance/FAQs

HUD may be forced to change current disparate impact approach as DI and HUD rule evolve in Court decisions

QUESTIONS

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