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TENANT SCREENING REGULATIONS

Tenant Screening Rules in Oregon, Washington, and Colorado

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"As many as 100 million U.S. adults – or nearly one-third of the population – have a criminal record of some sort… African Americans and Hispanics are arrested, convicted, and incarcerated at rates disproportionate to their share of the general population,"

(HUD 2016)

Housing discrimination in the U.S. against various identities, such as race, religion, and gender, is well documented. These, and many other identities are now protected by the Fair Housing Act ("FHA"). However, there are many characteristics historically associated with these identities that are not protected under federal law. To adapt to the changing times, state and local governments have created their own laws to prevent landlords from screening for these characteristics. Perhaps the most notable characteristic that is historically associated with race is a history of incarceration or criminal record.

In addition to criminal record, local governments have also created ordinances to prevent landlords from using other non-legal aspects of tenant applicants' pasts to deny them housing. Some examples of this include credit, income, and rental history. Preventing this type of screening could be construed to be more of an overreach than protecting against searching for criminal history. However, proponents of these laws will likely argue that credit, income, and rental history are historically associated with protected identities such as race, perhaps even more so than a criminal record.

This article will examine the laws that the states of Colorado, Oregon, and Washington – as well as their largest cities – have enacted to prevent landlords from screening for various characteristics that are historically associated with protected identities. It will also compare these state laws to federal guidelines from 2016 regarding the screening of tenant applicants.

MASS INCARCERATION AND SCREENING FOR CRIMINAL HISTORY

In April 2016, the U.S. Department of Housing and Urban Development issued a memorandum of guidance on the application of the FHA to the use of criminal records by landlords. According to the HUD guidance:

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The memo goes on to state that:

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According to HUD, in 2014 Hispanic-identifying people were also incarcerated at a rate higher than their share of the population. Conversely, Whites comprised about 62 percent of the total U.S. population, but only about one-third of the U.S. prison population at the time.

Because of this, screening for criminal records can have a disproportionately negative affect on African American and Hispanic individuals. However, in order to prove unlawful discrimination, HUD stated in the memo that a policy or practice must have, "*a disparate impact on individuals of a particular race, national origin, or other protected class*" (HUD).

HUD then sought to evaluate whether screening for criminal history has a discriminatory effect on tenant applicants, and if there is a less discriminatory alternative to screening for prior arrests and convictions. The department found that, "[an] 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" (HUD). Instead of denying someone based on the binary matrix of whether or not they have committed a crime, HUD recommends that housing providers evaluate each applicant on a case-by-case basis.

The guidance concludes that, "*Policies that exclude persons based on criminal history must…take into consideration such factors as the type of the crime and the length of the time since conviction*" (HUD). While HUD cannot legislate statutes, it is arguing that in order to satisfy the disparate impact standard, landlords must look at the amount of time that has passed since a crime was committed, among other factors. In response to this, lawmakers in the states of Colorado, Oregon, and Washington – and in their biggest cities – have recently passed legislation restricting the ability of landlords to screen tenant applicants for criminal history and ability to pay rent.

Because of this, landlords have to pay more for the screening process, and if they do not comply with the law, they are liable to be penalized for it. This has almost universally hurt small landlords for a few reasons: they

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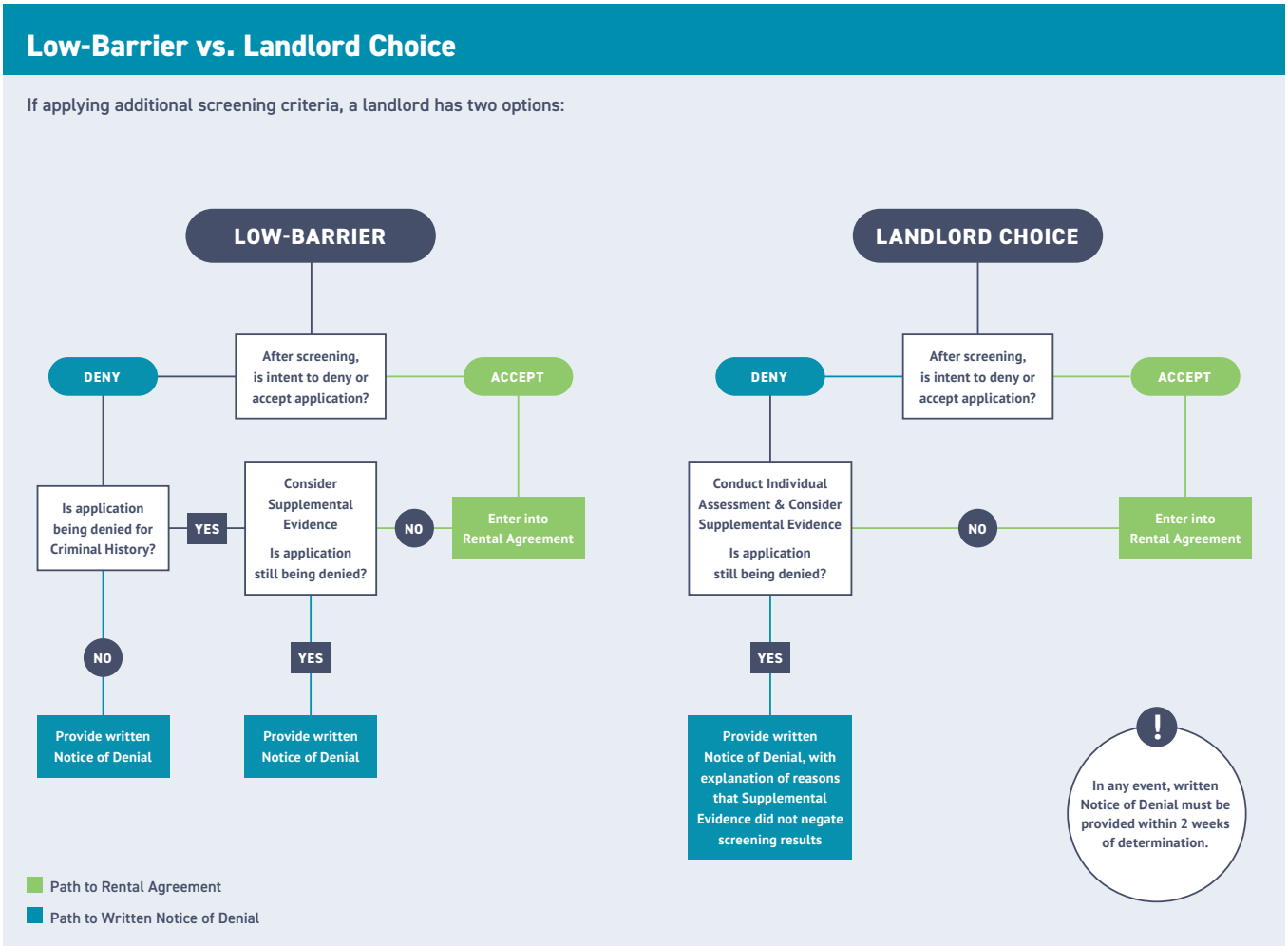
cannot profit off of the screening process, they have been forced to shift management to third party companies for compliance reasons, and they might be forced to accept a tenant who cannot reliably pay their rent. The COVID-19 pandemic, and the resulting eviction moratoriums in all three states have only added fuel to this fire.

LANDLORD-TENANT LAW IN DENVER

Tenant applicant screening in Denver is much less restrictive than its counterparts in Portland and Seattle. For one, landlords in Denver are still able to conduct criminal background checks on tenant applicants, while there are strict impediments to conducting background screening in Seattle and Portland. Interestingly, Colorado only established immigration status as a protected class for housing this year, with SB20-224. Some areas in which Colorado is perhaps more restrictive than Oregon or Washington is with House Bills 1048 and 1332, both of which have been signed into law.

Colorado HB20-1048 protects tenant applicants from discrimination on the basis of race, including, "traits historically associated with race, such as hair texture, hair type, and protective hairstyles" (Colorado General Assembly, 2020). Additionally, as of January 1, 2021, HB-1332 prohibits discrimination based on a person's source of income, as long as it is legal and verifiable, for landlords with four or more dwelling units. Landlords with five or fewer single family home rentals are not subject to this law. Both of these statutes seem to be quite reasonable.

Another positive step that the State of Colorado has taken during the COVID-19 pandemic has been the Senate Bill 20B-002. This bill authorized $54 million in housing assistance for people economically impacted by the COVID-19 pandemic. Through this bill, Colorado created the Property Owner Preservation ("POP") program, in which property owners can apply for rental assistance from the state on behalf of their tenants. This is an example of state legislation that benefits both landlords and tenants. The states of Oregon and Washington could certainly benefit from a program like this (Colorado Department of Local Affairs, 2020).



(Portland Housing Bureau)

TENANT SCREENING LAW IN SEATTLE

In August 2017, the Seattle City Council passed the Fair Chance Housing Act, which prohibits private landlords from screening for criminal history for any reason, with very minimal exceptions. This law also requires housing providers to include the following statement on tenant applications: "[Housing Provider] is prohibited from requiring disclosure, asking about, rejecting an applicant, or taking adverse action based on any arrest record, conviction record, or criminal history, except sex offender registry information" (WMFHA, 2020). There was a lawsuit filed against this ordinance in 2018 that is currently pending.

One exception of the Fair Chance Housing Act is if the landlord's dwelling unit shares a single family home with the dwelling unit that they rent, they can conduct a criminal background screening. Another exception is that landlords may search for tenant applicants on local, state, or national sex offender registries. However, even

if a tenant is on national sex offender registry, the Fair Chance Act requires landlords to conduct an individual assessment before denying a tenant's application.

The Fair Chance Act only affects private developers, so public housing authorities are still allowed to conduct criminal background checks. In addition to reducing the competitiveness of private developers, this could reduce both the quality and overall supply of affordable housing stock in Seattle, as the majority of affordable housing units are built by non-public developers. The law is so strict, in fact, that landlords cannot even screen tenants for being on the Office of Foreign Assets Control watch list for money laundering, and potentially the financing of terrorist activity.

While this policy certainly has good intentions, it fails to account for the amount of time since a crime has happened. The HUD memorandum of guidance argues that a policy that does not account for the length of time since a certain crime has happened will ultimately fail to:

"*serve a 'substantial, legitimate, nondiscriminatory interest'… especially in light of criminological research showing that, over time, the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense*" (HUD).

Instead of accounting for the amount of time since a crime was committed like the HUD memo recommends, Seattle has done the opposite in a sense, and categorically banned screening for any criminal history aside from sexual assault. This is simply put a reactive, rather than proactive, reform. The City of Seattle should amend this ordinance to account for the amount of time since a crime has happened, and it ought to apply to all developers – not just private businesses. This would increase the overall quality and supply of affordable housing in Seattle.

TENANT SCREENING LAW IN PORTLAND

In June 2019, the Portland City Council passed the Fair Access in Renting ("FAIR") ordinance, and it took effect March 1, 2020. Portland City Commissioner Amanda Fritz was the only City Council member to vote against the FAIR ordinance, while Commissioner Jo Ann Hardesty was absent for the vote. Fritz was dismayed by the ordinance's lack of protection for landlords in

screening against tenants with violent criminal histories. In June of 2019, she was quoted by Oregon Public Broadcasting as saying: "Will any landlords choose to use the low-barrier process with that in mind?" (Templeton, 2019). Fritz was also concerned that the FAIR ordinance could in fact be harmful to renters by, "driving up costs, discouraging new housing development, and prompting units that are currently rented to convert to owner-occupied housing," (Templeton).

FAIR instituted a low-barrier criteria of screening tenant applicants that landlords can choose in order to avoid having to complete an individual assessment. These criteria include not denying tenant applicants for: misdemeanors that are more than three years old; convictions that are more than seven years old; any credit score over 500; any past-due unpaid obligations reported by a consumer credit reporting agency of less than $1,000; and Chapter 13 Bankruptcy (Bluestone & Hockley, 2020). Failure to comply with any of these regulations or complete an individual assessment when required would result in a $250 fine on landlords. FAIR also includes penalties of twice the amount of the security deposit if landlords fail to send a move out settlement or deposit refund within 31 days, or include the depreciation schedule, name of banking institutions, and condition report in the Rental Agreement.

Another implication of FAIR are the limits imposed on screening fees on tenant applicants. If a landlord does all of his or her screening through a third party, they may only pass on that fee to the applicant, and cannot make any additional income on it (Portland Housing Bureau). This creates an undue burden on the landlord because they have to spend a certain amount of time, energy, and resources coordinating the tenant screening. However, they receive no net income for this type of screening, so it becomes a cost on their balance sheet.

Additionally, if a landlord does some, but not all of the screening for a tenant applicant, they can pass on an additional 25% fee to the tenant. However, if the landlord does all of the screening by him or herself, they can only charge what a screening company would plus an additional 10%. Now, let's assume that the cost of the screening conducted by the third party company is the same as what it would cost the landlord to do themselves. In this situation, why would any landlord not hire a third party company? They only stand to benefit from doing so because they could charge an extra 15% (25%

minus 10%) on top of the screening cost. This is plainly a disincentive for the landlord to conduct their own screening.

INDIVIDUAL ASSESSMENTS

If landlords do not choose the low-barrier criteria option created by the FAIR ordinance, and they deny an applicant for something covered in the criteria, they must complete an individual assessment, regardless of whether the applicant requests one (Portland Housing Bureau, 2020). Individual assessments are expensive and time-consuming for landlords to conduct. This requirement could cause many landlords to contract with a third party property management firm, or to shift to another firm altogether. Whether the landlord performs the assessment themselves, or hires a third party management firm, they are reducing their net income.

FAIR's requirement to conduct an individual assessment – regardless of whether the applicant requests one – would seem to be targeted to applicants who do not have access to adequate legal counsel. One possible solution to the problems that this rule causes could be a standardized online application which contains a disclaimer that if a tenant is denied for criminal history, they have the right to an individual assessment. Any such disclaimer would have to be reviewed by experts in the field, but one would believe it would have to be written in a large font, in laymen's terms, and at the beginning and end of the application. The tenant applicant could also be sent an email with the proper information and be required to verify that they have read the information in the email before submitting the application.

Another option, or something that could be used in conjunction with a disclaimer on a standardized application, would be an automated service, instituted by the City of Portland. This type of service could be conducted by a small team of municipal workers, perhaps four to six people. This team would automatically be directed to call and/or email anyone who is denied a unit, and happens to have a criminal history, low credit score, or low income. As with any option that could potentially affect FHA regulations, these options would have to be vetted by experts to ensure that it would not create a disparate impact among different groups of people.

CONCLUSION

Clearly of these three municipalities, Denver has the least restrictive screening processes for tenant applicants. Restrictions in Portland and Seattle appear to be more difficult on landlords. Seattle's Fair Housing Chance Act puts landlords in the difficult position of not being able to look up virtually any crime that any tenant applicant has committed. While Portland's FAIR ordinance allows for some assessment of criminal history, both ordinances have been burdensome on landlords. Eviction moratoriums in both states have only made it more difficult for landlords. In terms of rent payment during the COVID-19 pandemic, Oregon and Washington State could certainly benefit from instituting a similar system to the POP program in Colorado.

What is clear is that our criminal justice system is broken, and that there are institutions that have kept non-White people in a cycle of legal and financial hardship. We must condemn and address the systemic racism that has caused these cycles, rather than burdening landlords by making it harder for them to screen applicants. In the next legislative cycle, the Cities of Portland and Seattle will have to examine the ordinances that they have passed to ensure the sustainable development of residential properties in their jurisdictions. There are many services that could be created to educate renters in the Northwest, and hopefully these cities become more proactive, rather than reactive, in creating fair housing for all.

LANDLORD PENALTY CHART | FAIR ACCESS IN RENTING (FAIR) ORDINANCES, CITY OF PORTLAND, OREGON

Failure to include all required items in your ad. Items include date applications can be processed, criteria, whether this is an ADU or not, screening fee	$250
Failure to process applications in the correct order	$250
Not including the proper forms and sections with or on your applications	$250
Credit screening a Non-Applicant and using that against them in the screening process	$250
Charging more than the allowable screening fee	$250
Improperly deny an otherwise qualified applicant	$250
Not conducting the proper individual assessments before denying an applicant	$250
Failure to follow the appeals policy	$250
Charging more than the allowable security deposit	2x the deposit
Not including the proper information in the Rental Agreement. Information includes: Depreciation schedule, banking institution name and address, condition report	2x the deposit
Not providing a rental history form upon termination notice	2x the deposit
Charging a tenant for items not listed on the depreciation schedule or improperly charging an amount based on incorrect schedule, updated condition reports, charging for routine maintenance or normal wear and tear	2x the deposit
Not sending out the move out settlement and/or deposit refund within 30/31 days	2x the deposit
Not including the security deposit notice of rights with the move out settlement	2x the deposit

(BlueStone & Hockley Real Estate Services)

RESTRICTIONS ON LANDLORDS IN DENVER, PORTLAND & SEATTLE

Can landlords who share single family homes with their tenants in...	Denver	Portland	Seattle
Screen for applicants on sex offender registries?	Yes	Yes	Yes
Screen for applicants on OFAC watchlist?	Yes	Yes	Yes
Profit on screenings done by third parties?	Yes	No	No
Deny applicants based on source of income?	Yes	No	No
Can landlords who do not share single family homes with their tenants but have < 4 dwelling units, or < 6 single family homes in...	Denver	Portland	Seattle
Screen for applicants on sex offender registries?	Yes	Yes	Yes
Screen for applicants on OFAC watchlist?	Yes	Yes	No
Profit on screenings done by third parties?	Yes	No	No
Deny applicants based on source of income?	Yes	No	No
Can landlords with > 3 dwelling units or > 5 single family homes in...	Denver	Portland	Seattle
Screen for applicants on sex offender registries?	Yes	Yes	Yes
Screen for applicants on OFAC watchlist?	Yes	Yes	No
Profit on screenings done by third parties?	Yes	No	No
Deny applicants based on source of income?	No	No	No
Landlords with > 5 units must conduct individualized assessments in...	Denver	Portland	Seattle
For denying applicants with convictions < 7 years old	No	No	Yes
For denying applicants with convictions > 7 years old	No	Yes	Yes
For denying applicants with misdemeanors < 3 years old	No	No	Yes
For denying applicants with misdemeanors < 3 years old	No	Yes	Yes

RESOURCES

1. “Bills, Resolutions, & Memorials.” Colorado General Assembly, 2020, www.leg.colorado.gov/bills.

2. “Emergency Rental and Mortgage Assistance | Department of Local Affairs.” Colorado Department of Local Affairs, cdola.colorado.gov/rental-mortgage-assistance.

3. Kanovsky, Helen R., General Counsel. “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.” U.S. Department of Housing and Urban Development, 4 April 2016.

4. “Landlord Penalty Chart: Fair Access in Renting (FAIR) Ordinances, City of Portland, Oregon.” Bluestone & Hockley Property Management, 28 Feb. 2020, www.bluestonehockley.com/landlord-penalty-chart-fair-access-in-renting-fair-ordinances-city-of-portland-oregon.

5. “Portland Landlord-Tenant Law.” Portland Housing Bureau, January 2020.

6. “Seattle Landlord-Tenant Law.” Washington Multifamily Housing Association, 2020, www.wmfha.org/seattle-landlord-tenant-law.

7. Templeton, Amelia. “Portland Requires Landlords To Use First-Come-First-Served System To Choose Tenants.” Oregon Public Broadcasting, 19 June 2019, www.opb.org/news/article/portland-tenant-screening-regulations-pass.