

Frequently Asked Questions: HUD-Subsidized Housing for Older Adults with Criminal Records

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This FAQ is a follow up to NCLER's training, *HUD-Subsidized Housing for Older Adults with Criminal Records*. The webcast [recording](#) and [slides](#) have more information.

Do older adults face housing barriers because of past involvement in the criminal legal system?

Yes, an increasing number of older adults face criminal records barriers in housing for several reasons. First, there has been a startling growth in the older adult population in state and federal prisons across the country due to rising admissions rates and longer sentences.¹

Older adults are also more likely to experience homelessness after they have been incarcerated. While people who are formerly incarcerated are ten times as likely to experience homelessness than the general population, the rate is even higher for those over the age of 45.² A worsening shortage of affordable housing exacerbates these problems, especially for people whose prior justice involvement can often be a barrier to gainful employment.

Moreover, the harms of mass incarceration and homelessness often converge and burden Black older adults, other older adults of color, and older adults with disabilities.³

The U.S. Department of Housing and Urban Development (HUD) has encouraged HUD-assisted housing providers to give fair chances to justice-involved individuals and their families.

Why is HUD-assisted housing an important option for older adults with criminal records?

Housing subsidized by HUD is an important option for older adults who are formerly incarcerated, and who are likely to have low incomes because of employment barriers based on both criminal history and age. The most well-known HUD subsidized programs are public housing, the Housing Choice Voucher program, and project-based Section 8. Some public housing developments are specifically set aside for people over the age of 55.

1 bjs.ojp.gov/content/pub/pdf/aspp9313.pdf (noting that between 1996 and 2006, the number of older adults in prison nationally grew by 280%).

2 prisonpolicy.org/reports/housing.html

3 Memorandum from Demetria L. McCain, HUD Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity to Office of Fair Housing & Equal Opportunity et al., *Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (June 10, 2022), hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf

When must a Public Housing Agency (PHA) or project owner deny admission based on criminal history?

PHAs and project owners must deny admission to two narrow categories of applicants:

1. Applicants who have ever been convicted of the specific offense of manufacturing methamphetamine on federally assisted property
2. Applicants subject to a lifetime registration requirement for a past sex offense

These bans are absolute.

PHAs and project owners must also deny admission to:

1. Current users of illegal drugs, abusers of alcohol
 - » There is no definition of “current” but HUD has suggested as a best practice that “current” should signify “within the last three months.”
2. Anyone who, within the last three years, has been evicted from federal housing for drug-related criminal activity unless
 - » that person has undergone drug rehabilitation; or
 - » the circumstances that led to the eviction no longer exist (e.g., the person has died or is currently incarcerated).

When does a PHA or project owner have discretion to admit applicants with a criminal history?

PHAs and project owners have discretion to admit in the vast majority of cases.

PHAs and project owners may, but are not required to, consider denying admission for:

1. Drug-related criminal activity
 - » This covers manufacture, sale, distribution, use, or possession.
2. Violent criminal activity
 - » This covers the use of or threatened use of physical force that will cause serious bodily injury or property damage.
3. Other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing employees
 - » This category should not be used as a catch-all provision.

What are the limits on a PHA’s or project owner’s discretion?

There are several constraints to the discretion that PHAs and project owners have when deciding on whether to admit or deny an applicant.

The first is **time**. The criminal activity in question must have occurred during a “reasonable time” before the screening takes place. 42 U.S.C. §13661(c)(2012). Although there is no definition of a “reasonable time,” the trend among PHAs and other housing providers has been to move downwards, and a growing number consider criminal activity only within the last three years or less.

The second limit is **civil rights and other federal laws**.

- The Fair Housing Act protects applicants and tenants from discrimination on the basis of protected classes, such as race, national origin, and disability status. Blanket bans on people with criminal records will likely have fair housing implications, which landlords should avoid.
- The Violence Against Women Act (VAWA) provides housing protections for survivors of domestic violence, dating violence, sexual assault and/or stalking. Despite the name of the law, VAWA's protections apply regardless of sex, sexual orientation or gender identity. VAWA requires housing providers to consider "adverse factors" that may be a direct result of violence, including a criminal record.

The third limit is **local fair chance housing laws**, provided that they do not conflict with HUD's mandatory bans. If a local law limits the arrest and conviction records that a housing provider can use, then the PHA and project owner will be subject to the same limitations.

What criminal background check policies likely raise issues under the Fair Housing Act?

- Use of arrests:
 - » Policies that deny applicants on the basis of an arrest record, especially if the arrests never led to convictions and if there is no evidence that the applicant engaged in criminal activity other than the fact of the arrest.
- Use of overbroad categories:
 - » Blanket bans on broad categories of applicants – e.g., anyone with a criminal record, anyone with a felony record.
- Use of overlong lookback periods:
 - » Policies with no limits on how far a housing provider will look back ("have you ever been convicted of a drug-related offense?") or policies with unreasonably long lookback periods (e.g., 25 years).
- Underuse of mitigating circumstances:
 - » Policies that do not offer the applicant an opportunity to present mitigating evidence beyond the criminal record and that do not require the housing provider to conduct an individualized assessment of the applicant.

If I see these issues, who should I contact?

If you see these issues, it is very likely that there are fair housing issues at play, so it is best to contact your local private fair housing center: <https://nationalfairhousing.org/what-is-housing-discrimination/>.

What are examples of mitigating evidence that could help applicants overcome barriers related to arrest and conviction records?

HUD offers the following examples of relevant mitigating evidence:

- Facts or circumstances surrounding the criminal conduct
- Age at time of conduct

- Time passed since conduct
- Evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct
- Evidence of rehabilitation efforts

Disabled applicants or tenants may be entitled to a reasonable accommodation, which would likely be an exception or adjustment to the criminal records screening policy or practice. The applicant or tenant would have to provide evidence that (i) their disability contributed to the criminal conduct at issue and (ii) there are mitigating circumstances that eliminate or significantly reduce the risk of harm to others or property.

Reasonable accommodations are not available for individuals:

1. Who are currently engaging in illegal use of controlled substances; or
2. Whose tenancy would constitute a “direct threat” to the health and safety of other individuals or result in substantial physical damage to the process of others **unless** the threat can be eliminated or significantly reduced by reasonable accommodations. 42 U.S.C. 3604(f)(9).⁴

What can I do to help clients who are on the registry to find housing?

It is a challenge to find housing for people who are on a registry for past sex-related offenses because of a multitude of barriers, such as restrictions on where they can live and the public nature of registries. A [webinar from the Council of State Governments](#) provides a detailed discussion of these barriers and examples of how two communities have found effective solutions.

Additional Resources

- NCLER Training: [HUD-Subsidized Housing for Older Adults with Criminal Records](#)
- NCLER Training: [Reentry: Advocating for Formerly Incarcerated Older Adults](#)
- NCLER Resource Guide: [Reentry: Advocating for Formerly Incarcerated Older Adults](#)
- National Housing Law Project Resources: [Housing Opportunities for People Reentering](#)

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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⁴ For more information, see Joint Statement of the U.S. Department of Housing and Urban Development and the U.S. Department of Justice on Reasonable Accommodations under the Fair Housing Act, [hud.gov/sites/documents/reasonable_modifications_mar08.pdf](https://www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf)