

# Playing Fair in the Housing Market Protect Yourself from Discrimination Suits

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*Little things have the potential to compound and become big problems.*

That's not a comforting thought when you're dealing with Fair Housing and Equal Opportunity complaints against your company or property managers. By applying solid parameters to your tenant screening process, however, you can protect your company, its loss ratio and your insurance premium dollars.

## The FHEO Lays Down the Law

The mission of the office of Fair Housing and Equal Opportunity (FHEO) is to create equal housing opportunities for all persons living in America by administering laws that prohibit discrimination in housing on the basis of race, color, religion, sex, national origin, age, disability or family status.

The goal of fair housing law is to end discrimination and assure equal access to housing for members of "protected classes." Fair housing law states that a person's willingness to rent or sell housing to another person cannot be based, even in part, on that person's race, religion, color, sex, handicap, nationality or family status.

## Clear-Cut Criteria = Compliance

Within the past several years, property owners and landlords have experienced a rise in the number of applicants who threaten to file discrimination suits when their applications are denied, no matter what the reason is. The key to remaining compliant when interviewing potential tenants is to have clear-cut criteria for renting or selling to an applicant—and then to rigidly adhere to those parameters during every interaction. The criteria should be objective, easy to quantify and unrelated to the applicant's membership (or non-membership) in a protected class. Criteria should be based on reliable predictors of a tenant's ability to fulfill the requirements of the lease, such as paying on time and keeping the unit in good condition.

The following criteria are considered to be "safe" because they can be independently verified through sources like courthouse records, credit services, etc.:

- Has the applicant lied about rental history, employment or income?
- Does the applicant have a pet?
- How long has the applicant held his/her current job?
- How many places of residence has the applicant had in the last two years?
- Does the applicant earn at least three times (or in some cases four times) the amount of the rent or rent plus utilities?
- Has the applicant ever been evicted?
- Does the applicant have any unpaid judgments?

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Slightly tougher questions and criteria may result from the opinion of another person or through the use of reports obtained from a prospective tenant's previous landlord. These criteria are best determined by asking the following simple yes-or-no questions:

- Did the tenant pay \$xxx of rent each month (based on what the applicant reported)?
- Was he/she always on time with rent payments?



- Did the applicant leave the unit in good condition?
- Would you rent to this tenant again? <sup>1</sup>

### What do Fair Housing Testers Look For?

Fair Housing Testers most often evaluate one or more of the following situations:

1. **“Paired testing”**—a protocol used to detect the interviewer’s attempt to identify the race, sex, national origin, family status or disability status of an applicant. The tester sends an applicant to a facility and tracks how that applicant is received. Another applicant with a different background is then sent to the same facility and that applicant’s experience is tracked. Information from both applicants is reviewed and evaluated to determine if discrimination was involved in any interaction between applicant and property owner/manager.
2. **Accessibility violations.** Criteria examined may include the following:
  - a. accessibility to a unit or office
  - b. proper marking of parking lots
  - c. doors and hallways that are wide enough to accommodate disabled residents
  - d. sufficient turnaround space in kitchens and bathrooms.
3. **Reasonable accommodations to disabled residents.** Among others, this list may include the following:
  - a. a landlord’s willingness to fulfill applicants’ requests regarding ramp installation or other physical accommodations
  - b. allowing a service animal on premises (if animals are not generally permitted)
  - c. accepting late payments of rent to coincide with the scheduled receipt of disability checks

Owners and property management firms should regularly review on-site leasing activities to ensure that proper oversight is in place to help avoid any of the above violations. On-site employees who interact with prospective and current residents should receive adequate training in FHEO compliance issues.<sup>2</sup>

### Criminal Screening Process for Tenants

An increasing number of property owners and management companies have begun using criminal screening strategies to improve the safety of their properties and communities for residents, guests and staff.

Criminal screening can decrease a property owner’s or management company’s liability due to criminal acts, but it can

also create exposure to Fair Housing compliance issues. In order to minimize compliance risks, it is imperative to establish a criminal screening policy that treats all applicants equally and fairly. Each property owner or management company should consult with legal counsel when establishing any type of screening process.

While developing the screening process, ask yourself the following questions:

- Can I validate and document that the criminal screening process is being run on **all** applicants?
- Can my leasing staff make criminal screening decisions without assistance from mid- or senior-level management?
- Will the current process allow me to monitor criminal screening data, clearly identify the types of offenses that have been discovered and accept/decline trends in order to update the policy to current business conditions?
- Does my leasing staff have the skills required to interpret complicated criminal records?
- Can the criminal screening policy define accept/decline criteria by specific offense type and offense date?

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If the answer to any of these questions is “no,” an automated criminal screening service may enable you to establish and enforce a more consistent and compliant criminal screening policy. With most criminal screening tools, property owners/managers are expected to make “on the spot” decisions about what searches should be conducted and to determine if criminal offenders should receive an accept/decline leasing decision. This obviously places a great deal of responsibility on your staff and increases the risk of Fair Housing violations if searches are done and interpreted inconsistently.

It’s imperative that property owners and management companies look for screening products that categorize criminal records and automatically provide a clear accept/decline leasing decision based on criteria established for the community. There are a variety of companies in the marketplace that offer automated criminal screening services. The product you

choose should allow you to set the policies for accepting or declining criminal offenses using criminal offense categories that cover crimes against persons, property and society. The technology should evaluate criminal record search results and automatically deliver an accept/decline decision to your staff.

Ideally, the screening process should require management to monitor and report the number of accept/decline decisions and view the breakdown of criminal search results by offense type. With these parameters, you can monitor your staff’s performance and adjust screening criteria to meet the business and legal demands of your particular state.

### **Protect Yourself, Your Tenants and Your Property**

No matter what method of screening you choose, your best protection against a discrimination lawsuit is proper planning. The following list is a guide to help you create a strategy for interviewing potential tenants:

- All criteria should be in writing—no exceptions!
- Be adamant that on-site interviewers use the established criteria for **every applicant**.
- If it’s necessary to reject an applicant, write a thorough and comprehensive review of the reasons this action was taken and retain it in your files for at least five years.
- Be sure to create a file for accepted applicants, also. Document the interview and acceptance process and retain it for at least five years.
- If you believe that you need additional information on an applicant, be certain you request the same information on every applicant.
- If you need additional advice, don’t hesitate to contact your local fair housing agency.

It’s an unfortunate fact that even the most diligent owner/manager can be the target of a discrimination lawsuit. Assuming that you follow strict guidelines and do not discriminate against members of protected classes, your thorough documentation can help protect you. Fair housing testers employed by local fair housing agencies often dismiss lawsuits when it is discovered that you treat everyone equally and that you have written records available for review.

It’s the responsibility of you and your staff to protect your organization against discrimination lawsuits. Be certain you know the laws and regulations set forth by the FHEO, create a compliant program for your business and follow it to the letter.

1 Portions of this article were inspired by the Real Deal, a monthly newsletter for Real Life Real Estate Investors, used with the permission of Vena Jones-Cox.

2 Reprinted with permission from “What Fair Housing Testers Look for at Rental Communities,” by Scott Clark, Attorney, Apartment News.