

CHAPTER 06

PROPERTY MANAGEMENT

Learning Objectives

After this chapter, you will be able to

- Given the HUD recommendations, list what may not be considered when using a criminal history during the tenant screening process.
- Identify the law that protects tenants from eviction due to foreclosure on the property the tenants occupy.
- List the items that should be included in an adverse action notice.



Use of Criminal History

The Fair Housing Act prohibits discrimination in the sale and rental of housing based on race, color, national origin, religion, sex, familial status, and disability. A housing provider can violate the Fair Housing Act by either intentionally discriminating against a member of a protected class or by engaging in practices that have a discriminatory effect on members of a protected class, even if not intentional.

In April 2016, the U.S. Department of Housing and Urban Development (HUD) issued a warning to landlords and agents on the use of criminal records during the tenant screening process. According to HUD, African Americans and Hispanics are arrested, convicted, and incarcerated at rates disproportionate to

their share of the general population. While having a criminal record is not a protected characteristic under the Fair Housing Act, HUD said, criminal history-based restrictions may violate the Act if, without justification, their burden falls more often on applicants or tenants of one race or national origin over another.

If a landlord chooses to consider an applicant's criminal history, HUD made a few things clear:

- * Don't consider prior arrests, only convictions
- * Don't have a blanket prohibition on individuals with a prior conviction
- * Do consider the nature and severity of the conviction and ask yourself, *does this relate to the safety of residents, the safety of property, or the ability to be a good tenant?*

- * Do limit “lookback periods” (i.e. the period of time since the conviction)

Ultimately, whether use of criminal history violates the Fair Housing Act will be a case-by-case determination. However, landlords should ensure that their policy or practice is necessary to achieve a substantial, legitimate, and non-discriminatory interest and that the practice or policy actually achieves that interest.

Protecting Tenants at Foreclosure Act Reinstated

A law that expired in December 2014 was restored in June 2018. The Protecting Tenants at Foreclosure Act (PTFA) is intended to shield tenants from eviction because of foreclosure on the property they occupy.

The PTFA applies in the case of any foreclosure on a federally related mortgage loan or on any dwelling or residential real property. Under the PTFA, any immediate successor in interest (i.e. the purchaser) will assume the interest subject to the rights of a bona fide tenant. A bona fide tenant means:

- (i) the tenant is not the mortgagor, or the child, spouse, or parent of the mortgagor;
- (ii) the lease or tenancy is the result of an arms-length transaction; and
- (iii) rent is not substantially less than fair-market rent for the property (or that the rent is reduced or subsidized).

The tenant is allowed to occupy the premises until the end of the remaining term of the lease, with two exceptions. The first exception is if the purchaser will occupy the property as a primary residence. The second exception is if there is no lease or the lease is terminable at will. In those situations, the purchaser must provide to the tenant notice to vacate the property at least 90 days in advance.

Consumer Reports

Frequently, landlords (and their agents) may use consumer reports to evaluate prospective tenants prior to entering into a lease. Commonly, landlords will ask for authorization to do this in a lease or rental application. These reports can provide a wide variety of information about a person’s credit, rental, or criminal history. Examples of these reports could include a credit report from a credit bureau, such as TransUnion®, Experian®, and Equifax® or a report from a tenant screening service that describes the prospective tenant’s rental history based on reports from previous landlords or court records. The businesses who supply these reports are known as consumer reporting agencies.

If using consumer reports in the tenant screening process, landlords and their agents must comply with the federal Fair Credit Reporting Act (FCRA) and Federal Trade Commission (FTC) rules, along with provisions in the Texas Business and Commerce Code. Under both state and federal law, if the landlord takes an adverse action based even partly on information in a consumer report, the landlord must provide the person notice.

What is an adverse action?

An adverse action is any action taken by a landlord that is unfavorable to the interests of a rental applicant or tenant. Examples include:

- * Denying the lease application
- * Requiring a co-signer on the lease
- * Requiring a larger deposit
- * Raising the rent

What must an adverse action notice include?

An adverse action can be made orally or in writing; however, compliance may be easier to demonstrate if in writing. In addition to stating what adverse action was taken, the notice must include:

- * The name, address, and phone number of the consumer reporting agency that supplied the report (including a toll-free telephone number of the agency, if applicable);
- * A statement that the company that supplied the report did not make the decision to take the unfavorable action and can’t give specific reasons for it; and
- * A notice of the person’s right to dispute the accuracy or completeness of any information the consumer reporting company furnished, and to get a free report from the company if the person asks for it within 60 days.

If the consumer report on which the adverse action was based contained a credit score, the landlord must also provide a rental applicant or tenant a written disclosure of any credit score used by the landlord in taking any adverse action based on information in a consumer report, as well as the following information:

- * the range of possible credit scores;
- * key factors that adversely affected the credit score;
- * the date the credit score was created; and
- * the name of the person or entity that provided the credit score.

Can a tenant receive the copy of the consumer or credit report used by the landlord or property manager?

Both the FCRA and Texas law state that a consumer reporting agency cannot prohibit a landlord or property manager from sharing the contents or providing a

copy of the report, if an adverse action has been taken. However, there is no requirement in state or federal law that a landlord or property manager must provide a copy of the report to the tenant. Tenants are entitled to receive a free copy of the report, however, directly from the credit reporting agency in a variety of situations, including after an adverse action has been taken.

Can a landlord receive a copy of a consumer or credit report, if the property manager was authorized to request and maintain those records?

Consumer reporting agencies may restrict the property manager from sharing copies of the reports with others; however, the FTC has stated that sharing reports may be acceptable where two users share the report for the same permissible purpose with the consumer's consent.

While sharing may be permissible in this situation, the decision to share a copy of reports may hinge on other factors, like any privacy policy maintained by the property manager. Texas law requires individuals, like landlords or property managers, to have a privacy policy in place if they require a social security number to obtain goods or services from or enter into a business transaction with a person, like a tenant. The privacy policy must include certain information, like who has access to personal information. Therefore, if it is the property manager's responsibility to screen the applicant, a property manager might have a privacy policy that limits the situation when copies of documents like consumer reports are made available to the landlord.

Regardless, property managers are free to discuss pertinent information related to a tenant with a landlord, particularly during the application process. This information could include subjects such as income, employment history, rental history, criminal history, the number of occupants, credit scores, and so on.

Can a homeowners' association require a copy of a consumer report?

If the rental property is subject to mandatory membership in a homeowners' association, under Texas law, the association cannot require a property owner, their agent, or an applicant or tenant, to provide a copy of the applicant's or tenant's consumer or credit report. Note, however, that this prohibition does not apply to condominium associations.

How long and in what way should consumer reports be retained?

Consumer reports must be stored in a secure place where only those who "need to know" have access and that the reports are only used for the permitted purpose. When considering how long to retain a consumer

report, landlords or property managers may want to ensure they retain the reports and any related authorizations until the time period for filing a lawsuit or claim has ended. For a claim under the FCRA, the statute of limitations (i.e., the time period within which a claim can be brought) is the earlier of two years after the consumer discovers a violation, or five years after a violation occurs. A lawsuit under the Fair Housing Act has a two-year statute of limitation. Consumer reporting agencies may require the landlord or agent to keep records for a longer period. Agreements between the landlord and property manager may also determine how long records should be kept.

What are the laws regarding disposal of records?

Both state and federal law require that individuals must take appropriate or reasonable measures to protect against unauthorized access to sensitive consumer information, like consumer reports. All users of consumer reports must have in place procedures to properly dispose of records containing consumer information. Proper disposal can include burning, pulverizing, or shredding paper documents and disposing of electronic information so that it can't be read or reconstructed.

See Appendix F for six new laws relating to property management and leasing.