

Fair Housing Issues for Persons with Criminal Records (and Victims of Domestic Violence)

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What Laws Governs Landlord-Tenant Relationship?

- The Arizona Residential Landlord and Tenant Act (“ARLTA”). A.R.S. § 33-1301 *et seq.* (Modeled after the Uniform Residential Landlord and Tenant Act.)
- Forcible Entry and Detainer Statute. A.R.S. § 12-1171 *et seq.*
- Residential Rental Property Statute. A.R.S. § 33-1901 *et seq.*
- Rules of Procedure for Eviction Actions. (Effective January 1, 2009)
- Federal and state fair housing laws. 42 U.S.C. § 3601 *et seq.* and A.R.S. § 41-1491 *et seq.*

What Laws Governs Landlord-Tenant Relationship? Continued

- Provisions in the Violence Against Women Act of 2005 amending Federal Public and Section 8 Housing programs.

ARLTA General Concepts

- Obligation of good faith
 - There is an obligation of good faith under A.R.S. §33-1311. Every duty under the ARLTA and every act which must be performed, has a condition precedent of an obligation of good faith in its performance.
- Unconscionability
 - Under A.R.S. §33-1312(A)(1), unconscionability in a rental agreement, may render all or part of the agreement unenforceable.

ARLTA General Concepts Continued

- Under A.R.S. § 1312(A)(2), if in a settlement, a party waives or agrees to forego a claim or right, a court may refuse to enforce settlement.
- Landlord cannot include terms in lease that violate ARLTA. A.R.S. § 33-1314(A).
- Prohibited Provisions in Rental Agreement. A.R.S. § 33-1315(A).
 - Landlord cannot require tenant to forego “rights or remedies” under ARLTA in a rental agreement. A.R.S. § 33-1315(A)(1).

ARLTA General Concepts Continued

- Cannot limit or waive tenant’s rights to summon or any other person’s right to summon a police officer or other emergency assistance in response to an emergency. A.R.S. § 33-1315(A)(4).
- Remedies
 - If landlord knowingly uses a rental agreement with a prohibited provision, the tenant may recover actual damages and no more than two months’ rent. A.R.S. § 33-1315(B).

ARLTA General Concepts Continued

- Under A.R.S. § 33-1305, remedies provided in ARLTA shall be administered so that aggrieved party may recover “appropriate” damages. Aggrieved party has a duty to reduce or mitigate damages.

For Whose Actions are Tenants Responsible

- Under A.R.S. § 33-1341(7), tenant must require other persons on the property with her consent to not disturb the peaceful enjoyment of the neighbors.
- Under A.R.S. §33-1368 (G), a tenant is responsible for the actions of the tenant's guests that violate the lease agreement or rules "if the tenant could reasonably be expected to be aware that [the] actions might occur and did not attempt to prevent those actions to the best of the tenant's ability."

Victims of Domestic Violence-State Protections/ARLTA

General Protections:

- A.R.S. § 33-1315. Prohibition of Provisions in Rental Agreement.
- Cannot waive or limit tenant's or other person's right to summon a police officer or other emergency assistance. A.R.S. § 33-1315(A)(4).
- Cannot require payment of penalties or to penalize tenant if tenant or other person summons police or other emergency assistance. A.R.S. § 33-1315(A)(5).

Victims of Domestic Violence-State Protections/ARLTA

Continued

- Special Rights to Terminate Lease. A.R.S. § 33-1318.
 - Victim of domestic violence (defined in A.R.S. § 13-3601) may terminate lease by:
 - Written notice to landlord that the tenant is a victim of domestic violence and wants to terminate lease and attaches a copy of Protective Order, or report to police of incident of domestic violence.
 - Request must be made within 30 days of domestic violence unless waived by landlord.

Victims of Domestic Violence-State Protections Continued

- Landlord can request:
 - Proof authorizing service of protective order.
 - Name and address of perpetrator if known.
- Tenant must pay rent to date of termination and all outstanding previous obligations.
- Landlord may retain rent for month in which termination occurs if prepaid.
- No early termination fees or penalties allowed.
- Security deposit is refundable in accordance with A.R.S. § 33-1321, but cannot be offset for early lease termination.

Victims of Domestic Violence-State Protections Continued

- Additional Remedies:
 - Landlord is required to rekey or change locks at tenant's request and expense.
 - Landlord must refuse access to perpetrator.
 - Landlord can look to perpetrator for losses, even if perpetrator is not a tenant.
 - Co-tenant's lease is also terminated subject to renegotiation.
 - Order of protection applies to entire residential property.

Victims of Domestic Violence-Subsidized Housing Continued

- Provisions in the Violence Against Women Act of 2005. Local governments and landlords who receive federal funding cannot deny “assistance, tenancy, or occupancy” to any person because of domestic violence – related activity by a household member, guest, or other “person in control” of the tenant if the tenant or an “affiliated person” is the victim. 42 U.S.C. § 14043e-11(b)(3)(A).

Federal and State Fair Housing Laws

- Federal and State Fair Housing Acts (42 U.S.C. § 3601 *et seq.* and A.R.S. § 41-1491 *et seq.*)
- Protect persons on the basis of:
 - race
 - color
 - religion
 - national origin
 - gender (sex)
 - familial status, and
 - disability

Familial status discrimination is

- A.R.S. § 41-1491.01
- Discrimination because the person is:
 - Pregnant;
 - Living with a person who is younger than 18 years old to whom the person is either (a) the parent or legal custodian; or (b) has the written permission of the parent or legal custodian; or
 - In the process of obtaining legal custody of an individual younger than 18 years old.

It is unlawful to discriminate on the basis of any protected basis by:

- Discriminating in the **sale or rental** of a dwelling
- Discriminating in the **terms, conditions or privileges** of a rental or sale of a dwelling
- Discriminating in providing **services or facilities in connection with** a rental or sale of a dwelling.

Two Types of Claims for Discrimination

- Disparate Treatment
 - Requires proof of intent to discriminate against protected persons
 - Treat protected persons differently.
 - Will rent to white persons with criminal records but not African-Americans
 - Will rent to persons who have been assaulted but not victims of domestic violence
- Disparate Impact
 - Focuses on effect of neutral policy or practice on protected persons

Two Types of Claims for Discrimination Continued

- Applies the policy to everyone, but the application of the policy affects protected groups more
 - Will not rent to persons with criminal records

The Legal Standard for Establishing Disparate Impact: “Burden-Shifting”

- Step 1: Plaintiff demonstrates neutral rule or practices that has adverse or disproportionate impact on a protected group.
- Step 2: Burden shifts to defendant to prove its actions further “legitimate non-discriminatory goal.”
- Step 3: Plaintiff must show less discriminatory alternative that serves defendant’s interest equally well.

Criminal Background Check

Easy Access to Criminal Records

- Rental Applications
- Increased access to electronic criminal records post-9/11 → increased tenant screening
 - By 2003, 94% of criminal records maintained by state criminal history repositories were automated
 - Increased use of criminal background checks by tenant screening agencies, not just landlords
 - 80% of members of National Multi-Housing Council (organization of large apartment companies) report screening prospective tenants for criminal histories

Concerns with Background Checks

- Use of criminal background checks. In some cases, using criminal history in making a rental decision may violate fair housing laws.
- Housing discrimination analysis often follows employment discrimination analysis.
- EEOC Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions under Title VII No. 915.002, April 25, 2012, www.eeoc.gov.

Concerns with Background Checks Continued

- Using arrest and conviction records may be race or national origin discrimination.

Consequences of Discriminatory Policing

“African Americans are not significantly more likely to use or sell prohibited drugs than whites, but **they are made criminals at drastically higher rates for precisely the same conduct.** In fact, studies suggest that white professionals may be the most likely of any group to have engaged in illegal drug activity in their lifetime, yet they are the least likely to be made criminals.”

- Michelle Alexander, *The New Jim Crow*

HUD Guidance on Use of Criminal History

On April 4, 2016, the Office of the General Counsel for HUD issued “Guidance on the Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate – Related Transactions.” http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf.

The guidance explains that discriminatory liability can attach if a housing provider uses what may be a facially neutral policy or practice that has a discriminatory impact on persons protected by the federal Fair

HUD Guidance on Use of Criminal History Continued

Housing Act. 24 C.F.R. § 100.500; *Texas Department of Housing and Community Affairs vs. Inclusive Communities Project, Inc.*, ___ U.S. ___, 135 S.Ct. 2507 (2015). The use of criminal records in tenant decisions is such a policy or practice.

- The HUD Guidance provides that:
 1. Arrest records cannot be relied on in tenant decisions to exclude a person from residence. (page 5).

HUD Guidance on Use of Criminal History Continued

2. Blanket exclusions for a criminal record are unlawful. (page 6).
3. More tailored exclusionary policies for criminal records must accurately distinguish between criminal conduct that “indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.” (page 6).
4. Erroneous and out dated records cannot be relied upon. (page 6, footnote 29).

HUD Guidance on Use of Criminal History Continued

5. Policies or practices must consider the nature, severity of the conviction and the passage of time since the conviction. (page 7).
6. Even if the policy or practice meets the above standards, the provider must still prove that its interest “could not be served by another practice that has a less discriminatory effect.” (page 7). These factors could include the facts or circumstances surrounding the criminal conduct; the age of person at the time of criminal

HUD Guidance on Use of Criminal History Continued

conduct; the person's tenant history; and evidence of rehabilitation.

7. The guidance suggests that a housing provider should not ask about criminal history until financial and other qualifications are satisfied.

Challenging Criminal Records Bans

- Intentionally discriminatory if used to perpetuate desired racial balance or exclude persons of color.
- Absent intent, criminal records bans operate as facially neutral policies that have adverse, disproportionate impact on persons of color.

Less Discriminatory Alternative

- Rethink how landlords select potential tenants
 - Move from a blanket ban to an individualized review
 - Focus on requirements of tenancy
 - Examine mitigating factors
 - Nature of offense (minor)
 - Time of offense (long ago)
 - Tenant requirements (ability to pay)

Less Discriminatory Alternative

Continued

- Individualized assessments: less discriminatory while still effectively protecting public safety
 - Allow housing providers to carefully review all potential tenants
 - Permit prospective tenants who have criminal records but who pose no threat to the community to obtain housing

Crime Free Lease Addendums

Many local governments promote crime free housing programs that use crime-free lease addendums.

Under many “crime-free” lease addendums, landlords try to make tenants responsible for the criminal actions or other actions that violate the lease, by any person “affiliated” with the tenant, guest by household member.

- Whether or not the tenant could reasonably be expected to be aware that the actions might occur.
- Whether or not the tenant tried to prevent the action.

Crime Free Lease Addendums Continued

- Even if the actions did not occur on the premises.
- Even if the tenant, guest or household member is the victim of the crime.
- Often applies to arrests.
- These policies are encouraged by police departments and local authorities.
- The policies often make tenants liable for the actions of other persons that the tenant knows that occur “at or near” the premises.

Crime Free Lease Addendums Continued

- The policies try to expand tenant liability beyond ARLTA.
 - Examples: Victims of domestic violence; minor child steals candy from store near complex; or guest at party leaves and gets in a fight.
- An eviction based on violation of a crime free lease provision may be challenged.
 - Example: Landlord files eviction because tenant's ex-boyfriend came to unit and attacked tenant. Tenant called police and abuser arrested.

Crime Free Lease Addendums Continued

- HUD determination that eviction of victim of domestic violence because of domestic violence is sex discrimination. *Alvera v. Creekside Village Apartments*, Case No. HUDALJ 10-99-0538-8 (D. Oregon, April 16, 2001). Many other cases.
- May violate A.R.S. §§ 1341(7) and 33-1368(G).

Chronic Nuisance Ordinances

- In recent years, dozens of cities have passed chronic nuisance ordinances
- Most of these ordinances share common features:
 - Police designate properties as “nuisances” if there are excessive 911 calls made within a certain time period, and they issue citations accordingly
 - Landlords face fines, loss of permits, property forfeiture, or even incarceration if they do not “abate the nuisance.”
 - Eviction of tenants may be required by ordinance or be the result because landlord wants to avoid penalties
- Alleged purpose:
 - To assist police in addressing public nuisances

Chronic Nuisance Ordinances Continued

- Results
 - Properties in neighborhoods with heavily concentrated persons of color and in transitional neighborhoods are disproportionately deemed “nuisances”
 - The vast majority of nuisance incidents involve domestic violence
 - Eviction is often the preferred method of abating nuisance, and African-American women are disproportionately affected
 - These policies further discourage victims of domestic violence (and other crimes) from reporting the crime and

Chronic Nuisance Ordinances Continued

obtaining emergency services

(Matthew Desmond and Nicol Valdez “Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women,” *American Sociological Review* 2012)

HUD Guidance on Effect of Local Nuisance and Crime-Free Housing Ordinances

On September 13, 2016, the HUD Office of General Counsel issued guidance on local nuisance and crime-free housing ordinances on victims of crime and others who call the police or emergency services.

www.hud.gov/hud_portal/documents/huddoc?i=FinalNuisanceOrdGdnce.pdf

- Enforcement of nuisance or crime-free housing ordinances may violate fair housing laws because they have a discriminatory effect (disparate impact) on a protected class, such as:

HUD Guidance on Effect of Local Nuisance and Crime-Free Housing Ordinances

Continued

- Victims of domestic violence who are disproportionately female (80% of victims nationwide) or
- Persons with arrest or conviction records who are disproportionately persons of color
- If disparate impact, then need to see if there is a substantial, legitimate non-discriminatory reason/interest, and if yes – would the interest be achieved with a less discriminatory effect

HUD Guidance on Effect of Local Nuisance and Crime-Free Housing Ordinances

Continued

- Intentional discrimination could be selective enforcement of ordinance or where ordinance was enacted for discriminatory reasons
- Some analysis as with use of criminal background checks for housing and employment

Resources

- Housing Discrimination Complaints can be filed with the Arizona Civil Rights Division, Arizona Attorney General's Office.
- www.hud.gov has lots of information
- QUESTIONS?