

## LANDLORD-TENANT LAW

# Are NYC Housing Providers Ready for the Fair Chance Act?

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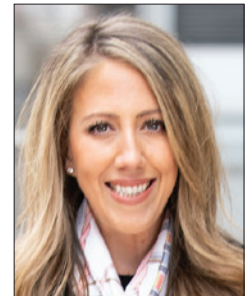
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In recent years, housing discrimination claims in New York City and State have predominantly involved alleged discrimination on the basis of disability, age, citizenship status, color, creed, familial status, gender, lawful occupation, lawful source of income, marital status, national origin, partnership status, race, religion, sexual orientation, and status as a veteran or victim of domestic violence (see NYC Admin Code. §8-107[5] the “City Human Rights Law,” Title 8 of the Administrative Code of the City of New York, see *also*, Executive Law Art. 15, the “SHRL,” and the Fair Housing Act, 42 USC 42 U.S.C.A. §3601, *et. seq.* the “FHA,” collectively the “Housing Discrimination Laws”).

Agencies such as the New York State Homes & Community Renewal (HCR) ([doc-w-kyr-justice-involvement\\_9.12.2022.pdf](#) ([ny.gov](#))), the New York City Department of Housing Preservation and Development (HPD) ([marketing-handbook-8-21.pdf](#) ([nyc.gov](#))), the New York City Housing Development Corporation (HDC), and



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the U.S. Department of Housing and Urban Development (HUD) (Office of the General Counsel ([hud.gov](#))), have long taken the position that blanket denial of applicants with criminal convictions has a disparate impact on persons of color.

As such, these agencies have implemented restrictions and recommendations for entities receiving benefits from such agencies when reviewing criminal background checks for prospective applicants.

Effective Jan. 1, 2025, by amendments to the City Human Rights Law, otherwise known as the Fair Chance for Housing Act, or Local Law No. 24 (the “Fair Chance for Housing Act”), it shall be an “unlawful discriminatory practice” for *all* New York City owners, lessors, managing

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agents, and others having the right to sell, rent or lease a housing accommodation (“covered entities”) to, *inter alia*, (a) “refuse to rent, lease, approve the sale, rental or lease or otherwise deny to or withhold a housing accommodation from an individual” (NYC Admin Code §8-107[o][1][A]), (b) provide different “terms, conditions or privileges of the sale, rental, or lease of a housing accommodation or an interest therein, or in the furnishing of faculties or services in connection therewith” (NYC Admin Code §8-107[o][1][B]), (c) “represent to any individual that any housing accommodation or an interest therein is not available for inspection, sale, rental or lease” (NYC Admin Code §8-107[o][1][C]), or (d) “declare, print, or circulate or cause to be declared, printed or circulated any statement, advertisement, or

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publication, or use any form of application for the purchase, rental or lease of a housing accommodation, which expresses, directly or indirectly, any limitation, specification, or discrimination in housing” (NYC Admin Code §8-107[o][1][D]), based upon an “individual’s criminal history, other than an individual’s reviewable (“reviewable” is the key, as defined below) criminal history obtained and considered” in conformity with the City Human Rights Law. (*id.*).

Of equal import, the Fair Chance for Housing Act defines “unlawful discriminatory practices” to include the act of conducting a criminal background check that fails to strictly conform with the rigid requirements of the City Human Rights Law (see NYC Admin Code §8-107[o][1]

[E]). These requirements dictate when a criminal background check may be run, the type of criminal history that may be considered, and how a covered entity might take adverse action against prospective applicants based upon the results returned, if at all. It is expected that civil actions and administrative proceedings alleging a perfunctory failure to abide by these rigid requirements, regardless of whether an applicant was, in fact, denied the housing in question, will ensue following the Fair Chance for Housing Act’s effective date.

### **What is Reviewable Criminal History?**

The Fair Chance for Housing Act provides that covered entities may only look at “reviewable criminal history” when qualifying an applicant for tenancy, sale, or lease of a housing accommodation. Reviewable criminal history includes, only, criminal histories involving (i) registered sex offenses (with no temporal lookback restrictions), (ii) convictions, or pending arrests for, misdemeanors where less than three (3) years have passed from the date of release from incarceration, or the date of sentencing if not incarcerated, and (iii) convictions, or pending arrests for, felonies where less than five (5) years have passed from the date of release from incarceration or the date of sentencing if not incarcerated (NYC Admin Code. §8-102a).

Expressly excluded from “reviewable criminal history” are (i) convictions sealed, expunged, pardoned, relieved, nullified or vacated; (ii) convictions in jurisdictions outside of New York for health, reproductive or gender affirming care, or cannabis possession that would not be a conviction had they occurred within the state; (iii) convictions resolved in favor of the accused that were terminated, sealed, for a violation, or sealed; (iv) pending cases adjourned in contemplation of dismissal; and (v) crimes disposed of in outside jurisdictions that are comparable to the crimes excluded in New York (NYC Admin Code §8-102a).

## **When Should a Criminal Background Check Occur?**

Arguably, housing providers and the like have been running background checks (i.e., for credit worthiness and criminal history) at the time that a prospective tenant, purchaser and/or applicant submits a completed application. With the enactment of the Fair Chance for Housing Act, criminal background checks may only occur *after* an applicant is otherwise approved for the housing accommodation in question, and has been provided with a purchase, rental or lease agreement committing the same to them (NYC Admin Code §8-107[5][o][4][B]). This process ensures that the criminal background check is the sole reason for the rejection because the transaction has been completed and is binding subject to the criminal background check.

Even prior to doing so, however, a covered entity must provide notice to the applicant of its intent to run a criminal background check and give the applicant a copy a document referenced in the City Human Rights Law as “the city’s fair chance housing notice” (the “Fair Chance Notice,” see NYC Admin Code §8-107[o][4][C]) which is to be created and made publicly available by the New York City Commission on Human Rights (the “Commission”).

As of the date that this article was drafted (Nov. 27, 2024), however, the Commission has not created or publicized the same, giving covered entities little time to educate employees and staff and otherwise ensure that their policies and practices are in order by the Fair Chance for Housing Act’s effective date.

## **Proper Consideration of a Duly Obtained Criminal Background Check**

A covered entity that provided a purchase, rental or lease agreement committing the housing accommodation to the applicant, notified the applicant of its intent to run a background check, and provided a copy of the yet to be published

Fair Chance Notice. The covered entity receives a report detailing “reviewable criminal history,” now what?

The covered entity can only revoke the tendered lease commitment based on reviewable criminal history, after engaging in what is known as the “Fair Chance Housing Process” (NYC Admin Code §8-107[o][5]). This process requires covered entities to provide applicants with all information received in conjunction with a criminal background check, whether or not relied upon or considered by the covered entity.

Thereafter, the covered entity must give the applicant no less than five (5) business days to submit information identifying errors in the criminal history returned, and/or to provide supplemental or mitigating information in support of the application (see NYC Admin Code §8-107[o][5][a][i]-[iii]).

Upon receipt of this information, or if none is received after five business days, the covered entity must conduct an individualized assessment of the “reviewable criminal history” and any supplemental information provided by the applicant. If the covered entity intends to take adverse action based upon the information reviewed, it is required to provide the applicant with a written notice detailing the same.

The adverse action notice must detail and demonstrate how the reviewable criminal history is relevant to a legitimate business interest of the covered entity and how any information submitted in support of such individual’s tenancy was considered and must include copies of any documentation reviewed or relied upon during such individualized assessment (see NYC Admin Code §8-107[o][6]).

What does this mean? Housing providers, and other covered entities, might be liable for housing discrimination, not just for improperly rejecting applicants with criminal histories, but for

failing to follow these procedures, perhaps even in instances where the application was approved. The law goes further to hold that covered entities are imputed with liability for any missteps by third-party screening companies retained to conduct these background checks.

If a covered entity fails to take reasonable steps to ensure that a utilized screening company conducts background checks in conformance with the Fair Chance for Housing Act and it receives information excluded from the definition of reviewable criminal history, it is presumed to have relied on such information. This presumption can only be rebutted by affirmatively showing that Fair Chance Housing Process was otherwise strictly followed, and that the covered entity did not rely on the wrongly received information in revoking the applicant's lease offer (see NYC Admin Code. §8-107[5][o][7]).

It is critical that the contract with any service provider performing the criminal background search require strict compliance with the law, and specify, among other things, the time parameters for criminal infractions to be searched, as well as specifics as to what is considered reviewable criminal history. The report must only include those items specified in the contract and allowable at law, given the ramifications associated with a covered entity even receiving any information beyond what is deemed reviewable criminal history.

With this in mind, a covered entity will have to weigh the costs associated with revoking any lease offer based upon a criminal background check. Inevitably, many, if not most, rejections will result in a civil action by a private party or nonprofit advocacy group, or an administrative proceeding brought by the Commission or State Division on Human Rights (the agency tasked with

enforcement of the SHRL) because all rejected applicants will know that criminal history was the catalyst for denial of their application. While a covered entity can rebut this discrimination claim, by showing that the denial was premised upon a legitimate business purpose, doing so is expensive, and a successful respondent is without recourse to recoup legal fees and expenses under the City Human Rights Law.

If unable to defeat a complaint for unlawful discriminatory practices, the exposure extends beyond the fees for defense. Fiscal liability for compensatory damages, punitive damages, and civil penalties may be awarded, as well as affirmative directives and injunctive relief, such as a mandate to create fair housing policies, set aside units for members of the aggrieved protected class, conduct trainings, publish notices, and report on future compliance. In the event of a challenge to a rejection, injunctive relief might include an order preventing leasing or the sale of the housing accommodation in question during the pendency of litigation, further increasing the costs of such litigation.

The worst exposure, however, is arguably that an adverse discrimination finding (or a published settlement) opens the floodgates to opportunistic lawsuits by attorneys and testing agencies hoping to establish a pattern or practice of discrimination and to profit from the right to recover attorney fees under the applicable Housing Discrimination Laws.

The best way to avoid liability is to create policies and educate employees on compliance with the Housing Discrimination Laws. Apart from the obvious avoidance of litigation, these proactive measures are often considered by administrative agencies investigating and, hopefully, dismissing allegations of housing discrimination.