

Seattle's Fair Chance Housing Ordinance: A New Wave of Tenant Screening Regulation?

First Published: March/April Journal 2018 Journal

Written by: Jennifer L. Sarvadi and Webb McArthur

If the web of tenant screening compliance wasn't tangled enough, with the federal Fair Credit Reporting Act, HUD regulations, and evolving state laws and regulations, now screeners must build in another layer: city and locality compliance.

Cities have historically had an interest in regulating the availability of properties for rent and in protecting tenants against abusive landlords to ensure that their neighborhoods are safe and vibrant, but today cities are taking it one step further, attempting to regulate not only who landlords may rent to but how they decide to rent. In particular, there are an increasing number of restrictions on the use of criminal records in tenant screening decisions.

One of the most recent examples is Seattle. As we discuss below, Seattle's new ordinance may impact not only landlords but tenant screening companies.

Last year Seattle passed its "Fair Chance Housing Ordinance," fully effective February 19, which restricts the use of criminal records in housing decisions. The ordinance makes it unlawful to "require disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant or a member of their household, based on any arrest record, conviction record, or criminal history, except for [sex offender registry information] and subject to [certain exemptions]." The ordinance greatly expands what constitutes "adverse action" to include denying tenancy but also other actions, such as representing that a rental property is not available for rent when it is, intentionally failing to list property for rent, refusing to accept a reasonable offer to rent, or failing to add a household member to a lease, among others.

The exemptions from this rule are quite limited, including rentals of a portion of a single-family home (or an attached unit) where the owner of the home will continue to reside in the property or for federally assisted housing programs. Additionally, sex offender registry information on non-juveniles may be considered where there is a demonstrable "legitimate business reason." If adverse action is taken based upon such information, a written adverse action notice must be sent that states the specific information that was the basis for taking adverse action.

To satisfy the "legitimate business reason," the business rule must be necessary to achieve a substantial, legitimate, and non-discriminatory interest. In establishing such a reason, a landlord must demonstrate "through reliable evidence" a connection between the practice and the landlord's interest in protecting resident safety or the property by considering: (i) the nature and severity of the conviction, (ii) the number and types of convictions,

(iii) the time that has elapsed since the date of conviction, (iv) the age of the individual at the time of conviction, (v) evidence of good tenant history before and/or after the conviction, and (vi) any supplemental information related to the individual's rehabilitation, good conduct, including any additional information provided by the individual.

While one might be inclined to view this ordinance as nothing more than the typical “ban the box” initiative at the local level, where the prohibition against “requir[ing] disclosure of” and “inquir[ing] about” criminal record information means that a landlord may not require an applicant to disclose—or even ask about—criminal record information, Seattle's Office of Civil Rights take the statute further. The Office, which enforces the ordinance, takes the position that the law applies to any person, including tenant screening companies.

In its Frequently Asked Questions (available [online](#)), the Office states “[u]nless there is an exclusion, neither landlords nor any person may run criminal background checks,” including for identity verification purposes. The FAQs also indicate that a screening company may be liable for violating the law. Thus, the Office takes the position that a tenant screening company may not create or provide a background report that contains criminal record information for a Seattle property—except as expressly excepted—because in doing so the company would be “inquiring about” an applicant's criminal record.

In addition to restricting the use of criminal record information in tenant decisions, the Fair Chance Housing Ordinance prohibits any person from advertising, publicizing, or implementing any policy or practice that excludes “all individuals with any arrest record, conviction record, or criminal history” from housing in the city. It also affirmatively requires a disclosure to applicants that such practices are prohibited.

The ordinance raises a number of compliance questions for affected landlords and consumer reporting agencies who work with them. For example, where sex offender information is going to be considered, Seattle's Open Housing Ordinance requires a provider to allow an applicant 72 hours to submit supplemental information to be considered before moving on to the next application. This necessitates a review of the underlying criminal information (which is limited to whatever is published on the registry) and any additional information the applicant chooses to provide. Users will also be required to assess its use of sex offender information to prevent it from impermissibly discriminating against protected classes. The ordinance also raises interesting potential conflicts with federal law. Seattle is just one example of the evolving landscape of tenant screening at the local level. As the pendulum continues to swing in favor of easier re-entry for the convicted population, tenant screeners should continue to be vigilant with its state law compliance practice management.

Jennifer Sarvadi

Jennifer L. Sarvadi is a partner at Hudson Cook, LLP, and a member of the Government Investigations Practice Group located in Washington, D.C. Ms. Sarvadi counsels businesses on compliance with federal and state consumer protection laws, such as the FCRA and GLBA.

Webb McArthur

Webb McArthur is an associate with Hudson Cook, LLP. Webb advises consumer reporting agencies, furnishers, and background screeners on compliance with the FCRA and data security and privacy laws. He also works with lenders, servicers, and others on state and federal credit compliance.

This article was first published in the March/April 2018 [NAPBS](#) *Journal*. It is reprinted here with permission. Copyright © [NAPBS](#) 2018. All Rights Reserved.