



# PARK WATCH TM LEGAL DEVELOPMENTS NEWSLETTER

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## SCREENING: Should You Care? – Criminal Background Checks and Discrimination

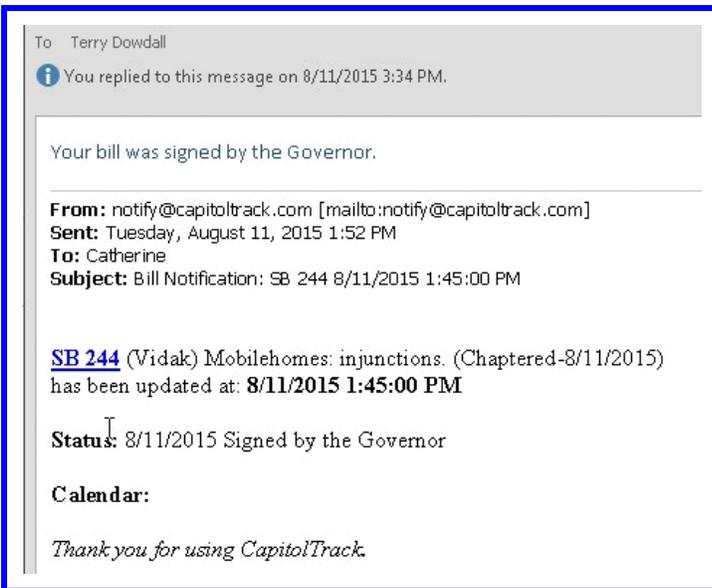
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### ■ UPSHOT:

**2015 WMA Convention & Expo !!**  
 Peppermill Reno, Reno, NV  
 OCTOBER 12-15, 2015

Many owners use and rely on criminal background checks in scrutinizing prospective purchasers. Many do not. Some owners still approve applicants by sitting in the office with them and staring them down. As though the piercing eye of the knowledgeable park owner is superior to a credit scoring test. Maybe it is. Some look for bank loan approval. Others routinely reject for recent bankruptcy. Some accept co-signers. Many more do not. In my experience, failing to run a credit screening on the basis of a strong first impression means an eviction waiting to happen.

The effort to qualify good homeowners can only go so far, however. While the MRL defines the limits of financial inquisition, there is much room left in the discretion of the owner to decide how past behavioral histories affect the qualification process. That process should not classify applicants based on any factor which would be deemed discriminatory, of course. The more sensitive issues of which to be aware, is whether a classification also bears indirectly on protected class characteristics. Criminal history is one such classification.



**Another WMA Legislative Success!!**  
**Rule Injunction Authority Now Permanent**  
*Approved by Governor Brown August 11, 2015*  
*I am proud to have initiated this successful*  
*WMA effort as a Legal Advisor to the*  
*Legislative Committee.*

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 Profitable Parks:*

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*For Articles, Cases, History, Updates:*



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- Screening: Criminal Background Checks, Fair Housing and Discrimination

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*Why?* Because it appears from demographic analyses, rather clearly, that there are more minority criminals than Caucasian criminals. Hence, it may be that when a landlord denies an applicant based on a criminal background history, a claim of racial discrimination may be made.

## ■ *DISCUSSION:*

According to the U.S. Census Bureau, there has been a significant jump in the number of individuals and families doubling up in housing. The definition of "doubled-up" households are those that include at least one person over age 18 who is not in school, not the householder, and not a spouse or partner of the householder.

The Census Bureau says 69.2 million, or 30%, of adults were doubled-up in 2010, compared to 61.7 million adults, or 27.7% in 2007. Total American households who have doubled up due to unemployment or underemployment stands at 18.3%. Much of the increase comes from people aged 25 – 34, living with their parents. That number increased from 4.7 million before the recession to 5.9 million (14.2% of the age group) in 2010.

The Census Bureau report on income, poverty and health insurance shows that household incomes dropped sharply last year. Since 2007, they have fallen 6.4%. Not surprisingly, the number of people living in poverty rose sharply, up for the fourth year in a row to 46.2 million people, or 15.1%. According to the Wall Street Journal, incomes have now dropped to 1996 levels.

It is not likely that the management will encounter a known criminal without the capacity to lie.

*Screening policies must be rational*, so management accepts good prospects and declines expensive mistakes. A consistent, documented approach is the best tool for efficient management and avoidance of decisions which are inconsistent, or *ad hoc*. It is not likely that the management will encounter a known criminal without the capacity to lie. Applicants are on their best behavior.

*Having a criminal record is not a protected class under fair housing laws.* Yet rental screening policies that examine the criminal histories of prospective tenants do have fair housing implications. This article explores some fair housing issues that can arise when you develop and implement policies that use criminal history to evaluate whether an applicant will be a good tenant.

Establishing that an applicant has the income to pay rent is the easy part. Evaluating whether an applicant will pay the rent, reasonably care for the premises and be a good neighbor requires checking credit records, checking court records for evictions, and talking to former landlords.

## ■ *APPLICANTS WITH CRIMINAL HISTORIES MAY BE MORE LIKELY MEMBERS OF A MINORITY GROUP:*

According to a recent article in the Washington Apartment Association newsletter, "*criminal records ... reveal the character of the tenant.*" Because of the perception that someone with a criminal history is of inferior character, landlords may believe they should, perhaps must, reject all applicants with a felony or violent misdemeanor history.

First, some research suggests that a criminal history does not predict failure or default. A 2009 study suggests that policies and practices that deny housing to those with criminal records may be "unnecessarily

restrictive” because there is no clear empirical basis for them.

It is certainly discriminatory to perform criminal background checks only on certain applicants, or to distinguish between applicants with criminal records based on a protected class. The FHA prohibits actions which result in a *disparate discriminatory impact*. *Disparate impact claims result when an outwardly neutral practice has a significantly adverse or disproportionate impact on people in a protected class produced by the seemingly neutral act or practice.*

- For example, a property management company has a policy of charging a set rental amount for the first three residents in a household, plus \$100 per month for each additional resident. This policy, although applied equally to all applicants and residents, will have a disproportionately negative affect on families with children, and violate the FHA.
- Too, a policy which denies approval to everyone with a criminal record may well have a disparate impact on certain protected class groups (such as race, color and national origin).

## ■ ARRESTS

The use of arrests as a basis for denying housing should be undertaken with extreme caution. Arrest records used to disqualify an applicant has a disparate impact on some protected groups. According to the EEOC, analogously, an absolute exclusion of prospective employees with arrest records is legally suspect because such a policy has a disparate impact based on race, color, and national origin.



- For example, a 2004 study in Seattle found that while the majority of those who deliver serious drugs are white,

78% of those arrested for this crime from January 1999-April 2001 were people of color  
64.2% percent were African American; 14.1% were Latino, and 17.6% were white.

Another study found that even though young blacks use marijuana at lower rates than young whites in all of the 25 largest counties in California, African Americans are arrested for marijuana possession at double, triple or even quadruple the rate of whites. While the EEOC guidance allows arrests to be considered when an arrest is recent or connected to employment, it states that when barring employment on the basis of an arrest, an employer must evaluate whether the arrest record reflects the applicant’s conduct.

## ■ *Zero-Tolerance Policies*

The EEOC issued policy guidance as early as 1982 providing that blanket bans on hiring people with criminal records result in disparate impact discrimination. The EEOC has advised employers that they must show they considered three factors to determine whether its decision was justified by business necessity:

1. The nature and gravity of the offense;
2. The time that has passed since the conviction or completion of the sentence; and,
3. The nature of the job held or sought.

To the extent that a housing provider wishes to consider criminal history when screening prospective tenants, it is recommended that consideration of criminal history be based on a clear connection between the offense committed and whether it was committed *in or on the premises of a former residence*, whether it is

a *violent act*, whether others were *injured*, whether property was *damaged*, whether it is *recent*, and further take into consideration that the justice machinery of society *has deemed that the individual is fit to be out of custody living among us*. Of course, the fact the applicant is on a sex registry cannot be taken into account under any circumstances. Additionally, park owners may wish to consider excluding:

- Criminal offenses older than seven years;
  - Arrests that did not lead to conviction;
  - Expunged/purged/sealed/vacated convictions or those subject to a certificate of rehabilitation;
  - Juvenile adjudications that do not qualify as convictions under state law as evidence of criminal activity;
- and,
- Criminal activity that resulted from acts against the applicant as the result of domestic violence, dating violence, or stalking against him or her.

## ■ *Applicant Must Provide A Full Application*

At least, the applicant is required to provide a fully-completed application.

In such case, the submitted application should be promptly returned to the prospective homeowner so a complete application can be submitted. Failure to fully provide information required on the application should be promptly brought to the attention of the applicant so the omissions can be rectified.

If the applicant cannot document income, the application is not complete. Be consistent. If you require full information from some applicants but not others, you may be subject to a claim of housing or arbitrary discrimination--for even a more favorable treatment of some.

If the park owner accepts the partially completed application and does not advise of the omissions, such conduct may admit that the omissions were not material and that action on the application is required within the 15 business days provided by Civil Code §798.74 to act on the application.

If you fail to approve or deny an application within 15 business days of submission of a completed application, it will be argued you waived your right to decline.

The law does not require the management to make a tenancy decision devoid of all the information requested, and without proof of reasonable expectation of sufficient source and amount of income to make timely payment. Consistently-applied criteria including review of financial reports, credit ratings and amount and source of income do not violate the law.

Our mantra is *Civil Code §798.74*. 2 issues: (1) ability to pay; (2) past conduct.

*". . . Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park. . . management may require the purchaser to document the amount and source of his or her gross monthly income or means of financial support."*

One Court holds that a landlord makes a rational decision when denying tenancy because the tenant housing cost was more than 33% of income. In *Harris v. Capital Growth*, female heads of low income families [whose income consists of public assistance benefits], filed suit against owners of apartment buildings, challenging their minimum income policy as economic discrimination and sex discrimination. Defendants had an express written policy that prospective tenants must have a monthly income equal to or greater than three times the

rent charged. The women alleged that they could afford to pay the rent but did not have incomes equal to three times the rent; and they contended that the policy was grounded on unsubstantiated assumptions and had a disparate impact on women.



Mentor

The court upheld the "income equals three times rent" test.

The court stated that business establishments have an obvious and important interest in obtaining full and timely payment for the goods and services they provide.

*"In pursuit of the objective of securing payment, a landlord has a legitimate and direct economic interest in the income level of prospective tenants, as opposed to their sex, race, religion, or other personal beliefs or characteristics. For nearly all tenants, current income is the source of the monthly rental payment. When a tenant ceases paying rent during the term of the tenancy, the landlord must resort to legal process to obtain possession of the premises and to collect any back rent that may be due."*

## ■ Where Can a Park Owner Consider Past Criminal Conduct?

If the applicant was terminated based on Civil Code §798.56 (c)(1), management may decide to decline. This logic assumes that prior conduct during tenancy which justifies termination, also qualifies to show that the applicant has demonstrated the inability to comply with the rules and regulations of the park. See:

- *Penal Code* §243[subd(d)]("When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year or imprisonment in the state prison for two, three, or four years").
- *Penal Code* §245[¶(2), subd (a)]("Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment").
- *Penal Code* §245 [subd(b)] ("Any person who commits an assault upon the person of another with a semi- automatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years").
- *Penal Code* §288 [subd(a)]("Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony...").
- *Penal Code* §451 ("A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.").

Are there any other reasons to deny tenancy? **Yes.**

- *Insufficient age* in "Older Persons" Parks (55+)
- *Liars*: Under general law, the applicant is required to provide truthful information. If there are misrepresentations which are material to the application, *i.e.*, facts which a reasonable landlord may want to

know, the application is based on false material "inducements."

- *Making a false statement* to induce a contract is a fraud and deceit. Fraud justifies rescission of a contract; hence its discovery justifies rejection of an offer of tenancy.
- You do not have to do business with someone trying to defraud you.

**(Ed. Note!!:** *As of this writing, pending legislation would include an express right, to be codified in statute, to decline an application based on fraud, concealment and material misrepresentation, which I proposed to the WMA Legislative Committee. The CMPA opposes the legislation on other grounds, including potential liabilities to park owners which CMPA argues. The WMA does not oppose, as the bill was amended to take all WMA amendments offered. Come to the convention in Reno (October, 2015) to learn all about it! I just hope, as do so many others, that the two organizations can find a way to harmonize their varying philosophies, as has usually been the case on many past occasions. Until then I am Switzerland.)*

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