



Question and Answer Sheet

Criminal Background Checks

Their Use and Application for the Rental Housing Industry

In today's society, rental property owners are often confronted by residents, neighbors and law enforcement official who demand that owners use "better" screening practices within their rental housing business to exclude applicants with criminal backgrounds. Pointing to screening procedures used by public housing authorities and some employers, some people believe owners and managers of rental property should deny applicants based upon their criminal background in order to make communities safer. Now, as a result of this demand, many businesses offer to provide criminal background checks to owners and managers of residential rental property. Predicting a person's conduct based on previous acts, however, is difficult. Strong warnings against certain uses of criminal records come from groups like the American Civil Liberties Union (ACLU) that point to the constitutional right to privacy and argue that "people who have completed their sentences for past offenses and are struggling to establish a new life should not bear heavy stigmas and disabilities for long periods of time. Societal interests are not served by making and keeping ex-offenders and their families homeless."

These competing interests raise a number of questions for owners and managers of residential rental property:

1. Can I have a Criminal Background Check performed on an Applicant?

Yes, as long as the way it is performed and the way the information is used comply with the right to privacy, fair housing, and fair credit laws. California's constitutional right to privacy protects an individual from being required to disclose personal information if he or she has a reasonable expectation of privacy, the invasion of privacy is serious, and countervailing interests do not justify the disclosure. (Cal. Const. Art I, Section 1). Fair housing and fair credit laws are discussed below.

2. Am I legally *required* to do a Criminal Background Check?

No. There is no statute or case law that requires an owner to acquire particular information, such as criminal background, about applicants in order to protect other tenants from potential harm. By contrast, housing authorities have access to more criminal records than are available to the general public and are required to deny housing to any person who illegally uses a controlled substance or who is a registered sex offender.



3. Do I have to ask permission or provide notice to the Applicant?

As with a credit check, the applicant's permission and signature is required before an owner can run a criminal background check. The criminal background check performed by a private services is treated as a consumer credit report, governed by the same state and federal laws as regular credit checks.

Providing clear notification of your policy on criminal background checks may encourage many applicants with problematic background to exclude themselves. This could be done by prominently posting a sign in the rental office stating "We perform criminal background checks." If the applicant asks, you should be prepared to provide your exact screening criteria (discussed below). Upon reviewing these criteria, many ex-offenders may choose to not apply. It should go without saying that if owners post a sign, they must actually perform background checks. In addition, fair housing laws, discussed below, require that the background check and screening criteria must be applied consistently to every applicant.

4. Can I charge an extra fee for the Background Check?

California law limits the fee owners may charge a prospective resident to cover the cost of screening. The fee cannot be greater than the actual out-of-pocket costs of gathering information on the applicant. That maximum fee, which is adjusted with inflation is currently \$36.52 as of March 2005. Owners who do not currently charge the maximum could increase their fee to cover part of the cost of the criminal background check. The cost of both a credit check and a criminal background check will, however, likely exceed the maximum fee allowed by law. Some background checking businesses suggest that owners require the applicant to provide the background check. Considering the legal limit on the screening fee, however, owners who require applicants to *provide* their own report may be a violation of that law or at least an "unfair business practice."

5. Should I perform a Criminal Background Check?

In addition to having a desire to protect your residents and to avoid liability, a number of other facts should be considered in deciding whether to add Criminal Background Checks to a screening practice. See further information below.

a. Is it practical and economical?

Fair housing laws require that any screening criteria be applied consistently. This means that a criminal background check must be performed on all applicants equally. Due to the inability to pass on the entire cost of the background check, this additional expense may be a problem in some areas where the market would not allow an increase in rent, and the owner is unable to otherwise absorb the cost.

b. If I have the information, am I prepared to use it?

There is no reason to do a background check, unless you will exclude all applicants who do not meet your screening criteria. The alternative is to allow people on the property who you now know may pose a risk to other residents or your property. This may open you to liability.



c. Might another alternative be as effective?

Some ex-offenders may be excluded by tightening your other screening criteria. Individuals who have been recently incarcerated are unlikely to have a stellar credit, housing, and employment history.

6. How do I develop and Apply Criminal Background Screening Criteria?

As with any other tenant screening criteria, the goal is to select the resident who is most likely to pay the rent on time and the least likely to damage the premises or cause problems with other residents. Fair housing laws prohibit certain types of discrimination in the selection of tenants. Screening criteria must be narrowly tailored to avoid illegal discrimination while also serving the legitimate business goals mentioned above. Excluding every applicant with any criminal background, without regard to the offense's relationship to the applicant's ability to meet tenancy obligations is likely to run afoul of fair housing laws.

a. Are Ex-Offenders A Protected Class?

The California Fair Employment and Housing Act (FEHA) and the Unruh Act expressly provide that it is unlawful to refuse to rent to an individual based on membership in certain listed protected classifications. However, in *Marina Point v. Wolfson*, the California Supreme Court interpreted the Unruh Act to prohibit any arbitrary discrimination, not just discrimination against the categories list in the law. Disqualification for residency based on criminal background could be considered unlawful arbitrary discrimination unless it relates to the prospective resident's ability to meet tenancy obligations. For this reason, criteria should be narrowly tailored. Another reason to narrowly tailor criteria is to avoid claims of *disparate impact* discrimination, meaning even if the screening criteria is neutral and applied objectively to all applicants, it may have the impact of disqualifying members of a particular legally protected group (race or gender) at a significantly higher rate than others. In this case, the criteria may be unlawfully discriminatory unless the owner/manager has a valid defense, such as *business necessity*. Criteria that are narrowly tailored to determine an applicant's ability to fulfill the responsibilities of tenancy are likely to qualify for the business necessity defense.

b. Consistent Application of Screening Criteria

Any screening criteria, whether about criminal background, income, or credit rating must be consistently applied to all applicants. This does not necessarily mean owners must run a criminal background check on every applicant. They can establish an order in which the screening criteria are applied – so that the background check is only run if the applicant has met all the other requirements. Owners, however, should document the process and must use the same process for each applicant. Once owners have established a process and criteria, they should not make exceptions for any applicant.

c. Activities That Should Not Be Considered

California law prohibits a consumer report from including arrests, indictments, or misdemeanor complaints that did not result in a conviction. Also reports may not include arrests, indictments, misdemeanor complaints, or convictions of a crime that, "from the



date of disposition, release, or parole, antedate the report by more than seven years.” (Civil Code Section 1785.13.) Labor laws and regulations also prohibit most employers from inquiring about arrest or detention that does not result in conviction, expunged convictions, and certain misdemeanor convictions. These laws evidence a governmental policy that older convictions and arrests that did not result in conviction should not limit an individual’s ability to seek employment, credit, and perhaps housing. (Note: The existence of California’s on-line sex offender registry does contain older convictions, which indicates that the policy is different for certain offenses that are believed to have higher rates of recidivism.) Screening criteria that are consistent with these factors are less likely to be found to constitute unlawful arbitrary discrimination.

d. Selecting Screening Criteria

Any screening standards should be narrowly tailored to help an owner select individuals who are able to fulfill their tenancy obligations without excluding others arbitrarily. The purpose is to identify past bad conduct that is relevant, based on a reasonable belief that the prospective resident may be a direct threat to the health or safety of other residents and neighboring property. Owners should consult with an attorney when they develop screening criteria. Questions to consider:

How far back to look? Just as bad credit and bankruptcy as predictors of ability to pay diminish with the passage of time, older convictions are likely to be less relevant. Owners may wish to set different time periods for different crimes - denying applicants with certain old felonies but accepting those with old misdemeanors or felonies unrelated to tenancy obligations.

Type and Severity of Crime? Background checking services can provide lists of crimes that can be included in screening criteria. For example, the following crimes are more likely to be found relevant toward the risk an ex-offender may pose to other residents or your property: burglary, assault, sexual crimes, manufacture of controlled substances, arson, possession of illegal weapons, or passing bad or forged checks. By contrast the following crimes, while serious, do not reflect as much on an individual’s ability to fulfill the obligations of tenancy: bigamy, traffic offense, illegal gambling, jury tampering. Note: It is illegal to refuse to rent to someone because of past drug addiction; both state and federal law classify *past* drug addiction and alcoholism as disabilities.

7. What is the procedure for denying an application based on the Check? Is there a special notice required?

Denial of an application based on the results of a criminal background check by a private service, requires the same procedure as any other adverse action taken based on a consumer credit report. The applicant must be provided written notice of the decision and of the right to obtain a free copy of the report on which the decision was based, and contact information for the agency that provided the report. See CAA Form 3.1 or 3.2 - Notice of Denial to Rent.



8. Can I evict an ex-offender?

The answer to this question is the same as for any other tenant. California law limits the grounds for eviction. If the ex-offender is on the month-to-month rental agreement, he or she can be given a 30 or 60 day notice of termination without cause. If the ex-offender is on a lease, this option is not available. The tenant may only be evicted if the tenant has defaulted in some way, i.e., nonpayment of rent, violation of the rental agreement, commission of waste, commission of nuisance, or use of the premises for an unlawful purpose.

9. Can tenants move out if they feel unsafe because they have learned of the ex-offender?

As with the prior question, the answer is the same as for any other tenant. If the tenant is on a month-to-month rental agreement, the tenant may terminate the tenancy on 30 days' notice. A tenant with a lease doesn't have the option. However, the reality is that a tenant who feels unsafe is likely to move if he or she is able, and an owner/manager will have the same remedies as with any other premature lease termination. An owner's failure to protect a tenant from the criminal act of third persons has been raised as a breach of the implied warranty of habitability, but the only reported cases to date have dealt with inadequate physical security of the premises.

10. What liability do I face if I know a tenant does have a criminal background?

There is very little case law to date that addresses the question of an owner's liability when the only reason to believe a tenant has dangerous propensities is based on prior convictions. Generally, in determining an owner's liability for the acts of a tenant, the court will look at factors such as whether (1) it was foreseeable, i.e., there was a history of similar behavior as that which caused the present injury; (2) the owner knew of the tenant's dangerous propensities, (3) the owner or manager had an opportunity to prevent the injury; and, (4) as a result of the owner/managers' failure to do so, the injuries happened. It is unclear in what circumstances information from a criminal background check, as opposed to more recent conduct, would qualify as "history of similar behavior" or otherwise make an injury foreseeable. Some courts have been reluctant to impose a duty to warn or take other action based on behavior for which the ex-offender has already been punished (i.e., prior convictions), because it would contravene the public policy of allowing rehabilitated ex-offenders to reenter society. The following cases may provide some indication of where courts are headed in this area of the law:

Rosales v. Stewart, (1980) 113 Cal.App.3d 130, 169 Cal.Rptr. 660.

An owner may be held liable for injuries caused by a tenant if the owner knew of a tenant's dangerous propensities and rented the premises to the tenant anyway or failed to terminate the tenancy after acquiring the knowledge. In this case, a neighbor's child was shot by a tenant who was known by the owner to "occasionally discharge firearms in the backyard."



Anaya v. Turk, 151 Cal. App. 3d 1092 (1984)

A guest was shot by a third party while visiting tenants on the premises. The guest sued the tenant, seeking damages for severe personal injuries. The court held that the mere fact that the tenants knew that the third party had been in federal prison was an insufficient basis to support a finding that the third party's dangerous propensities and his shooting the guest were foreseeable to the tenants. Specifically the court ruled that "as a matter of law such generalized knowledge cannot be the basis of a finding of foreseeability."

Sturgeon v. Curnutt, (1994) 29 Cal.App.4th 301, 34 Cal.Rptr.2d 498.

The owners of a house were not liable to tenant's guest for injuries suffered as a result of an accidental shooting by a drunken tenant, although the owners knew that the tenant had a drinking problem and kept firearms. The court held that the owners did not owe a duty of care to the visitor because the injury was not foreseeable because there was no evidence that the tenant had violent propensities or had previously handled guns unsafely while drinking.

Eric J. v. Betty M. , 76 Cal. App 4th 715 (1999)

This case arose when the mother of a child sued a parolee's family for failing to inform her of the parolee's prior felony child molestation conviction. The parolee had molested the child while the mother and child were visiting the parolee's family. The court held the family members had no duty to protect the boy against the parolee's criminal propensities, in light of the fact that society had accepted the possibility of his rehabilitation and released him. In addition the court held that, absent a special relationship, one cannot be liable for mere nonfeasance, such as not protecting another from a criminal attack by a third party.

