

Your rental criteria document is often the first impression that potential applicants have of you as a property and is an important factor in decisions as to whether or not to rent with you. It also has legal implications that can create fair housing and other issues that will end up costing you money. The beginning of the year is a good time for you to review your criteria to determine whether those criteria are likely to cost you or improve your bottom line. Sometimes the answers will surprise.

Identification

Many properties assume that “identification” is self-explanatory. Usually properties ask for “picture IDs” or “driver’s licenses” or “government issued ID” to meet this requirement.

Unfortunately our applicants’ ideas of what constitutes an appropriate “picture ID” or “driver’s license” does not always conform to the property’s idea of what is meant. Applicants have attempted to provide “picture IDs” that include Costco cards, medical marijuana cards issued by California marijuana licensing boards, high school or college identification cards, and credit cards with pictures on them. Drivers’ licenses, when sought, may be from Mexico, Togo or Afghanistan. Even government issued IDs may cause a problem because that term includes identification issued by arms of governments that (a) are not in the business of providing generally valid forms of identification; or (b) are not based in the United States and are more difficult to verify. When those pieces of identification are not accepted – because they really don’t conform to the property’s intent – potential fair housing issues loom.

When properties draft their rental criteria to require “proof of identification” they are usually seeking one or more specific pieces of information. At a minimum they want to know that the person applying to rent is really the person he/she purports to be. This is important for both safety and reliability. Who wants to send a leasing agent to an empty apartment with someone whose only identification is a Costco card or a medical marijuana card? And why would a property run a credit/background check on an applicant unless the property reliably believes that the person whose references they are checking is really the person who submitted the application?

In addition, many properties have made decisions that they will only rent to persons who are legally in the United States, and they want some kind of identification to demonstrate that the person is legally here. A high school ID simply does not prove that.

Because of these concerns, properties that require proof of identification before showing or letting an apartment, need to clearly articulate what they mean by “identification” and what forms of identification will be acceptable.

If the only concern is to have something in file so that you can try to skip trace the person in the event that she/he robs or assaults your leasing agent or leaves you with unpaid rent, it may be sufficient to simply require an unexpired driver's license, non-driver's license issued by a state Department of Motor Vehicles, or similar identification issued by a governmental entity for purposes of demonstrating that the person is who she/he purports to be. That requirement will eliminate medical marijuana cards (which are not intended for use to show identification) and high school IDs. It will also eliminate Costco cards, work IDs issued by different employers, and credit cards. It will not, however, preclude use of Chinese passports, Mexican consulate cards and other similar documentation that may legally be used to establish identity.

If the property's concern is legal status, a more complicated issue arises. HUD does not require that landlords rent only to persons who are legally in the United States. However, a guidance issued by HUD after 9/11 clearly states that if a property chooses to it may refuse to rent to persons who are not legally in the United States because "undocumented status" is not a status protected under the Fair Housing laws. If a property chooses to exclude undocumented persons pursuant to that guidance it must require all applicants, regardless of whether or not they appear to be "foreign," to show documentation demonstrating that they are legally here. The guidance goes on to refer to federally established lists of documents that can be used to verify legal status. A list of the approved identification can be obtained by contacting the Law Office of Scott M. Clark.

Regardless of which forms of identification are requested properties should keep a record showing what identification was shown and maintain that record in the application/tenancy file. This is particularly necessary when the property is requiring evidence of legal status because the absence of those records can and often will lead to inferences that the property is making its rental decisions based on illegal inferences or biases against "foreigners" – an inference that supports a claim that the property is discriminating on the basis of national origin.

Occupancy Standards

These criteria are generally self-evident. The Arizona Residential Landlord and Tenant Act (ARTLA) and the state and federal fair housing laws all prohibit discrimination against families with children unless the property meets the legal standards for being a senior community. In addition, ARTLA provides (and fair housing laws generally agree) that properties are okay if they limit occupancy to no more than two persons per bedroom.

Properties get in trouble under these laws if they try to decide where any individual can sleep (e.g. "we can't possibly allow a single mom to share a bedroom with a teenage son, so they have to rent a two-bedroom unit even if only two of them live there") or limit the units where children can live because of

safety or other considerations (“we don’t allow children under the age of six to live in upper level units because we are afraid they may fall down the stairs and we would be liable.”)

When including occupancy standards in rental criteria, therefore, properties should be careful to indicate only how many persons are permitted in each unit based on bedroom size, and leave it at that. Residents can and must work out other issues themselves. With the exception of senior properties, a property’s only issues are (1) whether they will allow more than two persons per bedroom, and (2) what happens if a resident gives birth during the lease term.

Properties that hold themselves out as senior communities that are exempt from the familial status provisions of fair housing laws still must comply with rules that prohibit them from limiting occupancy to fewer than two persons per bedroom. In addition they must always clearly provide that information up front and advise applicants as to what documentation they must provide to demonstrate that they qualify for residence in that community.

Credit Standards

Most communities have established some kind of credit standards and will do a credit check of applicants before they sign a lease with them. In general communities are free to establish whatever credit requirements they want and, if they choose to do so, permit residents with unacceptable credit to rent as long as they pay an increased security deposit. That security deposit, under no circumstances, may exceed one and one half times the monthly rent for the apartment.

It is worth noting that a few years ago the federal Equal Employment Opportunity Commission (“EEOC”) conducted studies and investigations demonstrating that creditworthiness often correlates with race and/or national origin. Because racial and ethnic minorities often have substantially lower incomes than others, their credit scores are predictably lower than the scores of racial and ethnic majorities. While this statistical correlation may potentially raise fair housing issues in extreme cases, as long as the level of creditworthiness for a property is linked to legitimate interests such as the person’s ability to pay the rent charged for the particular unit, most properties will not face complaints as long as they use the same standards for all applicants.

Income Criteria

Income criteria is generally used to ensure that a particular applicants’ income is sufficient to enable the household to pay the rent and utilities and provide for other essential needs such as food, clothing and transportation.

When properties use income criteria, they need to take into account the fact that “income” sometimes includes more than current earnings. “Income” can include such things as Social Security retirement and disability benefits, food stamps, transportation allowances, child support (that is being paid), retirement benefits, earnings from investments, savings, and similar matters. Insisting that the only “income” that can be considered is current wages not only prevents otherwise qualified applicants from renting at a property, but also has the effect of discriminating on the basis of age, disability, race, national origin and sex.

Properties should clearly indicate on their rental criteria that they will consider the value of alternative sources of income (such as SSI, food stamps, etc.) if the applicant provides verifiable information that he/she is receiving such benefits and is likely to continue to receive them. When calculating whether your applicant household has “income” valued at three times the monthly rent for the apartment, those food stamps, disability checks and transportation allowances may well put the person into the “qualified” rather than “unqualified” camp.

Criminal Background Considerations

Nobody wants “criminals” living on their property. Our Crime Free Addenda make it clear that we are not going to tolerate certain kinds of criminal activity and some landlords have assumed this to mean that we can ban all persons who have ever engaged in any kind of criminal activity – ever.

That is not entirely correct. Under fair housing laws a more nuanced approach is likely to lead to fewer complaints and less potential liability. Some specific issues include the following:

1. Fair housing laws define a person with a disability to include a person who is a former user of illegal narcotics. While current illegal drug users are not protected under the FHA persons who no longer use drugs are. Thus, if a property summarily rejects all persons who have ever been arrested or even convicted of possession or use of illegal drugs, the property may be engaging in unlawful disability discrimination if the applicant can show that she/he is no longer using drugs.
2. A long series of employment discrimination cases show that African-Americans and Hispanics are far more likely to be arrested and convicted of criminal conduct than other Americans. Because of this, barring everyone who has ever been convicted of any misdemeanor and/or felony is likely to have a disparate effect on African-Americans and Hispanics and can create liability under the FHA based on national origin and race discrimination.

Liability under both of these scenarios can be avoided if the property uses a nuanced approach to screen out the people who really do need to be screened out and allow others with old criminal histories or records of conduct that do not

harm the community to move in. Instead of saying that “no one” with a criminal history will be permitted, properties should take into account such things as how long ago the conduct occurred, how serious it was, whether it was repeated or was a one-time violation, whether the applicant has subsequently demonstrated an ability to live in a community without posing a risk of harm to others or to the property, and similar considerations. Properties should consider establishing a time period to be used for excluding violations based on their type and severity, e.g. no one who is a registered sex offender will be permitted; persons convicted of felony assaults will be excluded for a period of ten years; persons convicted of misdemeanor criminal damage will be excluded for two years; etc. In the case of convictions for possession and use of illegal drugs, applicants should be permitted to provide evidence demonstrating that they are no longer using drugs before they are excluded.

While these nuanced criteria make it more difficult for properties to come up with simple yes or no answers to rental decisions, the more nuanced a property’s approach is, the less likely it will be that the property will be found to have engaged in fair housing violations.

Rental History

In many ways this is the easiest criterion for a property to consider in evaluating rental qualifications. Assuming that the person has previously rented, the person’s past history as a tenant is a good indicator of whether or not the person will be a good tenant with you. Using this criterion you can inquire whether the person paid his/her rent on time, received any notices for rental violations, was evicted, and/or owed money to the property at the time of move-out or later. All of these considerations are clearly related to your applicant’s current eligibility to rent at your property and – assuming that you are looking at relatively recent time periods – should pose no problems.

The more common issues arise when the applicants’ only prior rental history is in a dormitory, the home of a friend or relative, or when the person is moving from a purchased home to a rental one. Many properties will accept these lessees only if the household pays a higher deposit than other applicants who have a good rental history. This higher deposit is permissible, but again only if the entire deposit required by the property does not exceed more than one and one half times the monthly rent.

Conclusion

Last month we discussed potential liability that could arise under HUD’s new proposed disparate effect regulations. As we noted at that time, the most likely use of these criteria is at the screening level, when properties decide who they are going to reject and why. Adopting screening mechanisms that take into account the property’s real objectives, as well as the effect of particular practices,

provides a relatively painless way for properties to avoid potential liability and to successfully find applicants who will be good, long-term residents.