

Date of Hearing: April 29, 2015

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

Ed Chau, Chair

AB 396 Jones-Sawyer – As Amended April 21, 2015

**SUBJECT:** Housing discrimination: criminal record

**SUMMARY:** Makes specified changes to when a landlord may inquire about a prospective tenant's criminal record. Specifically, **this bill:**

- 1) Provides that it is an unlawful housing practice under the Fair Employment and Housing Act (FEHA) for the owner of a rental housing accommodation to inquire about, or to require an applicant for rental housing accommodation to disclose, a criminal record during the initial application assessment phase, unless otherwise required by state or federal law.
- 2) Provides that, following the initial application assessment phase, an owner of a rental housing accommodation may request a criminal background check and consider an applicant's criminal record in deciding whether to rent or lease.
- 3) Provides that, if the owner of a rental housing accommodation is considering denying an application to rent or lease after requesting a criminal background check or considering an applicant's criminal record, he or she shall promptly provide the applicant with a written statement listing the reasons for the possible denial before making a final decision.
- 4) Provides that if, within 14 days of receipt of the written statement listing the reasons for the possible denial the applicant provides the owner of the rental housing accommodation notice orally or in writing of evidence demonstrating the inaccuracy of the item or items within the applicant's criminal record or evidence of rehabilitation or other mitigating factors, the owner of the housing accommodation must delay the denial for a reasonable period after receipt of the information and reconsider his or her decision in light of the information.
- 5) Provides that if, upon individualized assessment of the applicant's criminal record and the evidence of rehabilitation and mitigating factors, the applicant still has an unacceptable criminal record, then the owner of the housing accommodation must notify the applicant of his or her final decision to deny the application in writing.
- 6) Defines "criminal record" as criminal offender information, as defined in Section 13102 of the Penal Code or state summary criminal history information as defined in Section 11105 of the Penal Code.
- 7) Defines "evidence of rehabilitation or other mitigating factors" as including, but not limited to, the following:
  - a) A person's satisfactory compliance with all terms and conditions of parole or probation, provided that the person's inability to pay fines, fees, and restitution due to indigence shall not be considered noncompliance with terms and conditions of parole or probation;
  - b) Employer recommendations, particularly a person's postconviction employment;

- c) Educational attainment or vocational or professional training since conviction, including training received while incarcerated;
  - d) Completion of or active participation in rehabilitative treatment, including alcohol or drug treatment;
  - e) Letters of recommendation from community organizations, counselors, case managers, teachers, community leaders, parole officers, and probation officers who have observed the person since his or her conviction;
  - f) A person's familial relationship with a person who may be currently residing in the housing accommodation;
  - g) The age of the person at the time of the conviction; and
  - h) Explanation of precedent coercive conditions, including physical, emotional, or sexual abuse, untreated substance abuse, or mental illness that contributed to the conviction.
- 8) Defines "initial application assessment phase" as the period before a decision is made to rent or lease, which shall include the request for, and the provision of, an application to a person seeking a rental housing accommodation and including the time during which the assessment of rental history and credit history, the checking of sources of income, and the scheduling of an applicant interview routinely.
- 9) Provides that, with regard to an application for rental housing accommodations, the owner of the housing accommodation shall not require disclosure of, or, if such information is received, deny a dwelling based in whole or in part on the following:
- a) A previous arrest that did not result in a conviction.
  - b) Participation in, or completion of, a diversion or a deferral of judgment program.
  - c) A conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative, including, but not limited to, as is provided under Section 1203.4, 1203.4a, or 1203.41 of the Penal Code.
  - d) A determination or adjudication in the juvenile justice system or information regarding a matter considered in or processed through the juvenile justice system.
  - e) Information pertaining to an offense other than a felony or misdemeanor.

**EXISTING LAW:**

- 1) Declares it to be against public policy the practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information; and that every person has a civil right to be given the opportunity to seek, obtain, or hold

employment and housing without facing discrimination based on these protected classes (Government Code Sections 12920-12921).

- 2) Declares it unlawful, pursuant to FEHA, for any housing accommodation owner to inquire about; make known any preference or limitation as to; discriminate; or harass a person based on the person's race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information (Government Code Section 12955).
- 3) Provides that "discrimination" does not include either of the following:
  - a) Refusal to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household, provided that no more than one roomer or boarder is to live within the household, and the owner complies with existing prohibitions relating to discriminatory notices, statements, and advertisements.
  - b) Where the sharing of living areas in a single dwelling unit is involved, the use of words stating or tending to imply that the housing being advertised is available only to persons of one sex.

(Government Code Section 12927)

- 4) Defines "housing accommodation" as any building, structure, or portion thereof that is occupied as, or intended for occupancy as, a residence by one or more families and any vacant land that is offered for sale or lease for the construction thereon of any building, structure, or portion thereof intended to be so occupied (Government Code Section 12927).
- 5) Defines "owner" as including the lessee, sublessee, assignee, managing agent, real estate broker or salesperson, or any person having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations, and includes the state and any of its political subdivisions and any agency thereof (Government Code Section 12927).
- 6) Prohibits, under the Unruh Civil Rights Act, business establishments from discriminating on the basis of sex (including gender), race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation, and provides civil remedies for violations of its provisions (Civil Code Section 51 et seq.).
- 7) Provides that, when a landlord or his or her agent receives a request to rent a residential property from an applicant, the landlord or his or her agent may charge that applicant an application screening fee to cover the costs of obtaining information about the applicant. The information requested and obtained by the landlord or his or her agent may include, but is not limited to, personal reference checks and consumer credit reports produced by consumer credit reporting agencies (Civil Code Section 1950.6).
- 8) Provides that a landlord or his or her agent may, but is not required to, accept and rely upon a consumer credit report presented by an applicant (Civil Code Section 1950.6).

- 9) Defines "criminal offender information" as records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining as to each such offender a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release. This information must be restricted to that which is recorded as the result of an arrest, detention, or other initiation of criminal proceedings or of any consequent proceedings related thereto (Penal Code Section 13102).
- 10) Defines "state summary criminal history information" as the master record of information compiled by the Attorney General (AG) pertaining to the identification and criminal history of any person, such as name, date of birth, physical description, fingerprints, photographs, dates of arrests, arresting agencies and booking numbers, charges, dispositions, and similar data about the person. It does not include records and data compiled by criminal justice agencies other than the AG, nor does it refer to records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the AG and the Department of Justice (Penal Code Section 11105).
- 11) Provides the conditions and procedures for when a conviction may be judicially dismissed, expunged, voided, or invalidated (Penal Code Sections 1203.4, 1203.4a, 1203.41).

**FISCAL EFFECT:** Unknown.

**COMMENTS:**

FEHA: FEHA prohibits employment and housing discrimination based on the protected classes of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information. FEHA further provides that it is a civil right to be able to pursue and maintain housing or employment without facing discrimination. The Department of Fair Employment and Housing (DFEH) is the state agency responsible for enforcing FEHA and other civil rights laws.

AB 396 would not create a separate protected class under FEHA, nor would it prohibit a rental housing provider from considering or inquiring about an applicant's criminal record. Rather, it would limit when and how a landlord may consider a prospective tenant's criminal record when determining whether to rent to the applicant.

The use of criminal records when making hiring decisions: In the employment context, there are numerous provisions relating to when an employer may consider an applicant's criminal record. Employers are generally prohibited from asking applicants for employment to disclose information concerning an arrest that did not result in conviction, and convictions that have been sealed, expunged, statutorily eradicated, or dismissed. Additionally, there has been recent "ban the box" state legislation relating to when an employer may consider an applicant's criminal record. AB 1650 (Jones-Sawyer), Chapter 880, Statutes of 2014, provides that state contractors must determine an on-site, construction-related job applicant's minimum qualifications before obtaining and considering information regarding the applicant's criminal conviction history. AB 218 (Dickinson), Chapter 699, Statutes of 2013, requires that state and local agencies determine a job applicant's minimum qualifications before obtaining and considering information regarding the applicant's conviction history on an employment application.

The U.S. Equal Employment Opportunity Commission (EEOC) has recognized in policy guidance issued in April 2012 that there are observable racial disparities in the criminal justice system. Because criminal background checks may have a disparate impact on people of color, federal employment discrimination law prohibits no-hire policies against people with criminal records. An employer's consideration of a conviction history may pass muster if an individualized assessment is made, taking into account whether the conviction is job-related and the time passed since the conviction. An employer therefore risks violating federal civil rights laws when it cannot articulate an objective and well-supported reason why the use of a criminal record to disqualify an applicant is related to the functions of the job. The EEOC's guidance also makes a clear distinction between arrest and conviction records, and points out that "the fact of an arrest does not establish that criminal conduct has occurred."

The use of criminal records when considering an applicant's suitability as a tenant: Housing providers generally may inquire about and consider a wide array of information pertaining to an applicant's criminal record, subject to fair housing laws. There are no statewide "ban the box" laws in relation to when a housing provider may consider a potential tenant's criminal record. In the tenant screening process, landlords may use a variety of methods to inquire about an applicant's criminal record. For example, landlords may choose to provide rental applications that include an inquiry about an applicant's criminal record, obtain tenant screening reports, or verbally inquire about an applicant's criminal record. AB 396 would prohibit an upfront inquiry into an applicant's criminal record, and altogether prohibit inquiries into specified types of criminal records, including arrests that did not result in a conviction, juvenile records, and convictions that were dismissed. It would also provide applicants with a chance, if a landlord is considering denying tenancy based on the applicant's criminal record, to present evidence that the entries on their record are inaccurate, and evidence of rehabilitation or other mitigating factors.

Federally subsidized housing providers are only required to consider an applicant's criminal history in narrow circumstances, such as when the applicant is a sex-offender with a lifetime registration requirement. HUD has provided informal guidance encouraging HUD-assisted owners to develop policies to allow formerly incarcerated individuals to rejoin their families. In 2011 and 2012, former HUD Secretary Shaun Donovan sent two letters to HUD-assisted housing providers recognizing the pressing housing needs of individuals who have been incarcerated and urging the adoption of flexible admissions policies that enable these individuals to secure housing and rejoin their families.

Other state and local legislation: The author points to other state and local legislation that has attempted to balance the concerns of rental property owners and prospective tenants. In Oregon, it is illegal to refuse to rent to a tenant because of a previous arrest or certain kinds of criminal convictions. The legislation, passed in the 2013 session and effective Jan. 1, 2014, is based on the work of the General Residential Landlord and Tenant Coalition, comprised of landlord and tenant advocates. There are also numerous local ordinances nationwide limiting the use of criminal records in determining an applicant's eligibility as a tenant. Local governments that have enacted these ordinances include San Francisco, Dane County, WI, Madison County, WI, and Champaign, IL.

Proposition 47: Proposition 47: The Safe Neighborhood and Schools Act is a referendum passed by voters at the November 4, 2014 election. It reduces penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes. The measure also allows certain

offenders who have been previously convicted of such crimes to apply for reduced sentences, and requires any state savings that result from the measure be spent to support truancy (unexcused absences) prevention, mental health and substance abuse treatment, and victim services. AB 1056 (Atkins), which is also being heard in this Committee, would, among other things, direct a portion of these savings to providing post-incarceration housing opportunities such as rental assistance and housing navigation and placement. Rental property owners will be an important component of the implementation of AB 1056, should it become law.

Need for the bill: In response to prison overcrowding directives as well as recent public safety reforms such as AB 109 (Budget Committee), Chapter 15, Statutes of 2011 and Proposition 47, unprecedented numbers of formerly incarcerated individuals are returning to our communities. The author points out that, in light of realignment, redemptive policies should be implemented to ensure people with criminal records are not blocked from being productive citizens.

The author points to AB 396's four goals:

*"Safer communities:* AB 396's primary goal is to reduce recidivism. When people have stable housing, the chance of them re-offending significantly decreases. In fact, finding housing within the first month after release is critical to people leaving incarceration. People released without stable housing often end up in homeless shelters, where the likelihood of them absconding within the first month is seven times greater than a person with some form of housing.

*"Keeping families together:* By prohibiting people with arrest or criminal records from housing, families are often left with two choices: (1) they struggle to look for adequate housing that will accept all members of their family, or (2) they are ripped apart. Like all of us, people with criminal records have mothers, fathers, daughters and sons. As the HUD recognized in a letter to encourage HUD-assisted owners to develop policies to allow formerly incarcerated individuals to join their families, "people who have paid their debt to society deserve the opportunity to become caring parents, supportive parents, and caregivers to their elderly parents."

*"Homelessness is costly for all:* People with criminal records need access to one of the most fundamental building blocks of a stable life—a place to live. Yet, over 80% of housing providers conduct criminal background checks, barring people from adequate housing based on their criminal history. People with criminal histories, with families who could otherwise receive them, are left homeless upon release. According to the National Housing Law Project, at least 10% of parolees are homeless nationwide. In cities such as Los Angeles and San Francisco, 30% to 50% of people on parole are homeless. In other words, discriminatory housing policies result in our community's homeless shelters and foster care systems being unfairly burdened.

*"Unfair discrimination which harms families based upon reasons that have no bearing on the success of a tenancy:* Recent studies have examined the concept of foreseeability as it pertains to potential landlord liability for renting to an applicant with a criminal record whose actions harm another tenant, and the relationship between a criminal record and the ability to meet the obligations of tenancy. The findings indicate there is no empirical evidence establishing a relationship between a criminal record and an unsuccessful tenancy."

Arguments in support: Supporters point out that a safe, stable place to live is crucial to individuals transitioning back into the community post-incarceration. Housing discrimination poses an enormous barrier for these individuals. One of the bill's co-sponsors, RYSE Youth Center, states that "California has one of the highest rates of recidivism (61%) and ranks third nationwide in having the largest population of homeless. Furthermore, recent studies demonstrate an increasing relationship between incarceration and homelessness." They also point out that due to the historical and current disproportionate incarceration rate of people of color, this group is adversely affected by housing discrimination.

Another supporter, the California Partnership, states "AB 396 addresses a critical need to ensure formerly incarcerated individuals are able to find stable housing, reunify with their families, and be set up for success upon reentry into their communities. A stable place to live is fundamental to becoming and remaining a productive citizen. Therefore, automatic housing exclusions create an enormous barrier for those trying to reintegrate into society. Although California and other states nationwide have begun to pass "ban the box" laws as an attempt to address widespread employment exclusions based on a criminal record, similar action is needed to address housing exclusions."

The American Friends Service Committee specifies that "one in four adults in California has an arrest or conviction history that could show up on background checks for housing", and in Los Angeles and San Francisco, it is estimated that 30-50% of the homeless population is on parole "primarily due to the barriers confronted by formerly incarcerated people when they try to find housing." Without safeguards in the private rental market, "there is little alternative than to have the state provide housing to formerly incarcerated people, to enable them to get back on their feet. While this would undoubtedly enhance public safety, it may not be feasible within the budget constraints."

Arguments in opposition: Opponents of the bill, including the California Apartment Association, the California Association of Realtors, the California Chamber of Commerce, and the Civil Justice Association of California, contend that criminal background checks are an important tool to assist rental property owners in determining whether applicants pose a risk to tenants and to the property based on relevant prior conduct. In their view, AB 396 will impose "significant costs on rental property owners, will put existing tenants at risk, and will be unfair financially and otherwise to individuals with a criminal history."

Opponents point out that rental property owners are authorized to assess a screening fee, and that applicants are typically notified of screening criteria upfront, so they may disqualify themselves and avoid paying a screening fee if, for instance, their income or credit rating does not meet the qualifications. In opponents' view, the bill would prohibit an owner from disclosing up front that they will later inquire about certain criminal convictions, and will take away certain applicants' ability to self-disqualify prior to paying a screening fee at the time of application.

Additionally, opponents take issue with the process provided for in AB 396. The Apartment Association of Greater Los Angeles and the Santa Barbara Rental Property Association state that the bill "requires owners to adopt a cumbersome, time-consuming, multiple-step process of evaluating prospective renters and which prevents them from completing their necessary pre-rental due diligence." Opponents contend that it will be financially burdensome on property owners to wait 14 days after giving an applicant a tentative denial, as well as unfair to other applicants who are waiting for decisions on their applications. Opponents also contend that

owners and managers are not qualified to determine whether an applicant has an unacceptable criminal record, could face significant liability if they make the wrong decision, and would likely be forced to consult with their attorneys every time an applicant with a criminal record applies for housing.

Related legislation:

AB 1056 (Atkins): Would direct the Board of State and Community Corrections to develop a Second Chance Program to provide mental health services and housing to formerly incarcerated individuals. This bill is pending hearing in the Assembly Committee on Housing and Community Development.

AB 1650 (Jones-Sawyer), Chapter 880, Statutes of 2014: With certain exceptions, provides that state contractors must determine an on-site construction-related job applicant's minimum qualifications before obtaining and considering information regarding the applicant's criminal conviction history.

AB 218 (Dickinson), Chapter 699, Statutes of 2013: With certain exceptions, provides that a state or local agency shall not ask an applicant for employment to disclose, orally or in writing, information concerning the conviction history of the applicant, including any inquiry about conviction history on any employment application, until the agency has determined the applicant meets the minimum employment qualifications, as stated in any notice issued for the position.

Committee Amendments: The Committee may wish to accept the amendment below, which clarifies that the owner of rental housing, once he or she has reviewed the applicant's criminal record, is only required to provide a written list of reasons for the possible denial if it is based on the applicant's criminal record.

On page 7, line 3, insert the following language:

and the possible denial is based on the applicant's criminal record.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Ella Baker Center for Human Rights (sponsor)

Healthy Communities, Inc. (sponsor)

Legal Aid Society – Employment Law Center (sponsor)

RYSE Youth Center (sponsor)

Women's Policy Institute of the Women's Foundation of California (sponsor)

Alameda County Faith Initiative Office Faith Advisory Council

American Friends Service Committee

Bayview/Hunters Point Community Legal

Building Opportunities for Self-Sufficiency (BOSS)



California Catholic Conference of Bishops  
California Council of Community Mental Health Agencies  
California Immigrant Policy Center  
California Partnership  
Californians United for a Responsible Budget (CURB)  
Community Legal Services in East Palo Alto  
Corporation for Supportive Housing (CSH)  
Daughters of Destiny Youth Mentoring  
Drug Policy Alliance  
Fair Chance Project  
Grandma's House of Hope  
Justice Now  
Lawyers' Committee for Civil Rights of the San Francisco Bay Area  
Legal Services for Prisoners with Children (LSPC)  
Los Angeles Community Action Network (LA CAN)  
Los Angeles Regional Reentry Partnership (LARRP)  
Mental Health America  
Mothers United Against Gang Violence  
National Association of Social Workers- California Chapter (NASW-CA)  
National Housing Law Project (NHLP)  
Oakland Unite  
Princess Transitional Living for Women  
Project AVARY  
Root & Rebound  
St. Anthony Foundation  
The Black Caucus of the California Community Colleges  
Urie Properties Incorporated  
Volunteers of America – Project Choice  
Women's Economic Agenda Project  
Western Regional Advocacy Program (WRAP)  
Youth ALIVE

## **Opposition**

Apartment Association of California Southern Cities  
Apartment Association of Greater Los Angeles  
Apartment Association of Orange County  
California Apartment Association  
California Association of Realtors  
California Chamber of Commerce  
Civil Justice Association of California  
East Bay Rental Housing Association  
Nor Cal Rental Property Association  
North Valley Property Owners Association  
San Diego County Apartment Association (SDCAA)  
Santa Barbara Rental Property Association  
Western Manufactured Housing Communities (WMA)

**Analysis Prepared by:** Rebecca Rabovsky / H. & C.D. / (916) 319-2085