



DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING



PROHIBITED USES OF CRIMINAL HISTORY INFORMATION IN HOUSING

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With stable housing, people have the opportunity to support themselves and their families and to leave the criminal legal system behind them.

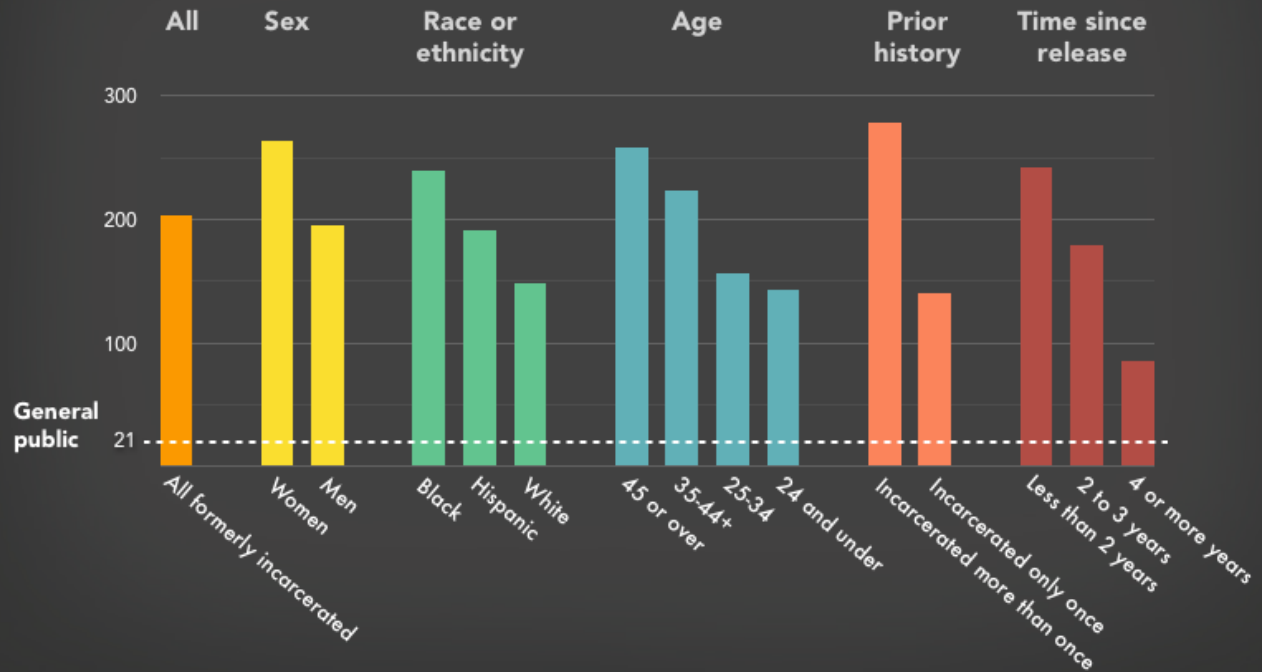




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Homelessness rates among formerly incarcerated people

Number of homeless per 10,000 formerly incarcerated people in each category, compared to the general public in 2008 (the most recent year data for formerly incarcerated people are available)



PRISON
POLICY INITIATIVE

Sources & data notes: <https://www.prisonpolicy.org/reports/housing.html#methodology>

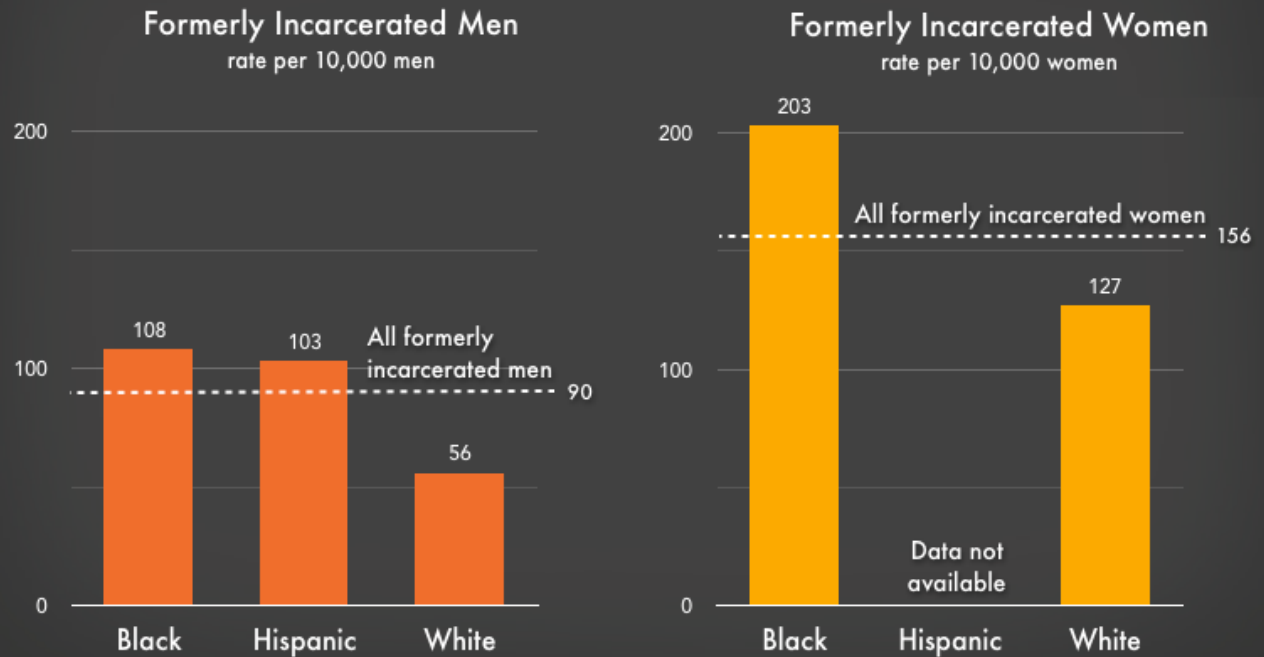




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Gender, race, and ethnicity combine to put women of color at greater risk of homelessness

Number of formerly incarcerated people per 10,000 experiencing sheltered homelessness when surveyed in 2008



PRISON
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Sources & data notes: <https://www.prisonpolicy.org/reports/housing.html#methodology>





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HOUSING INSECURITY

HOMELESSNESS

Unsheltered Homelessness	Sheltered Homelessness	Marginal Housing
Homeless or no fixed residence	Living in a shelter	Living in a rooming house, hotel, or motel
105 per 10,000	98 per 10,000	367 per 10,000





COMMON BARRIERS

- Use of unreasonable lookback periods (ex: 99 years)
- Use of arrests alone as proof of criminal activity
- Use of overbroad categories of criminal activity (ex: no felonies)
- Underuse of mitigating evidence





STATEWIDE EMPLOYMENT BAN-THE-BOX SINCE 2018





HUD FAIR HOUSING GUIDANCE ON THE USE OF CRIMINAL RECORDS (2016)

Criminal records status is *not a protected class*.

But adverse housing decisions based on a person's criminal record may violate the federal Fair Housing Act, which prohibits discrimination on the basis of race, national origin, and other protected classes.

1. *Discriminatory treatment* – criminal record as pretext for race
2. *Disparate impact* – facially neutral policies that have an unjustified disparate impact on racial minorities

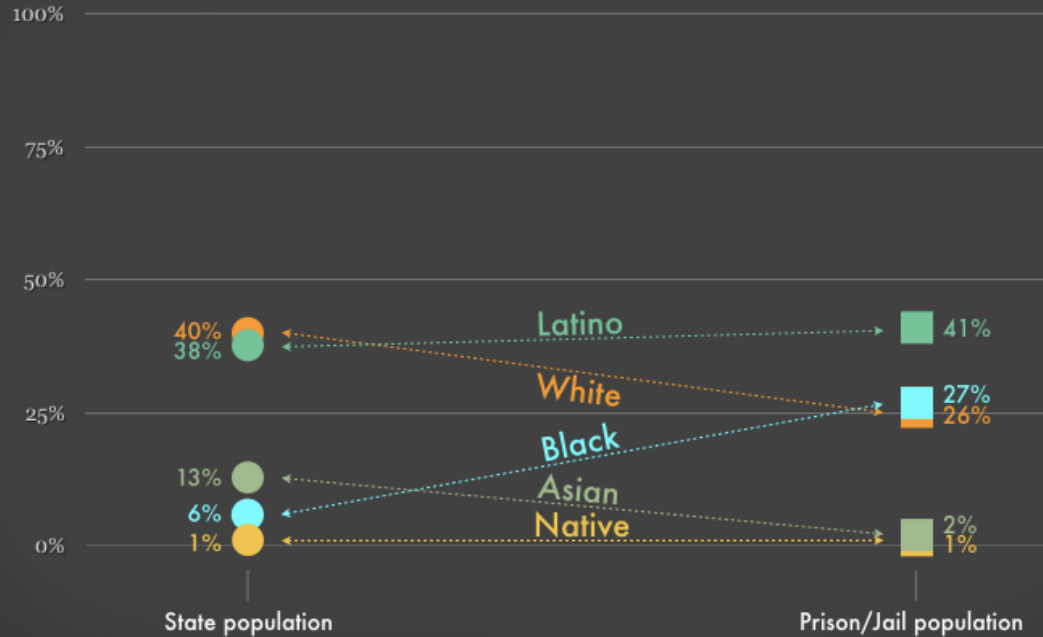




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Racial and ethnic disparities in prisons and jails in California

White and Asian people are underrepresented in the incarcerated population while Black and Latino people are overrepresented.



PRISON
POLICY INITIATIVE

Compiled from 2010 Census, Summary File 1.





OVERVIEW OF REGULATIONS REGARDING CRIMINAL HISTORY INFORMATION (CHI)

- The statute and the regulations do not ban all use of criminal history information, but they do limit it significantly.
- “Criminal history information” (CHI) is defined in Section 12264

Examples of CHI include: arrests, convictions and deferrals.





PERMITTED USES VS PROHIBITED USES OF CHI (1 OF 2)

Section 12265 lists prohibited uses:

Any practice of a person that includes seeking information about, consideration of, or use of criminal history information, as defined in Section 12264, is unlawful if:

- It has a **discriminatory effect** under Article 7, unless a legally sufficient justification applies under Section 12266;





PERMITTED USES VS PROHIBITED USES OF CHI (2 OF 2)

- It constitutes **intentional discrimination** under Section 12267;
- It constitutes a **discriminatory statement** under Section 12268; or
- It relates to **practices specifically prohibited** under Section 12269.

Note: it covers “practice” or “practices” as defined in Section 12005(v), which includes written or unwritten policies.





OVERVIEW OF A DISCRIMINATORY EFFECT CLAIM

CA Govt Code Section 12955.8(b) of FEHA imposes liability for practices that have a **discriminatory effect** (as defined in Section 12060) **even if not motivated by discriminatory intent, unless they are supported by a legally sufficient justification** (as defined in Section 12062)

The liability rule for a discriminatory effect claim in the CHI context (Sections 12264 – 71) builds on Article 7: Discriminatory Effect (Sections 12060 - 63)





DISCRIMINATORY EFFECT CLAIMS: SUMMARY OF BURDEN SHIFTING

- A Complainant must prove that a practice has a discriminatory effect (Section 12061)
- If Complainant meets its burden, the burden shifts to Respondent to establish a legally sufficient justification (Section 12266)

Note: Business establishments (defined in Section 12005(f)) and Non-business establishments have slightly different burdens.





WHAT IS A COMPLAINANT'S BURDEN?

Section 12061:

A complainant must show that the practice they are challenging has a discriminatory effect. This means...proving that a **challenged practice caused or predictably will cause a discriminatory effect.**





HOW IS “DISCRIMINATORY EFFECT” DEFINED? (1 OF 2)

Section 12060 provides (in part):

- A practice has a discriminatory effect where it actually or predictably results in a **disparate impact** on a group of individuals, or creates, increases, reinforces, or **perpetuates segregated housing patterns**, based on membership in a protected class.





HOW IS “DISCRIMINATORY EFFECT” DEFINED? (2 OF 2)

- A practice predictably results in a disparate impact when there is evidence that the practice will result in a disparate impact even though the practice has not yet been implemented.
- A practice that is proven under Section 12061 to create, increase, reinforce, or perpetuate segregated housing patterns is a violation of the FEHA **independently** of the extent to which it produces a disparate effect on protected classes.





WHAT TYPES OF EVIDENCE ARE RELEVANT TO ESTABLISH OR TO REBUT A DISCRIMINATORY EFFECT?

It will depend upon the facts of the case.

Section 12061(d) lists some potentially relevant types of evidence.

Examples include: national, state, and local statistics; tenant/resident files or data; and demographic or census data.

As is typical in litigation, the opposing party may rebut whether the party with the burden of proof has met its burden





OVERVIEW OF BUSINESS ESTABLISHMENT RESPONDENT'S BURDEN (1 OF 2)

- What are “Business establishments”? Defined in Section 12005(f)
- What are the elements of a legally sufficient justification for a business establishment?

Legally sufficient justification in this context builds on Section 12062(a):

1. The practice is **necessary to achieve one or more substantial, legitimate, non-discriminatory business interests;**





OVERVIEW OF BUSINESS ESTABLISHMENT RESPONDENT'S BURDEN (2 OF 2)

2. The practice **effectively carries out the identified business interest**; and,
3. There is **no feasible alternative practice** that would equally or better accomplish the identified business interest with a less discriminatory effect.

The justification must be supported by evidence, not hypothetical or speculative (Section 12062(c))





LEGALLY SUFFICIENT JUSTIFICATION, PART 1: NECESSITY (1 OF 2)

- Necessary to achieve one or more business interests that are:
 - **Substantial interest** = a core interest of the entity or organization that has a direct relationship to the function of that entity or organization (Section 12005(ee))
 - **Legitimate** = a justification is genuine and not false or pretextual (Section 12005(r))





LEGALLY SUFFICIENT JUSTIFICATION, PART 1: NECESSITY (2 OF 2)

- **Non-discriminatory** = the justification for a challenged practice does not itself discriminate based on a protected basis (Section 12005(s))

Note: This is a case-specific, fact-based inquiry.
(Section 12062(d))

What are some examples of such interests?
Safety of residents, employees or property.





LEGALLY SUFFICIENT JUSTIFICATION, PART 2: BUSINESS INTEREST (1 OF 2)

The practice must effectively carry out the identified business interest.

This element requires that the practice must seek, consider, and use only criminal history information regarding **directly-related convictions**, as defined in Section 12005(k), and **subject to Section 12269**.

In determining whether a criminal conviction is directly-related, a practice should include:

- **consideration of the nature and severity of the crime and**





LEGALLY SUFFICIENT JUSTIFICATION, PART 2: BUSINESS INTEREST (2 OF 2)

- the amount of **time that has passed since the criminal conduct occurred** as provided in CHI.

“Directly-related conviction” means a criminal conviction that has a **direct and specific negative bearing on the identified interest or purpose supporting the practice**. Section 12005(k)

Note: Under Section 12269(a)(1) only criminal convictions as defined in Section 12005(i) can be considered.





LEGALLY SUFFICIENT JUSTIFICATION, PART 3: NO FEASIBLE ALTERNATIVE (1 OF 2)

There is no feasible alternative practice that would equally or better accomplish the identified business interest with a less discriminatory effect.

Fact-specific and case-specific inquiry. The determination...will depend on the particulars of the CHI practice under challenge.

Factors required to consider:

- Opportunity to present mitigating evidence?
Written notice?





LEGALLY SUFFICIENT JUSTIFICATION, PART 3: NO FEASIBLE ALTERNATIVE (2 OF 2)

- Consideration of factual accuracy of criminal history information?
- Consideration of mitigating evidence?
- Delayed consideration of criminal history?
- Copy of policy?
- Other relevant factor?





HOW IS “MITIGATING INFORMATION” DEFINED?

Section 12266(e) provides:

- Mitigating information means credible information about the individual that suggests that the individual is not likely to pose a demonstrable risk to the achievement of the identified interest.
- Credible information is information that a reasonable person would believe is true based on the source and content of the information.





WHAT ARE EXAMPLES OF MITIGATING EVIDENCE?

1. Minor or young adult at time of conduct
2. Amount of time that has passed since date of conviction
3. Good tenant history before and/or after conviction
4. Evidence of rehabilitation efforts, etc.
5. Status as survivor of domestic violence
6. Status as a person with a disability
7. Other relevant facts or circumstances





WHAT IS A NON-BUSINESS ESTABLISHMENT RESPONDENT'S BURDEN IN THE CHI CONTEXT?

What is a “Non-business Establishment”?

- Legally sufficient justification – builds on Section 12062(b)
- Largely same as Business Establishment Respondent's Burden, except:
 - Substitute “purpose of non-business establishment” for “business interest” and
 - Additional element: “sufficiently compelling purpose”





WHAT ARE “DISCRIMINATORY STATEMENTS”?

This lovely Pittsburg apartment has been updated with wood style flooring, gas stove/oven, and refrigerator and has two bedrooms, one bathroom, a living room, a kitchen with a dining nook and a private in-unit laundry area with full sized washer and dryer.

You'll enjoy the privacy of there being only one other tenant instead of dozens like many apartment buildings. You'll have plenty of off-street parking space in the front and rear of the property. There's a large gated backyard that's perfect for gardening, pets, and BBQs and has a big private locked shed for storage. The unit is cable TV and internet ready.

This inviting home is minutes from California Delta Hwy 4, Los Medanos College, the Old Town, the Pittsburg Marina, Riverside High School, Pittsburg High School, City Park, and Marina Vista Elementary School. It's also walking distance to a lovely Farmer's Market and several stores and restaurants. There are even two great supermarkets just a block away!

CLICK REPLY OR TEXT [show contact info](#) TO SCHEDULE A VIEWING TODAY!

Available Now

- One-year lease
- Water is included
- \$1,850 monthly rent
- \$1,850 security deposit
- \$29.95 application fee
- Not registered for vouchers

Rental Requirements

- Previous landlord references
- Verifiable stable employment
- Credit score of 575 or above
- No felony conviction history

- Sec. 12268 prohibits notices or advertisements that conflict with these regulations:
- Advertising a lawful screening policy is not unlawful.





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“The mere fact that a man has been arrested has very little, if any probative value in showing that he engaged in any misconduct... [only that] someone probably suspected the person”.

Schwartz v. Bd. Of Bar Examiners, 353 U.S. 232, 241 (1957)





Sec. 12269 prohibits the use of :

- Arrests not leading to conviction
- Pre-post trial diversion programs
- Cases dismissed pursuant to “Clean Slate” or “expungement” remedies *
- Juvenile adjudications (but for court order W&I 827)
- Blanket Bans





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- Sec. 12269 (b) clarifies that although ICRAA allows housing provider to access record of criminal records up to 7 years, there may be a “feasible alternative” (shorter lookback) depending on facts of case
- Sec. (c) clarifies obligation to notify and provide applicant access to credit reports where “adverse action” is taken.





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Sec. 12270 (a) clarifies that provider may consider specific types of criminal history where required by federal or state law (individuals who are required to register as sex offenders; production of meth);





Sec. 12270(b) provides that prohibitions and/or consideration of mitigating factors may still be required

- For example, where conviction is result of instance of domestic violence, per VAWA;
- Where conviction is function of disability (reasonable accommodation)





Sec. 12271 clarifies that housing providers are subject to any local ordinances providing additional process or protections to applicants.

- Jurisdictions employing “Just Cause” ordinances include Richmond, San Francisco, Oakland. Berkeley and Emeryville under consideration.





HYPO #1

- For years, Yuna was in a physically abusive relationship. At one point, she was injured so badly that she had to be hospitalized for third degree burns. Already struggling with depression and PTSD, she then developed a drug dependency which led to her arrest and plea to possession of prescription painkillers in 2017. With support, she eventually left her abuser and completed an intensive substance abuse program. She applied for an apartment at Garden Apartments.
- ***What might the housing provider consider in reviewing Yuna's application?***





HYPO #2

- Blake was convicted of arson and has served his sentence. He applies for an apartment with Bayside Residences. After verifying that he meets financial and other qualifications, Bayside then requests a background check. The landlord notifies Blake in writing that it plans to reject him because of the arson, and pursuant to its policy requests if he has any mitigating information. Blake doesn't dispute the accuracy of the criminal history and offers no mitigating information. Landlord rejects him.
- ***In reviewing Blake's application, are Bayside Residences's actions consistent with FEHA?***





HYPO #3

- Joe is a tenant at Riverside Apartments. Last week, he got into an argument and started physically fighting with Harry, who also resides in the same building. Witnessing the fight, Harry's friend Peter called the police, who arrested Joe for assault upon arriving at the scene. Later that day, Joe was released without charges. Harry notifies Riverside Apartments about the fight and includes a written statement from Peter about what he saw.
- ***Can Riverside Apartments evict Joe because of his altercation with Harry? Why or why not?***





HYPO #4

- Tony is currently homeless and has been living on the streets since 2015. He has several arrests on his record spanning the last 5 years for offenses, such as loitering, disorderly conduct, and lying down in public. None of these arrests have resulted in a conviction. Tony also receives supportive services and has a case manager from the county health department. He applies for housing from Valley Housing and receives a denial letter listing his past arrests.
- ***Can Valley Housing use Tony's past arrests as the basis for denial? Why or why not?***





THANK YOU!

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