



Check List

Criminal background checks are helpful but be mindful of associated risks

by Pamela V. Rothenberg

The increased availability of information via the Internet has spawned an industry devoted to providing credit, criminal and rental histories to landlords. Criminal background checks, in particular, seem like a reasonable business practice to help landlords decide whether they should rent to a prospective resident. However, these present a host of thorny issues, and landlords should proceed carefully before establishing a definitive policy founded on the use of these reports.

One problem is the information provided is not always accurate. Criminal checks typically involve federal, state and/or local court records of misdemeanor and felony arrests and convictions. Because government agencies do not uniformly make their databases freely available, results can be incomplete. In addition, if the background service does not perform regular database updates, this may also result in incomplete information.

Before acting upon criminal background information, a landlord must be clear about both legal responsibilities and potential liabilities. Under federal fair housing laws, a landlord is permitted to refuse a prospect whose tenancy would constitute a direct threat to the health or safety of others or would result in substantial physical damage to the property of others.

However, cases decided under the Fair Housing Act limit the types of criminal activities a landlord may rely upon in rejecting a prospect. Furthermore, a landlord who elects to screen criminal history of applicants at some, but not all, communities, may unwittingly be exposed to claims of discrimination. Some applicable statutes and case law may impose an affirmative duty on the landlord to disclose report findings, and others, such as the

A landlord who elects to screen criminal history of applicants at some, but not all, communities, may unwittingly be exposed to claims of discrimination.

“privacy provisions” in certain state landlord/tenant acts, may require the information remain confidential.

Finally, a landlord must consider some difficult “slippery slope” issues associated with criminal checks, including:

- A landlord who takes action based upon a check that turns out to be false may be exposed to potential defamation or slander liabilities.
- A landlord who advertises that he or she performs criminal checks in an attempt to sell “safety” may face liability if a check fails to turn up a robbery, rape or other material criminal conviction and the prospect victimizes another resident.
- A landlord who fails to perform criminal checks, contrary to the general practice of other landlords in a community’s geographic region, may face liability if one resident with a criminal history victimizes another.

Given the complexity of the issues associated with performing criminal checks on prospective residents, landlords should seek guidance from experienced legal counsel in establishing parameters for rental policies, as well as how criminal record information should and may be disclosed. □

Pamela V. Rothenberg (prothenberg@wcsr.com) is a member of the Real Estate Development Group at Womble Carlyle Sandridge & Rice, PLLC.

Andrea Short (anshort@wcsr.com), a member of the Business Litigation Group at Womble Carlyle Sandridge & Rice, substantially contributed to this column.