

Federally-Subsidized Housing for People with Conviction Records During COVID-19

Much of the country is subject to a state or local stay-at-home order, demonstrating the clear consensus that home is the safest place for people to protect themselves and their families during the COVID-19 pandemic.

At the same time, some state leaders are recognizing that prisons and jails present significant public health risks to incarcerated individuals, correctional staff, and surrounding communities. The public health risks are elevated, in part, because of the inability to practice social distancing within such tight confines as well the failure to provide adequate supplies of soap and other hygienic necessities. To mitigate against these public health risks and avoid COVID-19 hotspots, a number of states have been working on releasing individuals from jails and prisons.

The question of where these men and women will live upon their release has never been more urgent.

For many, even before COVID-19, living with family offers one of the most affordable, stable, and commonly-used housing options available.¹ In the midst of a pandemic, it is critical to make this a viable option for protecting the safety of individuals, families, and their communities.

Public housing authorities (PHAs) can play an active role in reuniting their families in two ways. First, PHAs can extend their guest policies to allow current residents to temporarily house family members for as long as an applicable state or local stay-at-home order is in effect. Second, PHAs can exercise the broad discretion they have in criminal records screening in favor of allowing people to move in with their families on a more permanent basis. This paper will discuss each of these options and outline best practices.

¹ CLAIRE HERBERT ET. AL, NAT'L POVERTY CNTR., RESIDENTIAL INSTABILITY AMONG THE FORMERLY INCARCERATED 2-3 (2016), http://www.npc.umich.edu/publications/policy_briefs/brief42/policybrief42.pdf; URBAN INST., UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO 8 (2006) (showing that the majority of respondents from studies in Illinois, Maryland, Ohio, and Texas reported living with families or intimate partners upon release from the criminal justice system), <http://www.urban.org/sites/default/files/publication/42981/411289-Understanding-the-Challenges-of-Prisoner-Reentry.PDF>.

1. Extending Guest Policies

PHAs could immediately amend their guest policies to allow an individual to be a guest. This minor amendment may be the most immediate way to support families who want to help their loved ones exiting prisons and jails to shelter in place with them.

Under normal circumstances, guest policies restrict the number of nights a person can stay with a resident family before being considered an unauthorized occupant. For example, some PHAs limit guests to 14 nights per year and only 3 consecutive nights at a time. Instead of relying on an arbitrary number of days, a modified guest policy could permit guests to stay for the duration of the applicable state or local stay-at home order. In addition to giving the person a safe place to stay with minimal red tape, a modified guest policy helps by:

- Relieving the person of the stress of trying to find an apartment at a time when social distancing has suspended normal leasing operations,
- Relieving the resident family of the fear of eviction for having an unauthorized occupant, a lease violation currently not covered by the federal eviction protections, and
- Relieving the PHA of the uncertainty of not knowing who is actually staying in their units during the current emergency.

To create an extended guest policy, we recommend that PHAs adopt the following language:

ABC Housing Authority recognizes that home is the safest place for people to protect themselves and their families during the COVID-19 crisis. As a public health measure, the ABC Housing Authority adopts the following modified guest policy:

1. A guest is defined as a person temporarily staying in the unit with the consent of the head of household or other adult member. See 24 CFR 5.100.
2. Resident families may house overnight guests in their unit as long as residents are subject to a state or municipal stay-at-home order. A resident family must notify ABC Housing Authority of the presence of such overnight guests. Once notice is given, these overnight guests will not be considered unauthorized occupants and therefore will not give rise to lease violations for the resident family.
3. For the duration of an applicable state or municipal stay-at-home order, ABC Housing Authority will not restrict the number of consecutive nights a guest may stay.
4. Guests may represent the unit address as their residence address for receipt of benefits for the duration of the stay-at-home order.

2. Easing Tenant Screening Policies

In addition to modifying guest policies, PHAs can also exercise the broad discretion they have in criminal records screening to admit people who are looking to move in with their families on a more permanent basis.

Federal law imposes very few restrictions on admitting formerly incarcerated individuals to federally subsidized housing. The mandatory bans that do exist are very narrow and apply to a very small subset of individuals leaving prisons and jails.²

For the following categories of criminal activity, PHAs *may, but are not required to*, deny admission.

1. **Drug-related criminal activity**³
2. **Violent criminal activity**⁴
3. Other criminal activity that would **adversely affect the health, safety, or right to peaceful enjoyment** of the premises by other residents, the owner, or public housing employees.⁵ Note that HUD has said that this category should not be treated as a catch-all for all criminal activity.⁶

PHAs have significant discretion in applying their criminal records screening policies, and HUD has suggested that PHAs should use their discretion to admit people with conviction records so that they can successfully return to their communities.⁷

Moreover, PHAs are not prohibited from admitting individuals who are still serving their sentences, whether through parole, probation, or electronic monitoring. Federally subsidized housing, therefore, should remain a viable housing option for individuals who have been released from prisons and jails and are still completing their sentences.

² PHAs and project owners *must* deny admission to:

1. Anyone who has been **convicted of manufacturing methamphetamine on federally assisted property**. See 42 U.S.C. § 1437n(f)(1) (2018); see also 24 CFR § 982.553(a)(1)(ii)(C).
2. Anyone subject to **lifetime registration for a sex offense**. See 42 U.S.C. § 13663(a) (2018); see also 24 CFR § 982.553(a)(2)(i).
3. **Current users** of illegal drugs, abusers of alcohol, or pattern interfering with health, safety, peaceful enjoyment. See 42 U.S.C. § 13661(b)(1) (2018); see also 24 CFR § 982.553(a)(1)(ii).
4. Anyone who, *within the last 3 years*, has been **evicted from federal housing for drug-related criminal activity** unless (1) the person can demonstrate drug rehabilitation or (2) circumstances leading to eviction no longer exist (e.g., person has died or is incarcerated). See 42 U.S.C. § 13661(a) (2018); see also 24 CFR § 982.553(a)(1)(i).

³ 42 U.S.C. § 13661(c) (2012); 24 C.F.R. § 5.100.

⁴ 42 U.S.C. § 13661(c) (2012); 24 C.F.R. § 5.100.

⁵ 42 U.S.C. § 13661(c) (2012).

⁶ HUD, Public Housing Occupancy Guidebook, 96-97 (June 2003), available at <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf>.

⁷ Letter from Shaun Donovan, Secretary, HUD, to Public Housing Authority Executive Directors (June 17, 2011), available at http://www.nationalreentryresourcecenter.org/documents/0000/1126/HUD_letter_6.23.11.pdf, Letter from Shaun Donovan, Secretary, HUD (undated), available at <http://nhlp.org/files/HUD%20Letter%203.14.12.pdf>.

HUD's statutory and regulatory waivers in response to COVID-19 allow PHAs to immediately change their tenant selection criteria and remove discretionary criminal records screening policies for individuals who were released early.⁸ Correctional departments will have already made a determination that these individuals should return to their communities, so a prolonged screening process should not keep them from reuniting and seeking immediate shelter with their families. The ability of residents to add family members to their lease will be especially critical given the shortage of available units and the long waiting lists that many PHAs are experiencing. By using the waiver to remove these discretionary screening policies for the duration of the COVID-19 crisis, housing authorities would significantly contribute to the public health of their communities.

Because PHAs already have discretion in how they screen tenants for past criminal history, a written policy change may not be necessary in some cases. Rather, such PHAs should ensure that staff are properly trained in considering the applications of people who have been involved with the criminal legal system and that staff understands that a person is not automatically barred just because that person has been released early from prison or jail. PHAs should also take the important step of communicating to residents and applicants about the flexibility of their criminal records policies. Otherwise, there is a significant risk that many will choose not to apply based on erroneous information about the PHA's criminal records screening policies.

Whether a PHA chooses to extend its guest policy or modify its tenant selection criteria, the PHA should also waive standard occupancy limits. Permitted by HUD, such a waiver would immediately allow current tenants to add individuals to their household as a result of COVID-19, even if adding those individuals would normally result in the family being overcrowded. Individuals whose loved ones who already live in the Housing Choice Voucher or Project-Based Voucher programs could exit the correctional facilities and lawfully shelter in place with their family members for the lease term, or April 10, 2021, whichever is longer.

As demonstrated, PHAs have a number of options available to help reunite residents with family members coming home from prison and jails. By maximizing these opportunities for family reunification, PHAs will allow more people to safely shelter in place and thus protect the public health of their communities.

⁸ HUD PIH Notice 2020-05, COVID-19 Statutory and Regulatory Waivers for the Public Housing, Housing Choice Voucher, Indian Housing Block Grant and Indian Community Development Block Grant programs, Suspension of Public Housing Assessment System and Section Eight Management Assessment Program (2020), <https://www.hud.gov/sites/dfiles/PIH/documents/PIH2020-05.pdf>.

Appendix: Relevant Statutory & Regulatory Waivers

In April, the U.S. Department of Housing and Urban Development (“HUD”) issued HUD PIH Notice 2020-05 which provides broad authority for PHAs that administer public housing and Housing Choice Voucher programs to automatically elect to waive various regulatory and statutory provisions in response to COVID-19.

Several of these offered waivers can support allowing individuals to move into the homes of their loved ones during the pandemic, without conflicting with existing regulations, statutory obligations, or the PHA’s own plans. The relevant waivers available to PHAs are as follows:

1. **HQS-10: Housing quality standards; Space and Security Regulatory Authority: § 982.401(d) Description:** The regulation establishes a minimum standard for adequate space for both an HCV and PBV -assisted family. Specifically, it requires that each dwelling unit have at least 1 bedroom or living/sleeping room for each 2 persons. HUD is waiving this requirement for PHAs where the PHA wishes to assist a current participant that needs to add a member or members to the assisted household as a result of the COVID-19 emergency, and the additional family members would result in the unit not meeting the space and security standards. This provision does not apply to an initial or new lease. A participant must not enter into a new lease for a unit that does not comply with the space and security standards. Period of availability: For any family occupying a unit that does not meet the space and security requirements pursuant to this waiver, the waiver will be in effect for the duration of the current lease term or one year from the date of this notice, whichever period of time is longer.

Explanation of waiver: This waiver will permit housing authorities to allow current tenants to add individuals to their household as a result of the COVID-19 emergency, even if adding those individuals would normally exceed space and safety standards. This waiver can be for the duration of the existing lease or one year from the date of this notice, whichever is longer. Individuals who have loved ones who already live in public housing could exit the correctional facilities and lawfully shelter in place with their family members. This year could be used to either assist the individual to formally apply to be added to the lease at a later time, give them time to apply for other housing of the housing authority, or give them time to secure other housing.

2. **PH-4: ACOP: Adoption of Tenant Selection Policies Regulatory Authority: 24 CFR § 960.202(c)(1) Description:** The regulation requires that the PHA policies in the ACOP must be duly adopted and implemented. HUD is waiving this requirement to permit PHAs to adopt and implement changes to the ACOP, the planning document governing public housing units, on an expedited basis, without formal board approval. As an alternative requirement, any informally adopted revisions under this waiver authority must be formally adopted as soon as practicable following June 30, 2020, but no later than July 31, 2020. Please note that the requirement for tenant selection policies to be consistent with the fair housing and equal opportunity at § 5.105 remains in effect. Period of Availability: The period of availability ends on July 31, 2020.

HCV-1: Administrative plan Regulatory Authority: 24 CFR § 982.54 (a)

Description: The regulation requires that any revisions of the PHA's administrative plan must be formally adopted by the PHA Board of Commissioners or other authorized PHA officials. Recognizing the foreseeable difficulties in complying with this requirement in light of the COVID-19 emergency, HUD is waiving the requirement to allow the PHA administrative plan to be revised on a temporary basis without Board approval. As an alternative requirement any informally adopted revisions under this waiver authority must be formally adopted as soon as practicable following June 30, 2020, but no later than July 31, 2020. Period of Availability: The period of availability ends on July 31, 2020.

Explanation of the waivers: These waivers mean that housing authorities could immediately change their tenant screening criteria outlined in their ACOP and Administrative Plans, including criminal records screening, in order to use their discretion to create more flexibility within the criminal records screening policies as it concerns public housing and project-based vouchers and Housing Choice Vouchers. The housing authorities would not be required to secure board approval until after July 31, 2020.

Housing authorities could use this authority to immediately change their tenant selection criteria and remove discretionary criminal records screening policies for individuals who were released early from prisons and jails in response to COVID-19.

As well, housing authorities could immediately amend their guest policies to allow an individual to be a guest in the home for an extended period of time, without having to first meet the requirements of the tenant screening policies. This minor amendment may be the most immediate way to support families who want to help their loved ones exit prisons and jails and shelter in place with them.