

MAHC MESSENGER

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San Diego

EDITOR-IN-CHIEF

Randall Pentiuk, Esq.

Blanket Policies Against Hiring Ex-Cons Could Mean Trouble for Employers

RANDALL PENTIUK, ESQ.

Jane Doe was 19 years old when she was charged with prescription fraud. The court allowed her to enter into a diversion program and was able to avoid having a criminal record that would follow her for the rest of her life. She went on to have a productive career as a nursing assistant until she was fired after seven years of employment at a nursing home. The Department of Community Health informed her that she was barred for life from working in long-term care because of the drug offense in her youth.

Blanket policies that cover the hiring and firing of people with arrest and conviction records could mean trouble for employers. The Equal Employment Opportunity Commission (EEOC) recently released guidance on the employer use of arrest and conviction records on April 25 for the first time in two decades. The issue is that, while universally barring workers with criminal histories is not discriminatory on its face under Title VII of the Civil Rights act, the EEOC has determined that such hiring and employments do have a disparate impact on people of color.

In 1977, the courts first stated that blanket exclusions for criminal records were discriminatory. In *Green v. Missouri Pacific Railroad*, the 8th Circuit determined that employers must consider the nature and severity of the offense, the amount of time elapsed since the offense or completion of the sentence, and the nature of the job held or sought. The EEOC adopted that as the standard and didn't change it for more than 20 years.

Then, in 2007 the 3rd Circuit released an opinion on *El v. Southeastern Pennsylvania Transportation Authority*, which emphasized the importance of factual analysis in criminal record exclusions. With the advent of the Internet and technology it is easy for employers to check criminal history, although many of these databases are inaccurate or incomplete. Even when the records are accurate and complete, the EEOC is declaring that employers need to do an individual assessment on prospective hires who have been convicted of crimes, consistent with *Green*.



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HELP MAHC KEEP RECORDS UP-TO-DATE

Many housing cooperatives hold their annual meetings throughout the year, but fail to report these board changes to MAHC. This results in newsletters not reaching the proper individuals. In addition, management companies may be changed and MAHC is not advised of the change.

Please help us to keep our records current by forwarding any board changes as they occur (a letter or fax will suffice). You need not wait for your membership renewal.

We want the MAHC Messenger to reach the current housing cooperative leadership. Also, we want renewal and other notices to reach current officers in order to avoid interruptions in your cooperative's membership. Thank you.

Cont'd: Ex-Cons

The EEOC further reinforced its stance that employers cannot have blanket policies that reject every applicant with a conviction, as that would be deemed disparate impact. The most prudent, conservative approach is for employers to not consider arrest records that do not result in convictions, as Michigan law prohibits employers from asking about or maintaining records regarding misdemeanor arrests that did not result in convictions.

This begets the question: How risky is it to even ask about criminal convictions? Applying the court's test, if an employer performs a background check and a criminal conviction comes up, then the employer will have the burden of proving whether the conviction played a part in their hiring decision. The negative consequence to the EEOC's investigation may result in a disincentive to run background checks at all. A possible consequence of stopping employers from using criminal background checks is that potential employees with criminal backgrounds may be able to use their positions to commit crimes. Employers are also concerned about liabilities from employees with prior criminal history. For example, a prospective employee who has been convicted of assault may have no other convictions on his record, but if he assaults a customer the employer may be liable as they were aware of the employee's past criminal history.

The EEOC does not forbid employers from using such information in making a hiring decision, it just has to be relevant to the position. There are still many employers putting themselves at risk of being scrutinized by the EEOC, who has said for years that employers must treat every applicant similarly. Now the EEOC is changing their position, and mandating that employers must do individual assessments and decide each case on its own merits.



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Mr. Kanoyton became involved in the housing cooperative community while working for a nonprofit housing agency. There he learned a lot about housing and home ownership, the credit reinvestment act, and areas of housing law. Says Kanoyton, "If you want to be part of your community, being on the board of a housing coop is one way to invest in your community and neighborhood."

PRESIDENT OF RALPH BUNCHE HOUSING COOPERATIVE, KEVIN KANOYTON

Kevin Kanoyton, the President of Ralph Bunche Housing Cooperative sits down to share his story

A leader has quietly risen among the ranks to become President of the Ralph Bunche Cooperative in Detroit. Kevin Kanoyton, a native to Detroit, became the interim president this last march, and was officially elected as the cooperative's President on March 22. Mr. Kanoyton grew up in Detroit and cites his grandfather as his biggest role model. His grandfather taught him the value of good work ethic, the spirit of entrepreneurship, and how to be a good provider and role model for his family. Mr. Kanoyton graduated from Cass Tech High School in Detroit, and graduated from Madonna University in Livonia.

Early in his career Mr. Kanoyton received an opportunity to become an EMT through Wayne State University and Detroit General Hospital. He finished the training program and was led into the field of EMS and became a field paramedic. Currently Mr. Kanoyton leads health and safety training classes. Despite being very busy and involved in several different activities, Mr. Kanoyton says "When you're involved in different things, other things can suffer. You only have so much you can put on your plate, and you can focus and be more productive if you don't have a lot of things on your plate."

As evidence of his successful and productive accomplishments, Mr. Kanoyton cites one of his biggest successes in life as teaching adults. He says that he considers himself successful when previous students thank him for being their teacher and encouraging them to have a successful career. For Mr. Kanoyton, this is the highest honor he could receive.

As the newly elected President of Ralph Bunche, Mr. Kanoyton is committed to ensuring that the structural integrity of the coop is maintained so it can carry forward for many years to come. He aspires to create a place where families want to live, and for the cooperative to have a good reputation as a safe, nice, affordable, and community oriented cooperative. One way Mr. Kanoyton plans on achieving this goal is through working hard and looking for new trends in the cooperative housing field.

Ralph Bunche Housing Cooperative is a hidden gem within the city of Detroit. It is located centrally to downtown Detroit, Comerica Park, Belle Isle, Ford Field, Eastern Market, and many other shopping facilities and freeways. Ralph Bunche offers all the amenities people look for when they're going to move to a particular location. With Mr. Kanoyton at the wheel, Ralph Bunche can only get better with time.



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Does Your Housing Cooperative Have a Tenant Selection Policy?

Ensure your policy aligns with HUD, or create your own policy and streamline the application process.

RANDALL PENTIUK

Most housing cooperatives have a tenant selection policy, which helps ensure that tenants are selected for occupancy in accordance with either HUD requirements or state, federal and local laws. If your housing cooperative is regulated by HUD, then there are specific guidelines you must follow in order to continue to receive government assistance. If your housing cooperative is not regulated by HUD, then you can use these ideas to create your own policies in accordance with applicable state, federal and local laws as well as the cooperative's established management policies.

For housing cooperatives regulated by HUD, it is important to ensure your policy strictly adheres to the Fair Housing Act and the Civil Rights Act of 1968 as amended by the Fair Housing Amendments Act of 1988. Having a solid tenant selection policy will protect your cooperative from potential litigation and lawsuits from members or would-be members.

For example, HUD requires that every tenant selection policy should specify who is eligible, which means whether the property is designated for a special population such as the elderly, disabled, or students enrolled at an institution of higher education. In addition, HUD requires housing cooperatives to describe how various citizenship and immigration requirements are implemented, as well as provisions for providing social security numbers. Finally, HUD requires a tenant selection policy to specify income limits for potential members, whether the property is very low income or low income.

For housing cooperatives in general, a good tenant selection policy will specifically mention that no applicant shall be discriminated against or denied housing because of race, religion, color, sex, race by association, familial status, national origin, ancestry, or disability. In addition, there have been updates in the law regarding the sexual orientation of tenants, and this should also be a part of the tenant selection policy. It should also take into consideration whether there is an elderly restriction or preference in the admission of tenants. Any preference must also list supporting documentation to prevent allegations of discrimination in the selection of tenants.

In the advent that your housing cooperative must reject ineligible applicants, the tenant selection policy must describe the circumstances under which the owner may reject an applicant for occupancy or assistance. If the cooperative establishes a policy to consider extenuating circumstances then that must also be described in the plan.

Having a solid tenant selection policy will protect your cooperative from potential litigation and lawsuits from members or would-be members.



MAHC BOARD MEMBER: Nikita Frederick

Although Nikita Frederick is one of MAHC's newer board members, she has been in the housing cooperative community for years. Ms. Frederick was first introduced to housing cooperatives while living at Birch Run Cooperative in Romulus, and joined their board in 1989. She went on to serve for more than 17 years, and became a staple in their housing community. Ms. Frederick remembers, "I ran for the board just to see what was going on, but once I joined I saw how important it was to be a knowledgeable board member." She went on to serve as a Secretary as well as the President of the cooperative.

Ms. Frederick is serving her third term with the MAHC board, but do not let that fool you. She assists many of the younger cooperative board members in finding solutions to their housing problems. Ms. Frederick also teaches the Secretary Class along with her mentor, Cyndy Phillips at the annual MAHC Conference. She recently taught at the San Diego Annual Conference, and says "I love teaching the class and I always try to put a twist on it and make it fun. I want to make the people participate and keep them involved in the learning process."

Her number one goal for the housing cooperative movement is to teach new board members and get younger adults involved in the movement. Ms. Frederick says "Sometimes the younger adults are confused because the housing cooperative movement is very complex, but I want to tell them just have patience, don't be overwhelmed, they're not going to learn everything in one sitting. Over a period of time they will learn and it is important not to let it consume them to the point where they get discouraged. Just take one issue at a time."

Ms. Frederick says the biggest role models in her life are her parents. Her father is her first role model because he taught her many things, including how to cook, and he was always looking out for her. Her parents supported her through the hard times in her life and when she was discouraged they were always there with encouragement and sound direction.

When asked what her vision is for the housing cooperative movement, Ms. Frederick responded "The housing cooperative movement can grow through informing new members that we are not just renting. This is 'our' investment, and without participation and help we cannot grow." Housing cooperatives are not about renting a low-income place to live. She believes in giving members the knowledge that they are taking ownership in their community, resulting in increased pride in the neighborhood and respect for the other members as well as the grounds. For families that are starting out that are low income, housing cooperatives give them a vision that says "I can do this" and that is the message Nikita Frederick wants to spread. "If I can do it, anyone can do it."

For families that are starting out that are low income, housing cooperatives give them a vision that says "I can do this" and that is the message Nikita Frederick wants to spread. "If I can do it, anyone can do it."

Huntington Management

Exploring alternative methods to preventing bed bug infestation



Huntington Management, overseeing 25 properties with 3,500 units in Southeastern Michigan, adheres to a clear and concise mission statement to keep consistently on point. The company's mission is to preserve, maintain and enhance value. So what does Huntington Management value in Cooperative living? "The biggest benefit of living in a Cooperative is not only cost containment, but the advantage of having an environment of neighbor awareness or a 'village' so to speak, where everyone looks out for everyone's best interest. Co-ops have a mutual awareness which is not always present in a rental community", says Executive Director, Cindy J. Jones, who has managed 48 properties in her many years of experience.

Huntington Management attributes its experience to an unusually diverse client base. "Our clients are Boards of Directors, both non-profit and for profit; conventional property owners, affordable housing property owners; tax credit property owners and senior/assisted care property owners", says Cindy. With properties ideal for Senior Living, such as Carrington Place, to luxury units such as Crystal Lake Apartments, Huntington has tailored a program unique to an array of clients. Huntington Management stays proactive by staying in close communication with its Boards and Members quite often. "We listen and we respond right away to the needs of each property without the assumption that we know what they need just because it's what another property just asked for," states Cindy.



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The biggest benefit of living in a Cooperative is not only cost containment, but the advantage of having an environment of neighbor awareness or a 'village' so to speak, where everyone looks out for everyone's best interest.

CONT'D: **Huntington Management**



Huntington Management even incorporates different events tailored specifically for each property. The staff enjoys an array of fun activities with the Members on a weekly or monthly basis. One of these activities includes spearheading and supporting "Neighborhood Network Centers", which have been very successful in their portfolio. The staff also support and sponsor annual events within the community such as "Family Fun Day", picnics, "back-to-school" events, movie nights, etc., which prove to contribute to the sense of belonging that Cooperative Members hold so dear.

Huntington Management greatly appreciates the support and encouragement it receives from the MAHC Board of Directors and looks forward to continuing a strong relationship well into the future.

NCBA Brings 150 Cooperative Leaders to White House

WASHINGTON, DC -- (Marketwire) -- 05/03/12 -- One hundred fifty cooperative leaders from all sectors of the economy and corners of the nation will meet with top policymakers at the White House on May 4 to discuss how their organizations spur economic recovery through job creation and ongoing investments in their local communities.

"Every day cooperatives around the U.S. are stimulating the economy and we are pleased to have the opportunity to discuss our successes in job creation and ways to use the cooperative model to continue to strengthen communities large and small," said Liz Bailey, interim president and chief executive officer of the National Cooperative Business Association. "Two million jobs are generated each year as a direct result of cooperatives, which illustrates the incredible impact that these organizations have on local economies."

There are currently 29,000 cooperative businesses nationwide spanning most industries, including agriculture, energy, financial service and credit unions, food distribution, healthcare, housing, retail and telecommunications. U.S. cooperatives account for more than \$3 trillion in assets, over \$500 billion in total revenue and \$25 billion in wages and benefits.

***Every day
cooperatives
around the
U.S. are
stimulating
the economy.***

Are Your E-Discovery Policies Up-To Date?

With the rise of computer use and quickly advancing technology, e-discovery policies are a necessity to protect businesses during litigation.

With the rise of technology and the increased computer use in the legal profession, E-Discovery for lawyers has become increasingly important. Whether you are advising your client on e-discovery issues before a dispute arises, or you are requesting or producing electronically stored information in the course of litigation, there are important updates that you should know to help you stay on top of your e-discovery obligations.

Some of the most significant updates to be aware of are making sure your client has a written electronic document retention policy, drafting a litigation hold, and ensuring your client enters into a claw-back agreement. It is imperative to have competent legal counsel that can draft and give advice on these agreements in order to protect the client's best interests.

Electric Document Retention Policy

A document retention policy provides for the systematic review, retention and destruction of documents received or created in the course of business. The lawyer's biggest fear with regards to e-discovery is losing a case because their client did not maintain pertinent electronically stored information (ESI). ESI means "any data or data compilations stored in any medium from which information can be obtained" and is intended to include future technologies unforeseen. *Federal Rules of Civil Procedure 34 (a); MCR 2.302(B)(1).*

A document retention policy will identify documents that need to be maintained and contain guidelines for how long certain documents should be kept and how they should be destroyed. A document retention policy provides a system for complying with document retention laws, it ensures that valuable documents are available when needed, it saves money, space and time, it protects against allegations of selective document destruction, and it provides for the routine destruction of non-business, superfluous and outdated documents.

As legal counsel, advise your client on writing and implementing an electronic document retention policy, which should include a schedule for destruction of ESI, replacement of backup tapes, and automatic deletion of e-mails. Having such a policy in place is one of the best ways to avoid accusations of intentional or negligent destruction of evidence and court-ordered sanctions.

Some of the most significant updates to be aware of are making sure your client has a written electronic document retention policy, drafting a litigation hold, and ensuring your client enters into a claw-back agreement.

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CONT'D: E-Discovery

Guidelines to Establishing Document Retention Policies

- Make sure the policy addresses: all types of business records (human resources, financial, legal, correspondence, business activities); all media utilized by the company for record keeping (electronic and paper); and the needs and requirements of all functions and operations.
- Identify all legal requirements, including federal, state, and local laws and regulations that require a company to maintain records for a certain time.
- Ensure that the policy is claims and litigation neutral and consistently applied without regard to whether documents may be helpful or damaging in future litigation.
- Design the policy to work in conjunction with the organization's electronic document management system.
- Consider the use of technology to help in monitoring and enforcing compliance to the retention policies.
- Develop and include procedures for obtaining written approval of the initial retention policy and any subsequent modifications to the schedule.
- Develop and implementation procedure and how to train employees to use it.
- Develop a procedure for updating the policy as technological advances warrant changes.
- Develop and effective procedure for ensuring that electronic copies of paper records are 1) complete and accurate replicas of the originals and 2) are an will continue to be accessible in a tangible form for as long as the record will need to be retained.
- Utilize effective destructive methods, particularly in regards to electronic files.
- Permanently retain all documentation regarding the design, development, implementation and enforcement of the policy. *ArchScan LLC*

Ensure that the policy is claims and litigation neutral and consistently applied without regard to whether documents may be helpful or damaging in future litigation.

Written Litigation Hold Policy

A litigation hold is a written directive advising the records keepers of ESI to preserve potentially relevant evidence in anticipation of future litigation. These written requests are designed to trigger the duty to preserve relevant evidence, and suspend routine document retention/destruction policies.

In the past several years as computer and electronic technology has become the main medium of documentation, claims of spoliation and motions seeking discovery sanctions for failure to preserve relevant ESI are costly to the parties involved. Your client must preserve all potentially relevant ESI once litigation is foreseeable, and must begin this process before any lawsuits or investigations arise. You should aid your client in drafting a litigation hold policy which details the individual in charge of identifying and preserving the ESI and ensuring the ESI isn't inadvertently overwritten. ESI could be hiding in multiple servers, offices, computers, wireless devices, or in archives. The litigation hold policy should describe how your client will suspend routine destruction of this ESI.

Courts are divided in holding whether a failure to issue a written litigation hold amounts to negligence.

CONT'D: E-Discovery

Several other courts, however, have rejected such an absolute rule. Although courts consistently recognize that written litigation holds are common features of litigants' efforts to comply with the duty to preserve potentially discoverable information, several have held that the failure to issue such a formal litigation hold is not necessarily a breach of that duty. Instead, the courts focus on the overall reasonableness of a party's efforts to preserve relevant evidence.

Claw-Back Agreements

A clawback agreement is based on the producing party making a full review before production. Federal Rule of Evidence 502 now provides that the disclosure of attorney-client or work product information in a federal proceeding does not waive either privilege, so long as (1) the disclosure was inadvertent, (2) the holder of the privilege took reasonable steps to prevent the disclosure, and (3) the holder promptly took reasonable steps to rectify the error.

This is not to be confused with a "quick-peek agreement" where production is made without review by the producing party before production. Clawbacks are similar to the quick-peek procedure, but have one very distinct difference. In clawback agreements the producing party reviews the documents *before* producing.

If the review misses some privileged or confidential information, and the producing party later becomes aware of the mistake, he has a second chance to keep his secrets and may "claw them back" with a claim of privilege. Any disputes can be brought before the court, with the chance to correct the mistake. The issue with clawback agreements is that they are unenforceable against third parties. While clawback agreements are valuable, they are not without risks.

There are many things you can do to keep on top of your e-discovery obligations. Some of the two most important policies have been discussed, although there are many more.

It is essential to ensure your client preserves their ESI as soon as a lawsuit becomes foreseeable, use a computer forensics expert to harvest ESI once a litigation hold begins, refrain from handing over your client's hard drive or a copy of it, and always request metadata when requesting forms of production. In addition, always consider deposing your opponent's electronic records keeper.

A clawback agreement is based on the producing party making a full review before production.



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MAHC ANNUAL CONFERENCE

The MAHC Conference in San Diego, California was a success!! Attendees from all over the United States enjoyed a beautiful vacation in sunny San Diego learning about housing cooperatives and their management! With great food, great conversation, and great people the San Diego MAHC Conference had one of the largest turnouts to date!



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CAT WARS



Was Mrs. Smith's cat legally defined as a service animal? Did Mrs. Smith meet the qualifications for a companion animal? Who's going to win? Mrs. Smith or the Board?

It was the cutest little kitten Mrs. Smith had ever seen. She scooped it up and took it home, back to her Coop unit. What Mrs. Smith didn't know is that her Coop had a no pet policy. Mrs. Smith didn't bother to read it and no one said anything about her new little kitten. Pretty soon, Mrs. Smith's kitten grew up to be a cat and Mrs. Smith would let it outside on occasion. It also had a nasty habit of clawing the curtains and checking out the garbage. Mrs. Smith worked a lot and was not aware of where her cat was at all times. Pretty soon, neighbors began to complain. Eventually, the fact that Mrs. Smith had a cat made its way to the Board of Directors. The Board of Directors read on the internet that they could ban all pets in the Coop, and decided to enforce their policy. They gave Mrs. Smith two weeks to dispose of her cat or else she would be evicted from the premises.

Did the Board do the right thing? Was the Board's decision legal? The Board didn't find out the law. It just took action because Mrs. Smith had deceived them about the cat and that was good enough for the Board.

Mrs. Smith wanted to keep her cat. So Mrs. Smith did what she thought was best. She hired a lawyer. It was a friend of hers that was recommended. He didn't know too much about Coop law, but he felt Mrs. Smith should be able to keep her cat, so he sent a letter to the Board saying this violated Mrs. Smith's right. He found some law on the internet about service animals and so he claimed that Mrs. Smith's cat was a service animal and thus couldn't be prohibited.

What would you advise the Board? Is Mrs. Smith's cat a service animal or not? The Board didn't know. They thought it was a pet and that was the end of it. They moved to evict Mrs. Smith.

About this time, the management company got involved. The management company told the Board that Mrs. Smith could have a cat, but that the Board should regulate the size and breed of the cat. The Board thought this was good advice and adopted a pet size and breed policy. Unfortunately for Mrs. Smith, her cat did not fit within the policy and the Board told her she had to get rid of the cat. Mrs. Smith then went back to her lawyer who wrote another letter to the Board. Weeks passed. The letter said that Mrs. Smith's cat was now a companion animal and that she could keep it because it was a companion animal.

CONT'D: CAT WARS

The Board never heard of such a thing, nor did the management company think it was a companion animal. It was clearly an effort by Mrs. Smith to make up stories to keep her cat. The Board evicted Mrs. Smith. Two months later, Mrs. Smith's lawyer wrote a third letter saying that they would be filing a complaint with HUD for violating Mrs. Smith's civil rights.

Was Mrs. Smith's cat legally defined as a service animal? Did Mrs. Smith meet the qualifications for a companion animal? Who's going to win? Mrs. Smith or the Board?

Perhaps you are having issues with pets. Whether they be cats or dogs or some other type of animal. You should



be award of how the law classifies animals. Not all cats are created equal. Not all dogs are created equal. Some animals are just pets and can be regulated or prohibited by Coops. You could have the same animal and it may not qualify as a pet, but it may qualify as a service animal. Or, you can take that same animal and it may not qualify as a service animal or a pet, but it may qualify as an emotional support/companion animal. If it qualifies as either a service animal or a companion animal, Mrs. Smith might have been able to keep her pet and avoid being evicted or the Coop might have avoided being sued.

We don't recommend Boards rely on the intent to figure it out. These are questions for legal counsel. If you have questions about pets and whether the animals your members possess are simply pets or are service animals or are companion animals, we recommend you get good legal advice up front. Don't wait. The time and hassle and ill-will generated by fights over animals can be avoided by good legal advice up front. Unless you know the difference, you may end of making a mistake.

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