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Tenant Protections can Restore Power Balance in Landlord-Tenant Relationships

In a Nutshell

- Local governments across the state have started to enact ordinances regulating tenant screening, just-cause evictions, and providing the right to counsel for an eviction proceeding.
- Michigan's local approach to tenant protections leaves some renters vulnerable to eviction and housing instability.
- To provide equal protection for all renters, several states in the country have enacted statewide tenant protections.

Housing is the biggest expense for many low-income families and is fundamental to health, job stability, educational success, and other indicators of well-being. Landlords have immense power over tenants, controlling who has access to housing, the cost and condition of housing, and the tenants' ability to remain in their communities. Federal, state, and local governments have previously established standards in the landlord and tenant relationship through a range of laws that provide tenant protections. These provisions attempt to balance the needs of tenants and landlords while maintaining a stable rental housing market.

With the affordable housing shortage, the power imbalance between landlords and tenants has grown as low-income renters face new challenges following the pandemic: increased rents; vulnerability to landlords who are reluctant to renew leases; and fear of retaliation among tenants who advocate for better housing. Local governments in Michigan have enacted reforms to further support renters and increase tenant stability by regulating tenant screening, just-cause evictions, and providing the right to counsel for an eviction proceeding. As a result of the local approach to tenant protections, Michigan renters have uneven protections throughout the state.

Tenant Screening

When an individual applies for rental housing, a landlord may conduct an applicant screening to confirm an applicant's identity and their ability to comply with various lease provisions, including timely rent payments. Federal, state, and local fair housing laws prohibit landlords from basing rental decisions on an applicant's race, sex, familial status, disability, or other factors. In addition, some states prohibit landlords from considering other factors like an applicant's criminal history, prior eviction records, and sources of income. Michigan law does not prohibit landlords from considering a rental applicant's criminal records, eviction history, credit history, and sources of income in their decision making.

Criminal Screening. For housing applicants with criminal records, increased landlord discrimination has made finding a safe and decent place to live more challenging. Nationwide, an estimated 9 out of 10 landlords use automated background checks when reviewing applications, but the practice is largely unregulated and may provide results that are inaccurate. While the use of background checks is common, the practice is not particularly useful for landlords. Research shows that prior criminal history is not an accurate predictor of tenant behavior. Further, a landlord that denies all applicants with criminal backgrounds could be violating the federal Fair Housing Act because of the disparate impact those bans have on individuals of protected populations (e.g., race, disability).

The increased use of criminal history screening has spurred some state and local governments to prohibit or otherwise regulate the use of criminal checks. While federal guidance clarifies that banning all applicants with an arrest or conviction record may violate the Fair Housing Act, state laws make clear the expectations of landlords when using criminal background checks and may lead to more housing opportunities for applicants with criminal records.

States vary in their regulation of a landlord's use of criminal screening when considering rental applicants. For example, in Colorado, landlords may only consider convictions for offenses that occurred within five years of the application, or specified offenses, like the unlawful distribution of methamphetamine. In New Jersey, a landlord cannot require a prospective tenant to complete an application that includes a criminal record screening until after extending a conditional offer. Further, when considering the information, the landlord may only withdraw a conditional offer in certain unique situations, like protection of tenants and property.

Michigan law does not regulate the use of criminal screenings during the rental application process, but at least one municipality in the state does. In 2021, Ann Arbor enacted an ordinance to prohibit the use of criminal history in tenant selection. The only exception is if the landlord is required to conduct a background check under federal or state law and the denial is based only on state and federal requirements.

Eviction Records. Most landlords consider any eviction history a disqualifier, making it difficult for renters with an eviction judgment to secure decent housing in a safe neighborhood. Given the low-income status of many renters facing eviction, default judgments in eviction cases are commonplace because tenants fail to appear. In some instances, without a tenant present, landlords are granted the ability to evict despite the fact that they did not have legal right to take possession of the unit in the first place or standing to evict (e.g., because the property was not in compliance with local ordinances).

For example, in Detroit, 9 out of 10 evictions between January 2019 to March 2022 involved properties operating unlawfully, despite an ordinance stating the landlords may not collect rent without a certificate of compliance. Further, eviction records include the documents used to initiate the eviction process, even if the process doesn't result in an eviction order or judgment against the tenant. As research has shown, the mere filing of an eviction makes it harder to find housing. In Michigan, however, eviction records are

not sealed. While legislation was introduced in 2022 to provide for the expungement of eviction records after five years, the bill was not reported out of committee.

The number of evictions and the common practice of denying rental applicants with prior evictions, has led some states to seal eviction records or prevent landlords from considering past actions when screening tenants. In the states with these laws, sealing records is either discretionary or mandatory. Illinois allows discretionary sealing in cases that were without a basis in fact or law; whereas California automatically seals any case unless the landlord prevails at trial within 60 days. Some states don't seal records, but instead prevent landlords from considering eviction records. For example, in New York, landlords cannot consider past legal actions in screening tenants.

Source of Income. The refusal of landlords to rent to individuals that receive housing assistance, like vouchers, is a common barrier to finding affordable housing for low-income renters. Recent studies suggest that landlords are using housing assistance in their decision making very often when the practice is not prohibited by state or local law. One study by HUD found that rental denial rates were lower in jurisdictions with voucher non-discrimination laws. The research showed only a 35 percent application rejection rate in areas with voucher non-discrimination laws compared to 77 percent in those communities that did not have a similar prohibition. Several municipalities, like East Lansing and Lansing, have enacted ordinances to prevent discrimination based on sources of income, but don't define sources of income. In 2018, when the Michigan Coalition Against Homelessness surveyed homelessness service providers, 44 percent reported that landlords will not rent to voucher holders in their community.

Property owners are sometimes hesitant to rent to voucher holders because of administrative problems or low rental payments; however, these concerns can be misplaced. Housing assistance is guaranteed income and is paid directly to the landlord, eliminating issues with late or missed payments. Further, some housing agencies, like the Michigan State Housing Development Authority, have increased their voucher payment standards to 115 percent of the fair market rent. Although some landlords may be able to get higher rents from non-voucher holders, the payment standard is set high enough to rent about half of the rentals in an area.

At least seven municipalities in Michigan have enacted an ordinance prohibiting source of income discrimination. The ordinances generally prohibit source of income discrimination by including it as a protected class in the local government's fair housing law. This allows the tenant access to the state and local government's enforcement mechanisms and often the ability to file a lawsuit. The ordinances don't appear to define sources of income or explicitly protect voucher holders, so their effectiveness is uncertain.

Many states, in addition to local governments, prohibit discrimination based on the source of income. Most states include specific protections for voucher holders, though some laws have been weakened by court interpretation. For example, in Minnesota, the court held in a 2010 case that because participation in Section 8 programs is voluntary, it is not unlawful for property owners to either refuse to rent or refuse to continue renting to tenant-based Section 8 recipients based on a legitimate business decision not to participate in Section 8 programs.

Just-Cause Evictions

The end of a lease period can be a vulnerable time for many low-income tenants because landlords are not obligated to renew a tenant's lease. If a tenant stays after their lease ends, state law generally allows them to be evicted. To promote tenant stability, some state and local governments have enacted "just cause" eviction statutes that limit the reasons a landlord can refuse to renew a tenant's lease or evict a tenant with

a month-to-month lease. In theory, just-cause eviction statutes empower tenants to advocate for better living conditions without fear of retaliation and promote long-term housing stability for low-income renters. Although Michigan law prohibits landlord retaliation against tenants for enforcing their rights, such as requesting repairs, tenants often report they are afraid to report code violations for fear of retaliation or eviction. Just-cause eviction statutes provide tenants a right to renew their lease, adding another layer of protection against landlord retaliation.

Ann Arbor is the first municipality in the state to enact a right to renew ordinance. The ordinance, enacted in 2022, gives tenants the legal right to renew their leases, unless the landlord has a legal reason to evict them, such as for nonpayment of rent. Landlords who don't follow the law can be penalized and be forced to pay for relocation assistance, equal to two months' rent under the current lease.

At least five states (New Jersey, California, New Hampshire, Oregon, and Washington) have implemented just cause legislation, though the protections provided to tenants vary widely across jurisdictions. In general, allowable reasons to evict a tenant include failure to pay rent, property damage, landlord intent to sell the unit, lease violations, and drug activity in a unit. In New Hampshire and Washington, landlords are also permitted to terminate a tenancy for legitimate business or economic reasons. Statute doesn't define legitimate business or economic reasons, so a judge would need to decide if the landlord's reason is valid.

In New Jersey, the law establishes that failure to pay rent is only a grounds for eviction if the rent increase is reasonable and complies with all other laws or municipal ordinances governing rent increases. In some ways, this provision acts as rent control for existing tenants because the landlord must prove a good reason for increasing rent in between leases; meaning a 5 percent increase could be deemed unreasonable by the courts if the conditions are poor and the landlord hasn't made repairs. Michigan law currently preempts local rent control ordinances, so a rent increase provision in a local ordinance might not be legal.

Tenant Right to Counsel

Renters facing eviction are almost always unrepresented in court eviction proceedings. In Michigan, only five percent of renters are represented compared to 83 percent of landlords during legal proceedings. Legal representation for renters facing eviction is an important intervention to keep people in their homes and prevent the long-term harms of eviction. Three states (Washington, Maryland, and Connecticut) and numerous cities, including Detroit, have adopted a right to counsel for tenants facing eviction. Legal representation is an effective intervention: in cities such as New York, San Francisco, and Cleveland, most represented tenants remain in their homes.

In 2017, approximately 30,000 eviction cases were filed in Detroit; only 4.4 percent of tenants were represented compared to 83 percent of landlords. In an effort to bridge the representation gap, Detroit enacted a right-to-counsel ordinance ensuring tenants facing eviction and earning at or below 200 percent of the federal poverty threshold have access to legal counsel. The program launched in March 2023 and has a budget of \$18 million, although advocates argue the program is underfunded.

The right to counsel in Washington, Maryland, and Connecticut guarantees that tenants below certain incomes will have access to public attorneys at no cost during evictions. All three states have provided funding for their programs. Still, funding is an issue for any legal aid service. However, studies have shown it is worth the investment. For example, a 2020 analysis found that a \$5.8 million investment in a right to counsel for Baltimore tenants yields \$35.6 million in benefits or avoided costs to the city and the state.

Conclusion

The growing housing crisis in Michigan and elsewhere has given landlords more leverage than ever to pick and choose their tenants. Low-income tenants already struggle to secure affordable housing, and barriers such as tenant screening and no-cause evictions can make that housing search harder. Several municipalities in Michigan have enacted new tenant protections to address these concerns, but Michigan's local approach leaves some renters vulnerable to increased evictions and housing instability.

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