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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Wisconsin Rentals

Many REALTORS® are involved with the rental of residential properties in Wisconsin. Some own apartment buildings that they rent out themselves while others work as rental agents or property managers for other owners. In either case, working with rental properties can be a complicated business.

This *Legal Update* reviews many of the basics of residential rentals, with an emphasis on tenant screening and numerous fair housing considerations that come into play at that juncture.

Applicable Law

Wis. Stat. chapter 704 is applicable to almost all landlord and tenant relationships, both commercial and residential. The Wisconsin Department of Agriculture Trade and Consumer Protection has adopted Wisconsin Administrative Code rules applicable to the conduct of landlords in residential rental situations. Counties and local municipalities may also have landlord-tenant ordinances that impose additional requirements on landlords. All landlords should have an attorney review their leases or rental agreements, application and disclosure documents, and rental practices for compliance with all applicable laws.

If a landlord violates a statute in chapter 704, the tenant may sue for damages. When Wis. Admin. Code chapter ATCP 134 has been violated, Wis. Stat. § 100.20(5) applies, potentially subjecting the landlord to double damages, court costs and attorney fees. A tenant claiming landlord violation of chapter ATCP 134 may file a complaint with the DATCP or go to court. Some municipal ordinances, like the Madison General Ordinances, may allow for triple damages in some instances.

Whether the issues relate to the tenant's obligation to maintain property, the landlord's right to access the property or how a tenancy may be terminated, licensees should be cautious not to give legal advice to property owners or tenants.

REALTOR® Involvement in Rental Situations

Does a property manager or rental agent need to have a real estate license?

Persons who are paid or otherwise compensated to rent property and negotiate and sign leases for the owner fall within the definition of a broker under Wis. Stat. § 452.01(2). This statute states that a broker includes "any person who for another, and for commission, money or other thing of value, negotiates or offers or attempts to negotiate a sale, exchange, purchase or rental of an interest or estate in real estate." This definition includes persons negotiating the terms of a rental interest in real estate. If the negotiation of lease terms or the drafting and signing of leases for another is involved, then licensure is required.

The activity of drafting, filling out and signing leases by a non-party could be deemed to be the unlicensed practice of law if the individual is not an attorney or a properly licensed real estate broker. Real estate licensees are allowed to provide limited legal services

Contacts

EDITORIAL STAFF

Authors
Debbi Conrad
Tracy Rucka

Production
Emily Zampardi

ASSOCIATION MANAGEMENT

Chairman
Michael J. Mulleady, GRI

President
William E. Malkasian, CAE

ADDRESS/PHONE

Wisconsin REALTORS® Association,
4801 Forest Run Road,
Suite 201
Madison, WI 53704-7337
(608) 241-2047
(800) 279-1972

LEGAL HOTLINE:

Ph (608) 242-2296
Fax (608) 242-2279
Web: www.wra.org

per the Wisconsin case, ***Reynolds v. Dinger***, 14 Wis. 2d 193(1961).

No license, however, is required for the custodian, employee, rental agent or property manager who merely coordinates maintenance services, shows residential rental units to prospective tenants, gives out basic information, takes rental applications, accepts rental deposit checks (but not cash) and facilitates the owner's and tenant's execution of a rental agreement or lease.

Rental Clients

Licensees who are paid to negotiate leases and provide other brokerage services for rental property owners need an appropriate agency agreement giving them authority to act on behalf of the owner per Wis. Stat. § 452.135. This typically will be either a lease listing or property management agreement. The Department of Regulation and Licensing requires a licensee to use approved forms when acting as an agent or a party in a real estate transaction, as stated in Wis. Admin. Code § RL 16.04. In most rental situations, one of the following forms would be employed by a licensee providing brokerage and negotiation services to a client:

1. **WB-37 Exclusive Listing Contract for Lease of Real Property or WRA Exclusive Listing Contract for Lease of Commercial Property**

The WB-37 Exclusive Listing Contract for Lease of Real Property is used when a property owner hires a real estate broker to lease the owner's property. This DRL-approved form is mandatory with respect to the lease of residential property. Use of the WB-37 is optional, however, for lease listings in commercial or industrial property settings. A WB-37 Exclusive Listing Contract for Lease of Real Property authorizes a broker to advertise a rental property, get it leased and handle the rental funds (security deposit and rents).

Types of Tenancies and Agreements

Wis. Stat. § 704.01 and Wis. Admin. Code § ATCP 134.02 define the following terms:

- **Lease:** An oral or written agreement for the transfer of possession of real property, or both real and personal property, for a definite period of time. A lease is for a definite period of time if it has a fixed commencement date and a fixed expiration date or if the commencement and expiration can be ascertained by reference to some event, such as completion of a building.
- **Rental agreement:** An oral or written agreement between a landlord and tenant, for the rental or lease of a specific dwelling unit or premises, wherein the landlord and tenant agree on rent and other essential terms of the tenancy. A rental agreement includes a lease, but not an agreement to enter into a rental agreement in the future.
- **Periodic tenant:** A tenant who holds possession without a valid lease and pays rent on a periodic basis, such as a day-to-day, week-to-week, month-to-month or year-to-year tenant. The interval between rent-paying dates normally determines the applicable period.
- **Tenant at will:** Any tenant holding with the permission of the landlord without a valid lease and under circumstances not involving periodic payment of rent.
- **Tenancy:** Occupancy or a right to present occupancy under a rental agreement, including periodic tenancies and tenancies at will. The term does not include the occupancy of a dwelling unit without consent of the landlord after expiration of a lease or termination of tenancy under Wis. Stat. ch. 704.

The WRA Exclusive Listing Contract for Lease of Commercial Property is an optional lease listing designed for commercial rentals and is available only on ZipForm.

2. Property Management Agreement

Generally, property managers are expected to advertise vacancies, take tenant applications, qualify and approve tenants, receive earnest money and security deposits, execute leases on behalf of the property owners and collect rent. They also are put in charge of most, if not all, aspects of the day-to-day operations of the rental property. This will often include responsibility for lawn care, snow removal, repairs, general maintenance, tenancy complaints and terminations, on-site staff and bookkeeping for the entire property or complex. A property management agreement may be prepared by a broker, the broker's attorney or the landlord per Wis. Admin. Code § RL 16.03(1)(e).

3. WB-36 Buyer Agency/Tenant Representation Agreement

As the title to the contract indicates, the WB-36 Buyer Agency/Tenant Representation Agreement is designed to be used by licensees entering into a client representation agreement with a prospective tenant. The definition of "Buyer" in the Definitions section of the WB-36 clarifies that the WB-36 does not apply to just purchase situations. The term "buyer" includes buyers, tenants, optionees, exchangers, business investors, entrepreneurs, etc. The WB-36 is flexible and can be used by tenant representatives assisting parties looking to rent or lease an interest in real property.

Must an agent for a landlord or rental owner make agency disclosures to a tenant? When must the Broker Disclosure to Customers be given to a prospective tenant?

Wis. Admin. Code § RL 24.07(8)(e) provides with respect to listings for lease and property management contracts that, "Licensees entering into listings for lease or property management contracts with property owners shall provide to their clients the disclosure form required under s. 452.135, Stats. A licensee shall also provide an agency disclosure form to prospective tenants when the licensee is actually negotiating the terms of a lease on behalf of the owner. A licensee is not required to provide an agency disclosure form to a prospective tenant in situations when the licensee does not negotiate the terms of a lease, such as when the rental unit is only being shown to the prospective tenant or a completed and 'non-negotiable' lease is presented to a prospective tenant." Accordingly, a lease listing or property management client must receive a Broker Disclosure to Clients and prospective tenants must receive a Broker Disclosure to Customers when the licensee is negotiating lease terms or signing the lease on behalf of the owner.

Similarly, Standard of Practice 16-12 provides that "REALTORS®, acting as agents or brokers of sellers/landlords or as subagents of listing brokers, shall disclose that relationship to buyers/tenants as soon as practicable and shall provide written confirmation of such disclosure to buyers/tenants not later than execution of any purchase or lease agreement. (Amended 1/98)" This disclosure is contained within the WRA Residential Lease and Residential Rental Contract forms.

REALTOR® Practice Tips: While the WB-36 has been updated to incorporate the Broker Disclosure to Clients verbiage required by Wis. Stat. § 452.135(2), the same is not true of the WB-37 Exclusive Listing Contract for Lease of Real Property, the WRA Exclusive Listing Contract for Lease of Commercial Property and the WRA Property Management Agreement. A separate Broker Disclosure to Clients must be used with those agreements. This occurs automatically for ZipForm users. Members using paper forms can follow Pages 1-2 of the Instructions for Completion of Broker Disclosure to Clients at www.wra.org/pdf/products/BDtoClientsInstruct.pdf.

For a complete discussion of the WB-37 Exclusive Listing Contract for Lease of Real Property and the WRA Property Management Agreement, see *Legal Update 01.02*, "Lease Listing and Property Management Agreement," at www.wra.org/LU0102. For discussion of the WB-36 Buyer Agency/Tenant Representation Agreement, see the November 2007 *Legal Update*, "WB-36 Buyer Agency Agreement – 2008 Revisions," at www.wra.org/LU0711.

Renting Personally Owned Rental Properties

An agent owns a duplex where she and her mother reside. The mother passed away recently, so the agent will be renting half of the duplex. Will the agent's personal rental activities as a landlord/licensee impact the agent's broker-company?

A broker-company faces potential liability for damages resulting from an agent's unsupervised rental activity of personally owned real estate.

Wis. Admin. Code § RL 17.08 requires broker-companies to supervise the activities of their agents. However, this rule has been interpreted by the Real Estate Board to apply only to those activities requiring real estate licensure. Because Wis. Stat. § 452.01 does not require a license for the rental of personally owned real estate, the broker-company is not required to provide supervision.

Despite the foregoing, a potential still exists for broker-company liability

for damage or injury suffered by the agent's tenants. A tenant may assume that he or she is dealing with the broker-company through the agent. This assumption may be justified if the agent met the tenant in career apparel, provided the tenant with business cards from the real estate company, accepted telephone calls or rent at the real estate office, sent correspondence on company letterhead, etc. The broker-company may be prevented from denying liability if reasonable steps are not taken to counter the misconception that the agent is acting on behalf of the broker.

A worse case scenario for the broker-company would be one in which the agent discriminated against a "tenant" who was really a fair housing tester. If there is apparent company involvement as described above, and no broker counter-measures, the broker-company may be the one to pay the penalties and fines for the fair housing law violations.

Two approaches are frequently used to address this situation. First, the broker-company can require that all real estate activity by company associates, including rental of personally owned real estate, be performed under broker-company supervision. Commissions/compensation can be adjusted and negotiated between the parties to reflect any financial arrangement the parties might agree to. Alternatively, the broker-company should build in as many safeguards into the process as possible. For instance, the agent should never be permitted to meet tenants or receive tenants' calls or payments at the office. The agent should be required to have his or her own business cards and letterhead (rather than using company cards and letterhead).

The broker-company may require that a "disclosure" letter be given to prospective tenants indicating no broker involvement. There may even be instances where errors and omissions insurance would be appropriate for the personal business. Where necessary, the broker-company should consult with private counsel. Approved policies should be incorporated into the office policy and procedures manual and the salespeople may be asked to sign a statement acknowledging and agreeing to abide by the office policy and rules. The greatest risk will be to those companies who do not address the issue in any fashion.

Advertising Vacancies in Owned Rental Properties

When renting personally owned property, licensees must not advertise in a manner that is false, deceptive or misleading per Wis. Admin. Code § RL 24.04(1). Under § RL 24.04(2), advertising to rent property owned by a broker or licensee, however, need not be done in the name of the broker.

The opposite is true under the REALTOR® Code of Ethics. Article 12 requires that, "REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations. REALTORS® shall ensure that their status as real estate professionals is readily apparent in their advertising, marketing, and other representations, and that the recipients of all real estate communications are, or have been, notified that those communications are from a real estate professional. (Amended 1/08)" Standard of Practice 12-6 provides that, "REALTORS®, when advertising unlisted real property for sale/lease in which they have an ownership interest, shall disclose their status as both owners/landlords and as REALTORS® or real estate licensees. (Amended 1/93)" Thus, REALTORS® must disclose that they are the landlord and that they are a REALTOR®/licensee when advertising to rent personally owned property.

Disclosure of Professional/Licensee Status

When renting personally owned property, a real estate licensee must disclose that he or she has a real estate license and that he or she is the landlord to the other party (tenant) or the other party's agent (tenant representative), generally upon first contact:

Wis. Admin. Code § RL 24.05(5) provides, "DISCLOSURE OF LICENSURE.

(a) A licensee acting as a principal in a real estate or business opportunity transaction shall disclose his, her, or its license status and intent to act in the transaction as a principal at the earliest of all of the following:

1. The first contact with the other party or an agent representing the other party where information regarding the other party or the transaction is being exchanged.
2. A showing of the property.
3. Any other negotiation with the seller or the listing broker.

(b) The disclosure under this subsection shall be made to the other party in a transaction or to an agent representing the other party."

In addition, it is recommended that a REALTOR® follow up this § RL 24.05(5) disclosure with written disclosure of the agent's interest as landlord in the lease or rental contract. Article 4 of the Code of Ethics provides, "REALTORS® shall not acquire an interest in or buy or present offers from themselves, any member of their immediate families, their firms or any member thereof, or any entities in which they have any ownership interest, any real property without making their true position known to the owner or the owner's agent or broker. In selling property they own, or in which they have any interest, REALTORS® shall reveal their

ownership or interest in writing to the purchaser or the purchaser's representative. (Amended 1/00)" Standard of Practice 4-1 indicates that, "For the protection of all parties, the disclosures required by Article 4 shall be in writing and provided by REALTORS® prior to the signing of any contract. (Adopted 2/86)" While these provisions do not explicitly address rental or lease situations, as do many of the other Code of Ethics provisions, the safest course would be to include a short disclosure statement.

REALTOR® Practice Tips: REALTORS® renting their personally owned properties would be wise to include a short statement in their leases and rental contracts that the landlord is a real estate licensee. This will head off any tenant claims that they did not hear or see the verbal or advertising disclosures previously given.

Advertising Rental Property

Fair Housing Law and Advertising

Fair housing laws impact what may or may not be said when advertising property for rent.

Fair Housing Law Section 804(c) of the federal Fair Housing Act makes it unlawful to make, print or publish any notice, statement or advertisement with respect to the rental of a dwelling that indicates a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status or national origin, or an intention to make any such preference, limitation or discrimination. Wisconsin law adds sexual orientation, marital status, lawful source of income, age and ancestry to the list of protected classes and offers similar protections in Wis. Stat. § 106.50. Counties and local municipalities may develop their own fair housing ordinances, so it is important to become familiar with all local fair housing ordinances affecting the market area. County and municipal ordinances may tend to offer broader protections and may have more protected classes than federal or state law.

HUD Guidance for Real Estate Advertising

The United States Department of Housing and Urban Development has provided guidance regarding whether certain words and phrases commonly used in real estate advertising violate the Federal Fair Housing Law.

- **Race, color and national origin:** Real estate advertisements may not state a discriminatory preference or limitation on account of race, color or national origin. Nor may such advertisements use words describing the housing, the current or potential residents, neighbors or neighborhood in racial or ethnic terms (i.e., white family home, no Irish). Do not use Negro, black, Caucasian, Oriental, Indian, white or colored. However, it is not unlawful to use facially neutral phrases such as "master bedroom," "rare find" or "desirable neighborhood," which are deemed to be "neutral" on their face.
- **Religion:** Advertisements that contain an explicit preference, limitation or discrimination on account of religion are prohibited (i.e., no Jews, Christian home). Do not use Protestant, Christian, Catholic, Jewish or Muslim. If an advertisement uses the legal name of an entity or landmark that contains a religious reference, for example, Roselawn Catholic Home, or a religious symbol like a cross, a religious preference could be implied. If the advertisement contains an appropriate disclaimer against such preference or limitation, it will not be held in violation of Federal Fair Housing Law. Descriptions of the property (i.e., apartment complex with chapel) or the services (i.e., kosher meals available) are permissible. Use of terms (i.e., Merry Christmas), symbols (i.e., Santa Claus, the Easter Bunny) or images (i.e., St. Valentine's Day graphics) relating to certain religious holidays does not violate the law.
- **Sex:** It is unlawful to advertise for single-family dwellings or separate units in multi-family dwellings in a manner that explicitly indicates preference, limitation or discrimination on the basis of sex. It is permissible to use the terms "master bedroom," "mother-in-law suite" and "bachelor apartment," which are commonly used as architectural terms or physical descriptions of housing units. Gender may be specified if the housing involves shared living space.
- **Handicap:** Real estate advertisements may not contain exclusions, limitations or other indications of discrimination based on handicap (i.e., no wheelchairs, no service animals). It is lawful to describe the property (i.e., great view, fourth-floor walk-up, walk-in closets), the services or facilities (i.e., jogging trails), or the neighborhood (i.e., walk to the bus stop). It is also permitted to describe the conduct required of residents (i.e., nonsmoking unit). Advertisements may contain descriptions of accessibility features, such as a wheelchair ramp.
- **Familial Status:** Advertisers may not discriminate on the basis of familial status; ads may not state an explicit preference, limitation or discrimination based upon family status. For example, advertisements that limit the number or ages of children, or state a preference for adults (unless the property meets a housing for older persons exemption), couples or singles are prohibited. On the other hand, descriptions of the property (i.e., two-bedroom, cozy family room, immaculate, like new) or services and facilities (i.e., exercise room, warm water pool, no bicycles allowed) are not discriminatory on their face and therefore do not violate the law.

The common theme throughout the guidelines is: DESCRIBE THE PROPERTY, NOT THE

DESIRED TENANT OR BUYER, NOT THE NEIGHBORS!

Other facets of an advertisement may influence the reader's perception of what is being said or what is being implied. For other advertising resources, see the April 2007 *Legal Update*, "Avoiding Discrimination in Advertising and Racial Steering," at www.wra.org/LU0704, and the February 2006 *Legal Update*, "Real Estate Advertising," at www.wra.org/LU0602.

The Application Process

Tenant Screening

Tenant screening requires a landlord to balance finding good "customers" who will be able to pay the rent and respect the landlord's property with avoiding any illegal discrimination against applicants. The key to tenant screening is to be consistent and fair: give equal information and services to all applicants and tenants.

Landlords and property managers typically use a written tenant application form to screen prospective tenants with respect to their income and employment, credit, personal references, rental history and evictions. See, for example, the WRA Rental Application, which includes the applicant's consent to the landlord checking references and financial information and pulling a credit report. The WRA Rental Application and the other WRA forms referenced in this *Update* are available from the WRA at www.wra.org/Products/Forms/default.asp or on Zipform.

Screening may include examination of the applicant's identification (make a copy of their driver's license, passport, etc.), running a credit report, checking references and conducting a criminal background check. The landlord can ask for the names of everyone applying to live in the unit, the places the tenant has lived the past few years, where the tenant works and the amount of income (in order to verify ability to pay), financial/debt information and whether everyone is 18 or older (to determine if the person is an adult or a minor). The landlord cannot ask about the specific ages of adults without discrimination based upon age.

BE CONSISTENT AND USE UNIFORM CRITERIA FOR ALL!

- Income – OK to have a minimum requirement.
- Credit – need objective criteria that are consistently used.
- Housing References – can check with existing and previous landlords, but should ask objective questions that address consistent criteria. Do not ask the prior landlord if he or she would rent to the tenant again because that is a subjective question.
- Behavior – OK to research arrest/conviction records, e.g., on the Consolidated Court Automation Programs (CCAP) at http://.wcca.wicourts.gov/index/xs/.

CAUTION: With respect to tenant screening and all other aspects of rental practice, landlords and property managers in the city of Madison, city of Fitchburg, Dane County and other localities with landlord/tenant ordinances must observe the additional requirements and prohibitions imposed by those ordinances.

The safest screening procedures will include providing a tenant selection standards handout to all applicants. These standards must be objective. Some landlords set up a point system with a minimum score as part of their screening process. The key is to be uniform and consistent; treat every applicant the same using the same checklists and criteria. Fair housing laws do not require landlords to rent to people in protected classes if there is a legitimate reason to deny their applications. Legitimate reasons include poor references or credit, a record of eviction, criminal history, an incomplete application or false information on an application.

Social Security Numbers

Some believe it is best to not insist upon Social Security Numbers (SSN) from applicants because this can raise issues of citizenship or legal residency. Not everyone has a SSN, but that does not necessarily mean that they are in this country illegally.

Some people will not provide their SSN because of privacy and identity theft concerns. However, landlords typically cannot obtain a credit report for an applicant who does not have a SSN. Someone who is in this country illegally will not have a credit report so they may be rejected on a rental application on the basis of no or poor credit unless the landlord has other tests or standards with regard to credit.

Citizenship and Alien Status

An alien is defined as a person who is not a U.S. citizen. A person is a resident alien if he or she is a lawful permanent resident of the U.S. at any time during the calendar year. This is called the "green card" test because the U.S. Citizenship and Immigration Service generally issues a permanent residence card (a green card) to persons residing permanently in the U.S. as immigrants.

A person can also be considered a resident alien if he or she meets the Internal Revenue Service substantial presence test: Under this test, a person must be physically present in the U.S. on at least 31 days during the current year and on at least 183 days during the three-year period concluding with the current year. A person who is not a U.S. citizen and who does not meet either the green card or the substantial presence test is considered a nonresident alien. See IRS Publication 519 (www.irs.gov/pub/irs-pdf/p519.pdf). A person who has been lawfully admitted to the U.S. for permanent residence (green card) or under other immigration categories that authorize employment in the U.S. must have a SSN. If the person is not eligible for a SSN, the IRS will issue an Individual Tax Identification Number (ITIN), which is for tax purposes only. For more information, see the Social Security Administration Web site (www.ssa.gov/pubs/10096.html) or call the SSA at 1-800-772-1213 or TTY 1-800-325-0778 (all calls are confidential).

An immigrant is someone who is not a U.S. citizen but has been authorized to permanently live and work in the U.S.. Becoming an immigrant is a three-step process. First, the USCIS must approve an immigrant petition, usually filed by an employer or a relative for the individual. Second, a visa number, through the State Department, must become available to the individual. Receipt of an immigrant visa number means that an immigrant visa has been assigned. Third, the individual applies to adjust to permanent resident status after a visa number becomes available.

There are two types of visas: immigrant and nonimmigrant. The government primarily issues nonimmigrant visas to tourists and temporary business visitors. The government divides nonimmigrant visas into 18 different types. Only a few categories of nonimmigrant visas allow their holders to work in the U.S.. Immigrant visas, on the other hand, permit their holders to stay in the U.S. permanently and eventually to apply for citizenship. Aliens with immigrant visas can also work in the U.S..

Federal law makes it illegal to harbor certain aliens who are not here legally. There was a case in a New York Federal District Court where the court found a landlord guilty of harboring illegal aliens. In that case there were 28 aliens staying in one unit for which they were paying an exorbitant price. The court said that merely providing shelter with knowledge of an individual's illegal status constitutes harboring. On the other hand, a 2008 Kentucky federal District Court case found that "harboring" requires demonstration of an intent to shield the undocumented persons from the immigration authorities. There had to be evidence that the landlord intended to violate the immigration laws by concealing or hiding tenants, not just renting to them.

Thus, the law is not crystal clear in this area. If a landlord knows an applicant is not in this country legally, there is a risk involved in renting to that person, depending upon the circumstances. Some landlords may choose to follow a "don't ask, don't tell" policy.

It is unlawful to screen housing applicants on the basis of race, color, religion, sex, national origin, disability or

familial status, but the Fair Housing Act does not prohibit discrimination based solely on a person's citizenship status. Accordingly, asking housing applicants to provide documentation of their citizenship or immigration status during the screening process would not violate the Fair Housing Act as long as the questions about citizenship and alien status were not a guise for racial discrimination in violation of fair housing laws. Landlords who are considering implementing similar measures must make sure they are carried out in a nondiscriminatory fashion and are uniformly applied to every applicant. The key is that the landlord treats everyone uniformly.

Checking References

The most helpful references are often previous landlords, previous employers and co-workers. The biggest advantage comes when owners can call prior landlords because the current landlord often will not disclose derogatory information if he or she really wants to be rid of the tenant.

Pertinent questions to ask address whether the rent was paid on a timely basis, whether there were deductions from the security deposit, whether complaints were made against the tenant, whether there was law enforcement intervention with respect to the tenant, etc.

Criminal Background Checks

If criminal background checks are to be performed for potential tenants, this must be done in a consistent and uniform way for all applicants. It is recommended to use a systematic process and to keep written records in the files for a couple of years. Landlords and property managers may wish to check the Wisconsin Circuit Court Access Web site at http://wcca.wicourts.gov/index.xsl. Users of this site should be aware that often a person may be initially charged with one crime and found guilty of a lesser crime or an ordinance violation. Owners and property managers must also recognize that this site pertains only to the court records from Wisconsin. Another site would be needed to check the background of a person from out of state.

Owners can refuse to rent to an applicant if the conviction record of the applicant or a member of his or her household shows a history or current activity involving the disturbance of neighbors, destruction of property or violence to people or property. Conviction information would substantiate that the applicant posed a direct threat to the safety of other tenants, thus allowing the owner to refuse the applicant under Wis. Stat. § 106.50(5m)(d).

Keeping Alert to Potential Terrorism

The following tenant screening tips are taken from the REALTORS® Commercial Alliance Report, "Is your tenant a terrorist," published by NAR, Vol. 5, Issue 4 (Fall 2004), online at www.realtor.org/NCommSrc.nsf/files/FallRCA2004.pdf/$FILE/FallRCA2004.pdf:

1. Be sure ID is current. Look at expiration dates and add a note to your tenant file to recheck near the time a document expires.
2. Look for misalignments, raised letters, misspelled words or fading that might indicate a forgery.
3. Get a copy of the passport or driver's license and keep it on file. (For residential rentals, you will need to do this for every tenant to avoid possible fair housing violations.)
4. Let your mind be cognizant of anything that seems inconsistent. Do not just ignore your instincts.
5. Be suspicious of cash. There may be a good reason, but most people conduct major business transactions such as rent payments in other ways.
6. Watch for tenants who seem to avoid contact with you or other tenants.

The Institute of Real Estate Management publishes "Preparing for Terrorism," a great resource manual for property managers, available for purchase by calling 1-800-837-0706.

Earnest Money and Security Deposits

CAUTION: With respect to earnest money, security deposits and all other aspects of rental practice, landlords and property managers in the city of Madison, city of Fitchburg, Dane County and other localities with landlord/tenant ordinances must observe the additional requirements and prohibitions imposed by those ordinances.

Earnest Money

Wis. Admin. Code § ATCP 134.02(3) defines an "Earnest money deposit" as "the total of any payments or deposits, however denominated or described, given by a prospective tenant to a landlord in return for the option of entering into a rental agreement in the future, or for having a rental agreement considered by a landlord." It does not include a credit check fee charged under § ATCP 134.05(3).

The rules governing earnest money in residential rentals are found in Wis. Admin. Code § 134.05. A landlord may not accept earnest money until the unit the prospect is applying for has been identified. Immediately upon accepting an earnest money deposit, the landlord must give the prospective tenant a written receipt, stating the nature and amount of the deposit. A receipt is not required if the prospective tenant pays by check with a notation describing the purpose of the payment, unless requested by the prospective tenant.

If the applicant is accepted and enters into a rental contract with the landlord, the earnest money will either be applied as rent or a security deposit or returned to the tenant. If the landlord rejects the applicant or if

the applicant withdraws the application before the landlord accepts it, the landlord must mail or deliver the earnest money to the applicant by the end of the next business day. The same holds true if the landlord does not approve the rental application by the end of the third day after the landlord accepts the applicant's earnest money deposit or by a deadline set by mutal agreement of the applicant and landlord that is no later than 21 days after the earnest money is paid. Landlords cannot charge "processing fees" because they will be deemed to be earnest money and subject to being returned to the applicant depending upon the outcome.

Many landlords do not accept earnest money because of all of the hoops a landlord must jump through before accepting an earnest money deposit. A landlord must identify the specific unit the tenant is applying for, allow the tenant prospect to review a copy of the rental agreement and any rules and regulations, disclose code violations and conditions affecting the habitability of the unit, disclose utilities not included in the rent and the allocation of utility charges not separately metered, and provide an earnest money receipt. However, these requirements also need to be met before the landlord may accept a security deposit, so the real difference is how early these tasks must be performed in the process. See the WRA Rental Disclosure Form.

If the prospective tenant fails to enter into a rental agreement after being approved by the landlord, the landlord may withhold from the earnest money unless the landlord has significantly changed the rental terms previously disclosed to the tenant. Wis. Admin. Code § ATCP 134.05(3) provides that the landlord may withhold an amount sufficient to compensate the landlord for the actual costs and damages caused by the prospective tenant's failure to enter into a rental agreement. The landlord may not withhold for lost rents unless he or she made a reasonable effort to mitigate those losses, per Wis. Stat. § 704.29.

Security Deposit

A "security deposit" is defined in Wis. Admin. Code § ATCP 134.02(11) as the total of all payments and deposits given by a tenant to the landlord as security for the performance of the tenant's obligations, including all rent payments in excess of one month's prepaid rent. Immediately upon accepting a security deposit, the landlord must give the prospective tenant a written receipt, stating the nature and amount of the deposit. A receipt is not required if the prospective tenant pays by check with a notation describing the purpose of the payment, unless requested by the prospective tenant.

Credit Check Fees

A landlord may charge a tenant up to $20 to cover the landlord's actual cost of obtaining a consumer credit report from an accredited national consumer reporting agency. The landlord must provide the tenant with a copy of the consumer credit report that the landlord obtains. The landlord shall notify the prospective tenant of the charge before requesting the credit report. The landlord may not charge a credit check fee if the tenant provides the landlord with a credit report from an accredited nationwide consumer reporting agency that is less than 30 days old. The landlord may choose to obtain a more current consumer credit report at the landlord's expense. (Credit check fees in Madison and Fitchburg are a cost of doing business and cannot be withheld from an applicant regardless of § ATCP 134.05(4).)

When an applicant has a bad credit score or no credit score, instead of just rejecting the applicant, the landlord may want to have some fall-back criteria like a co-signer or guarantor, different standards that make allowances for major medical bills, etc. See, for example, the WRA Lease Guaranty/Renewal/Sublease/Assignment form. When someone is starting to fall behind in other bills but not the rent, the landlord should decide whether this will be considered to be bad credit and grounds for refusal. The landlord can refuse the applicant as long as consistent standards and policies are uniformly applied in all similar situations. Landlords should be careful about how strict they are because they may want to rethink these standards when they have a lot of vacancies and they risk fair housing violations if they make a lot of changes in response to market conditions.

CAUTION: With respect to credit check fees and all other aspects of rental practice, landlords and property managers in the city of Madison, city of Fitchburg, Dane County and other localities with landlord/tenant ordinances must observe the additional requirements and prohibitions imposed by those ordinances. For example, landlords cannot withhold any credit check fees at all in the city of Madison or the city of Fitchburg.

Credit Report Rejections

The landlord or property manager must tell the applicant if a rejection or other adverse action is based in whole or in part upon information from a credit report under the Fair Credit Reporting Act (FCRA). A consumer report contains information about a person's credit characteristics, character, general reputation and lifestyle. A report also may include information about someone's rental history, such as information from previous landlords or from public records like housing court or eviction files.

The FCRA applies to reports prepared by consuming reporting agencies (CRAs) such as a credit bureau like Trans Union, Experian and Equifax, or an affiliate company; a tenant-screening service that describes the applicant's rental history based on reports from previous landlords or

housing court records; a tenant-screening service that describes the applicant's rental history and also includes a credit report the service got from a credit bureau; or a reference-checking service that contacts previous landlords or other parties listed on the rental application on behalf of the rental property owner.

An adverse action is any action by a landlord that is unfavorable to the interests of a rental applicant. Common adverse actions include denial of the application, requiring a co-signer on the lease, requiring a deposit not required for other tenants, requiring a larger security deposit than other tenants or charging a higher rent than other tenants. When an adverse action is taken that is based solely or partly on information in a consumer report, the FCRA requires landlords to provide a notice of the adverse action to the consumer/tenant applicant. This is true even when the consumer report played only a small part in the overall decision. If the landlord rejected an application because of additional research the landlord performed based on something seen on the credit report, such as an additional address, then the landlord must also give the adverse decision notice.

The notice must include:

- the name, address and telephone number of the CRA that supplied the consumer report, including a toll-free telephone number for CRAs that maintain files nationwide;
- a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give the specific reasons for it; and
- a notice of the individual's right to dispute the accuracy or completeness of any information the CRA furnished, and the consumer's right to a free report from the CRA upon request within 60 days.

Because there are no costs in giving the adverse decision notice, some landlords provide the notice every time they pull a credit report. That way the applicant may receive a free report and it eliminates any arguments over whether they received a notice they should have.

(Using Consumer Reports: What Landlords Need to Know: www.ftc.gov/bcp/edu/pubs/business/credit/bus49.shtm.)

Steering

Illegal steering substitutes the judgment of the real estate licensee, property manager or landlord for that of the tenant and thus eliminates or restricts the tenant's choice. Steering based on race, color, national origin, religion, sex, disability or familial status is prohibited. This may include:

- discouraging any person from inspecting or renting a dwelling unit;
- discouraging the rental of a dwelling by exaggerating drawbacks or failing to inform any person of desirable features of a dwelling unit, community, neighborhood or development;
- communicating to any prospective tenant that he or she would not be comfortable or compatible with existing residents of a community, neighborhood or development; or
- assigning any person to a particular section of a community or development, or to a particular floor of a building.

Racial steering is a practice by which real estate licensees, property managers and landlords preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups. Steering based on family status may occur in rental situations where some buildings in a complex are designated as "children's" buildings and others are reserved for those without children. Requiring families with children to live on the first floor or prohibiting them from having an apartment next to the pool is illegal. A prohibition against children playing in the building common areas has been found to be a limitation on children's use of the property that violates the Fair Housing Act because it is not the least restrictive means of protecting children's safety and maintaining quiet.

See the April 2007 *Legal Update*, "Avoiding Discrimination in Advertising and Racial Steering," at www.wra.org/LU0704.

Family Status/Occupancy Standards

Occupancy standards are established in local zoning ordinances (may themselves be illegal, so be careful), state building codes and HUD policy (two persons per bedroom is the presumption). Occupancy standards must be reasonable based upon the number of persons, size of rooms, hot water and sewer capacity, etc.

Both the federal law and state statutes provide that it is not discrimination based on family status if property owners comply with any fair and reasonable federal, state or local regulations/ordinances that relate to the maximum number of occupants permitted to occupy a housing unit. Neither law prohibits an owner or property manager from restricting the number of occupants so long as the number of occupants, and no other factor relating to protected classes, resulted in the restriction. Occupancy standards may be created to meet legitimate reasons: health and safety of the occupants, prevent overcrowding, etc.

HUD has issued a statement of policy setting a general standard of two persons per bedroom to be used in enforcing the Federal Fair Housing Law. It will also consider several criteria to determine whether an occupancy

policy is reasonable or not, including size and number of bedrooms, size of unit, configuration of unit, age of children, other physical limitations of the housing and any applicable state and local laws. Occupancy standards more restrictive than two persons per bedroom are evaluated to see if they are reasonable under the circumstances.

In summary, owners and property managers may adopt occupancy standards so long as such standards are in compliance with reasonable federal, state or local regulations/ordinances; relate to the number of occupants in the dwelling unit and are not based on any other factor relating to protected classes. An extra charge per occupant also may be illegal discrimination based on familial status.

Read the HUD policy on occupancy standards online at www.nmhc.org/Content/ServeFile.cfm?FileID=1545.

A Nigerian friend was refused a two-bedroom apartment she wanted to rent – in fact she was not even shown the unit even though she specifically asked to see it. Instead, the apartment manager indicated the unit was too small for the woman and her three children and that is was too far away from the elementary school and the Boys and Girls Club. Can the friend sue the apartment manager?

The rental agent unfortunately made assumptions about where and how the friend wanted to live and in the process apparently violated fair housings laws by pre-judging the unit as being too small for the family. While the rental agent may have been ignorant, biased or even well-intentioned, all that matters in the end is that the agent steered the woman away from a unit for which she may have been perfectly qualified. In addition to the assumption about the size of the unit, the rental agent concluded that the friend's children frequented the Boys and Girls Club, an assumption that might have been ethnically or racially grounded.

The friend may wish to look for a local tenant or fair housing agency or organization to assist her with this situation. It will likely be a case of one person's word against the other unless additional evidence or confirmation can be provided.

Housing for Older Persons

The Fair Housing Act protects all citizens from discrimination on the basis of race, color, national origin, religion, sex, handicap or familial status (families with children under the age of 18 living with parents or legal custodians; pregnant women and people securing custody of children under 18). Congress, however, also intended to preserve housing specifically designed to meet the needs of older persons.

Housing that meets the Act's definition of "housing for older persons" can legally exclude families with children. Housing for older persons means housing that falls into one of the following categories:

- HUD has determined that the housing is specifically designed for and occupied by elderly persons under a federal, state or local government program;
- The housing is occupied solely by persons who are 62 years of age or older; or
- At least one person who is 55 years of age or older occupies at least 80 percent of the occupied units, and the project adheres to a policy that demonstrates an intent to operate as housing designed for persons who are 55 or older.

For additional information regarding housing for older persons, see the April 2005 *Legal Update*, "Diversity and Fair Housing," at www.wra.org/LU0504.

Smoking

Smokers are not a protected class, so landlords should be able to refuse to rent to smokers and to prohibit all smoking on the premises. Units may be advertised as non-smoking units. The fair housing laws prohibit discrimination against people with disabilities, including those with severe breathing problems that are exacerbated by secondhand smoke. So it may be advantageous to offer smoke-free rental properties for those with that preference or those who require a smoke-free environment out of medical necessity.

Pets

Landlords should have policies regarding pets that are made known to tenant applicants. Landlords generally may require an additional pet deposit (extra security deposit for pet damage) or extra monthly rent for each animal residing in a rental unit. If landlords wish to charge both, they should carefully and clearly indicate the purpose of the extra charges in the rental agreement and pet policies. Tenants may argue that if monthly pet rent is intended to cover pet damage, then any repair costs for damage caused by the pet should not also be deducted from the pet deposit because double charging is illegal.

See "Dealing with Pets in Rental Properties," in the March 2006 issue of the *Wisconsin Real Estate Magazine*," at http://news.wra.org/story.asp?a=336.

Reasonable Accommodations and Modifications

Landlords have a duty to make reasonable accommodations for tenants with disabilities under the fair housing laws. A "reasonable accommodation" is a physical or policy change or modification to accommodate a person's disability. Since persons with disabilities may have special needs, often simply treating them exactly the same as others will not ensure that they have an equal opportunity to use and enjoy a dwelling. In order to show that a requested accommodation may be necessary, there must be

an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. A person who uses a service animal could request a reasonable accommodation to allow the service animal on a property that has a "no pets" rule.

A reasonable modification is a structural change usually made at the tenant's expense that allows persons with disabilities the full enjoyment of the housing and related facilities. Depending upon the circumstances, the landlord can require that the property be returned to its original status if it would impact the future use of the property; the landlord and tenant may enter into a restorative agreement for this. Examples of a reasonable modification include allowing a person with a disability to install a ramp into a building for wheelchair access, lower the entry threshold of a unit or install a strobe light/doorbell.

The determination of whether a requested accommodation or modification is reasonable depends upon whether the request imposes an undue financial and administrative burden on the rental property and whether making the accommodation or modification would require a fundamental alteration in the nature of operations.

Legally speaking, no one may:

- Refuse to let a person with disabilities make reasonable modifications to the dwelling or common areas, at the expense of the person with disabilities, if necessary to afford the person with disabilities with an equal opportunity to use and enjoy the housing. In a rental situation, the landlord may permit modifications only if the tenant agrees to restore the property to its original condition when the tenant moves out. 45 U.S.C. § 3604(f); Wis. Stat. § 106.50(2r)(b)3.
- Refuse to make reasonable accommodations in rules, policies, practices or services if necessary to afford the person with disabilities with an equal opportunity to use and enjoy the housing. 45 U.S.C. § 3604(f); Wis. Stat. § 106.50(2r)(b)4.

A person is considered to have a disability under 45 U.S.C. § 3604(f) and Wis. Stat. § 106.50(1m)(g) if the person:

1. has a physical or mental disability (including hearing, mobility and visual impairments, chronic alcoholism, chronic mental illness, AIDS, AIDS Related Complex (HIV) and mental retardation) that substantially limits one or more major life activities;
2. has a record of such a disability; or
3. is regarded as having such a disability.

"Disability" does not include the current illegal use of a controlled substance (defined in § 961.01(4)) or a controlled substance analog (defined in § 961.01 (4m)) unless the individual is participating in a supervised drug rehabilitation program.

The three tests that must be met for both reasonable accommodations and reasonable modifications are:

If a unit owner needs an emotional support animal, or any other reasonable accommodation or modification, he or she should request a reasonable accommodation or modification, in writing, from the landlord or property manager.

1. The request should state that the tenant has a disability.
2. The request should demonstrate a relationship, connection or nexus between his or her ability to function and the requested accommodation/modification. For example, it is reasonable for a person with a hearing impairment to request a doorbell that flashes when rung. But if this person requests a ground level unit because of the hearing impairment, that request does not need to be granted since there would be no reasonable relationship between the disability and the requested accommodation.
3. In addition, the tenant should include a letter or prescription from an appropriate professional, such as a therapist, physician, psychiatrist, social worker or psychologist, verifying the need for the accommodation or modification.
4. The tenant need not disclose the details of the disability, provide a detailed medical history or provide copies of personal medical records.
5. A request may be denied only if:
   a. the tenant does not demonstrate a disability;
   b. there is no reasonable connection between the disability and the requested accommodation/modification;
   c. the accommodation/modification would be an undue financial burden to the owner; or
   d. the accommodation/modification would cause a fundamental alteration or drastic change in the provision of housing.

It is reasonable to ask for verification from a doctor or other medical professional if the disability is not easily discernable to the average person, but the questions must be limited.

Perception of disability. The Wisconsin Supreme Court held that a perceived disability is sufficient to qualify as a "disability" under Wis. Stat. § 106.50. In this case, the Department of Workforce Development hearing examiner correctly decided that the landlord perceived a disability, that the perceived disability rose to the level required under the statutory definition and that the landlord proceeded to discriminate against the tenant based on that perceived disability by exacting more stringent lease terms. (***Kitten v. DWD***, 2002 WI 54.)

Failure to relocate wheelchair-bound tenant to first floor unit. A federal district court held that the landlords of an apartment complex violated the Fair Housing Act by

refusing to reasonably accommodate a handicapped Section 8 tenant's request to move to a less physically challenging apartment. The tenant, a wheelchair-bound person with arthritis, requested to relocate to a lower floor apartment to facilitate her movement within the complex. The apartment managers, however, refused to relocate the tenant even though first floor units were available. The court also found that the landlord could be personally liable for the violation because he was personally involved in the management of the complex. (***Roseborough v. Cottonwood Apartments*** (No. 94 C 3708, 1996 US Dist. LEXIS 7687, 6/4/96).)

Refusal to terminate lease for psychiatric disability. The landlord refused to let a mentally disabled man terminate his lease after his mental condition worsened and his psychiatrist determined that it would be unsafe for him to continue to live on his own in the apartment. The court ruled that the refusal to terminate the lease could be found to be a refusal to reasonably accommodate a disability under the federal fair housing law. (***Samuelson v. Mid-Atlantic Realty Co.***, 947 F.Supp. 756 (D. Del. 1996).)

Refusal to adjust rent payment due date. One owner refused to allow a tenant to pay his rent on the third Wednesday of each month instead of the first day to coincide with his Social Security disability payments. The owner charged him late fees each month and ultimately filed for eviction. HUD sued the owner and property manager for a failure to grant a reasonable accommodation in violation of the fair housing laws. Visit www.hud.gov/news/release.cfm?content=pr06-032.cfm for more information.

Service Animals

1. Service animals that assist persons with disabilities are considered to be auxiliary aids and generally are exempt from pet restrictions, pet deposits and extra pet rent.

2. Service animals are not pets. Service animals perform some of the functions and tasks that a person with a disability cannot perform for him or herself. Service animals include guide dogs for persons with vision impairments, hearing dogs for people with hearing impairments and emotional assistance animals for persons with chronic mental illness. Service animals may also alert persons with hearing impairments to the presence of intruders or sounds, pull wheelchairs, or carry and pick up things for persons with mobility or balance impairments. Multiple service animals must be allowed so long as each animal is directly related to a separate disability. For example, the person with disabilities may have a cat that can sense and alert the person that an epilepsy attack is coming and a dog for post traumatic stress syndrome (gives security and protection). However, the landlord does not have to allow multiple animals for the same disability (e.g., two or three large dogs will not normally be reasonable).

3. In Wisconsin, Wis. Stat. § 106.50(2r)(bm) includes specific rules about animals assisting persons with vision, hearing or mobility disabilities. It is illegal for an owner or property manager to refuse to rent to a tenant, evict the tenant, require extra compensation or harass a tenant because he or she keeps an animal that is specially trained to lead or assist the tenant with impaired vision, hearing or mobility, provided that:

   a. Upon request, the tenant shows to the owner or property manager credentials issued by a school recognized by the Department of Workforce Development as accredited to train animals for vision, hearing or mobility assistance.

   b. The individual will be liable for any damage caused by the animal and agrees to maintain sanitary practices with respect to the animal's toilet needs.

   c. However, the owner is not required to accommodate the service animal in owner-occupied rental housing if the owner, or a member of his or her immediate family occupying the housing, has been certified to be allergic to the type of animal the prospective tenant possesses. The only time a service animal can be rejected for allergies is for an owner-occupied property where the owner of the unit or a member of the owner's family is allergic. A landlord cannot deny the request of a person with disabilities for a service animal based upon the allergies of a pre-existing neighboring tenant.

4. While seeing-eye and hearing dogs are generally recognized and accepted by the public, the idea of emotional support animals is often met with some resistance. However, research has demonstrated that emotional support animals can be extremely effective at ameliorating the symptoms of emotional disabilities, such as depression and post-traumatic stress disorder.

5. The federal Fair Housing Act protects the right of people with disabilities to keep emotional support animals, even when a landlord's policy explicitly prohibits pets. The law generally requires the owner or property manager to make an exception to his no pet policy as a reasonable accommodation as long as the accommodation does not constitute an undue financial or administrative burden for the landlord, or fundamentally alter the nature of the housing.

Some communities and insurance companies do not allow for certain types of aggressive breeds, for example, Rottweilers and pit bulls. The owner may have a policy restricting tenants' pets based upon size, weight, breed, etc., but service animals are not pets so they are not subject to these limits. However, aggressive breeds are a hot topic and might be viewed as an issue of whether or not it is reasonable. It

is difficult to say that a landlord must allow a service animal when his insurance policy prohibits the breed. Some insurance policies may be a bit more permissive and will prohibit certain breeds unless the tenant has insurance and keeps the animals fenced.

A broker has a rental property that he has just remodeled. The broker advertises it as "no pets." However, someone has called and would like to rent it, but they have indicated they have some type of service dog and they have documentation. Can the broker tell the prospective tenant that he will not accept the dog, or would this be a violation of fair housing laws?

The federal Fair Housing Act protects the right of people with disabilities to keep support animals, even when a policy explicitly prohibits pets. The law generally requires the exceptions to no pet policies as a reasonable accommodation as long as the accommodation does not constitute an undue financial or administrative burden for the landlord, or fundamentally alter the nature of the housing.

If a prospective tenant needs a support animal, he or she should request a reasonable accommodation, preferably in writing, from the owner. The request should state the disability if that is not readily apparent and indicate a relationship between his or her ability to function and the assistance of the animal. In addition, the tenant should include a letter or prescription from an appropriate professional, such as a therapist or physician, verifying the need for the support animal. The prospective tenant need not disclose the details of the disability nor provide a detailed medical history.

For details about making reasonable accommodations, see the Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations under the Fair Housing Act, online at www.usdoj.gov/crt/housing/jointstatement_ra.htm.

For details about making reasonable modifications, see the Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Modifications under the Fair Housing Act, online at www.usdoj.gov/crt/housing/fairhousing/reasonable_modifications_mar08.pdf.

Fair housing is the law and compliance is the right thing to do. For further discussion of fair housing and equal opportunity in housing, visit the WRA REALTOR® Resource Page for Fair Housing-Equal Opportunity in Housing Resources, online at www.wra.org/fairhousing, and the National Association of REALTORS® Field Guide to Fair Housing, online at www.realtor.org/libweb.nsf/pages/fg705.

Sex Offenders

Under Wis. Stat. §§ 452.24, 704.50 and 706.20, real estate licensees, landlords, property managers and sellers all will have a duty, if asked by a person in connection with a real estate transaction, to disclose any actually known information concerning any sex offenders. Specifically, if asked whether a particular person is required to register as a sex offender, about the location of sex offenders in a neighborhood or for any other information about the sex offender registry, the licensee, owner or property manager must disclose whatever actual knowledge he or she has on the subject.

However, the real estate licensee, owner or property manager will have immunity relating to the disclosure of such information if he or she promptly gives the person requesting the information a written notice indicating that the person may obtain the sex offender/registry information by contacting the Department of Corrections either via the Internet or by a toll-free telephone number. In other words, even if the licensee, owner or property manager knows something about sex offenders in the neighborhood, the licensee, owner or property manager will have immunity if the person asking the question is referred to the Department of Corrections. Instead of answering based upon what they have heard or read, the licensee, owner or property manager can instead just refer the person to the Department of Corrections' sex offender registry for factual and accurate information.

The following notice, which may be inserted into any existing form or a WB-41 notice form, is what must be given to satisfy the sex offender disclosure requirements. This notice is included in many WRA real estate forms. Notice: You may obtain information about the sex offender registry and persons registered with the registry by contacting the Wisconsin Department of Corrections online at www.widocoffenders.org or by phone at 608-240-5830 or 877-234-0085.

The federal Fair Housing Act makes it unlawful to indicate a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status or national origin, or an intention to make any such preference, limitation or discrimination (Wisconsin statutes add sexual orientation, marital status, lawful source of income, age and ancestry to the list of protected classes). Although registered sex offenders are not included in the additional classes under state law, the broker should check with an attorney in the area to confirm that local ordinances/codes do not expand the protected classes to include felons and/or sex offenders. Occasionally the argument is made that being a sex offender stems from having a handicap or disability, which would put some sex offenders within a protected class. This has not been tested in the courts.

Landlords would be well-served to visit with their attorneys and develop a policy with regard to sex offender

applicants. While there is no legal obligation to disclose if the sex offender registry disclosure is given (this information appears in many of the WRA rental forms), landlords may wish to address their moral concerns, the impact of local ordinances, etc. Some find it helpful to speak to the parole or probation officer to get more specific information about the individual, the conviction and the applicable restrictions. There is no easy answer in this troublesome area.

For additional information, see *Legal Update 02.05*, "Sex Offender Registry," at www.wra.org/LU0205, and the Sex Offenders Registry Resource page at www.wra.org/sexoffenders.

Disclosures

Wis. Admin. Code § ATCP 134.04 lists several different disclosures that must be made to the tenant prospect in writing quite early in the application and screening processes.

1. The landlord must disclose the following information to the tenant and perform the following tasks before the landlord can accept any earnest money, accept a security deposit, or enter into a rental agreement:

- The specific dwelling unit or units for which the prospective tenant is being considered must be identified.
- Any written rental agreement and rules and regulations must be furnished to prospective tenants for their inspection.
- All uncorrected building and housing code violation notices must be exhibited to the prospective tenants.
- Disclose if the unit lacks hot or cold running water; the heating facilities serving the unit are not in safe operating condition or are incapable of maintaining a temperature of at least 67F (19C) in all living areas during all seasons when the unit will be occupied, measured in the center of the room, halfway between the floor and the ceiling; the unit is not served by electricity, or if the electrical wiring, outlets, fixtures, or other electrical components are not in safe operating order; any structural or other conditions constitute a substantial health or safety hazard or create an unreasonable risk of foreseeable personal injury; the dwelling unit is not served by plumbing facilities in good operating condition; and the dwelling unit is not served by sewage disposal facilities in good operating condition.
- Disclose whether the charges for water, heat, and electricity are not included in the rent.
- Disclose the basis on which charges for water, heat, and electricity will be allocated among individual dwelling units if these charges are not included in the rent, and if the units are not separately metered.

2. Before the landlord accepts any security deposit or converts an earnest money deposit to a security deposit, the landlord must notify the tenant in writing, that tenant may, by a specified deadline that is at least seven days after the start of tenancy:

- Inspect the dwelling unit and advise the landlord of any preexisting damages or defects (landlords should provide a check-in form at this time).
- Request a list of physical damages or defects charged to the prior tenant's security deposit (the landlord may require that the request be in writing). If the tenant requests the list, the landlord must provide a list of all physical damages and defects charged to the prior tenant's security deposit, regardless if the damage has been repaired. This list must be provided within 30 days after the landlord receives the tenant's request, or seven days after the landlord notifies the previous tenant of the defects, whichever is later.

3. At or before the time that the landlord and tenant enter into the lease or rental agreement, the landlord must disclose to the tenant, in writing, the names and addresses of:

- The person(s) authorized to collect and receive rent.
- The person(s) authorized to manage and maintain the premises (who can be contacted by the tenant).
- The owner or other person authorized to accept service of legal documents, notices and demands on behalf of the owner. This address must be a location within Wisconsin where personal service or delivery may be made.

Landlords must advise tenants of any changes in their contact persons, by mail or personal delivery, within 10 business days after the change occurs.

The landlord also must give the tenant copies of the written rental agreement (lease) and any written rules and regulations at the time the lease or rental agreement is signed.

See the WRA Rental Disclosure Form or the DATCP Sample Disclosure Form for Landlords contained within "The Wisconsin Way, A Guide for Landlords and Tenants," at www.datcp.state.wi.us/cp/consumerinfo/cp/factsheets/pdf/cp-127web.pdf.

Tenant Acceptance

Once a landlord accepts a tenant, the landlord must allow the tenant to move in, even if the tenant materially falsified their rental application. Wis. Admin. Code § ATCP 134.09(6) provides, "FAILURE TO DELIVER POSSESSION. No landlord shall fail to deliver possession of the dwelling unit to the tenant at the time agreed upon in the rental agreement, except where the landlord is unable to deliver possession because of circumstances beyond the landlord's control."

CAUTION: With respect to disclosures to tenants and all other aspects of rental practice, landlords and property managers in the city of Madison, city of Fitchburg, Dane County and other localities with landlord/tenant ordinances must observe the additional requirements and prohibitions imposed by those ordinances.

Safety Requirements for Residential Rentals

Lead-Based Paint

Antwaun A. v. Heritage Mutual Insurance Company, 228 Wis. 2d 44, 596 N.W.2d 456 (1999), mandates testing whenever the landlord of a residential property constructed before 1978 either knows, or in the use of ordinary care should know, that there is peeling or chipping paint on the rental property. If testing confirms the presence of LBP, the court gave no specific direction about what was next required. However, the footnotes of the opinion quote the Wisconsin Civil Jury Instructions regarding the duty of property owners and other materials that indicate that, under general common law negligence law, the owner has a duty to either warn other persons of a defect or harmful condition or correct the condition, as is reasonable under the circumstances. As all REALTORS® know, the federal LBP law requires all sellers and landlords to disclose all known LBP, including all testing results, whenever a pre-1978 residential rental property is rented or sold. If the peeling paint is LBP, landlords have common law and statutory duties to eliminate the hazard to protect their tenants. For further discussion see www.wra.org/legal/Court_cases/antwaun.asp.

The federal LBP disclosure rule applies to leases of target housing: housing constructed prior to 1978, except for housing for the elderly or persons with disabilities (unless any child who is less than six years of age resides or expects to reside in such housing), and except for any 0-bedroom dwellings such as lofts, efficiencies and studio apartments.

A lease, for the purposes of this law, is a transaction where the tenant or lessee enters into an agreement with the landlord or lessor to lease, rent or sublease target housing. Subleases are also included so that the subtenant or sublessee also receives the LBP disclosures and information. Verbal rental agreements and periodic tenancies such as a month-to-month tenancy are also included. The rule does not apply to leases for 100 days or less, such as vacation homes or short-term rentals, and rental housing that has been inspected by a certified inspector and found to be free of LBP.

Landlords who rent out target housing must:

- Disclose all known LBP in the home and provide any available reports on LBP in the housing to tenants.
- Give tenants the EPA-approved LBP pamphlet, *Protect Your Family from Lead in Your Home*.
- Include certain warning language in the lease as well as signed statements from all parties verifying that all requirements were completed, typically by attaching an LBP addendum such as the WRA's Addendum L.
- Retain signed acknowledgments for three years, as proof of compliance.

Failure to disclose LBP can be very expensive, as demonstrated by a recent $2.25 million settlement of a U.S. Environmental Protection Agency and HUD enforcement action against a group of Massachusetts property owners: www.hud.gov/news/release.cfm?content=pr09-030.cfm.

For further discussion of LBP issues, see *Legal Update 03.07*, "Residential Rental Primer," at www.wra.org/LU0307, *Legal Update 96.07*, "Lead-Based Paint Disclosure Implementation," online at www.wra.org/LU9607, and *Legal Update 96.04*, "Lead-Based Paint Disclosures," online at www.wra.org/LU9604.

New LBP Renovation Rules

To protect against the risk of LBP poisoning, the EPA issued a Lead-Based Paint Renovation, Repair and Painting Program (RRP) rule on March 31, 2008, requiring contractors, painters and other workers to use lead-safe practices, provide educational pamphlets to property owners and occupants, contain the work area, minimize lead dust and follow thorough clean-up protocol.

The RRP rule applies to residential houses, apartments and child-occupied facilities such as schools and day care centers built before 1978. The rule covers residential, public or commercial buildings where children under age 6 are regularly present as well as those buildings where an expectant mother resides. Renovation is broadly defined to include many activities not normally considered to be renovations. "Renovation" is defined as any activity that disturbs painted surfaces and includes most repair, remodeling and maintenance activities, including painting and window replacement.

Effective December 22, 2008, contractors, property managers and others who perform renovations for compensation in residential houses, apartments and child-occupied facilities built before 1978 are required to distribute the March 2008 *Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools* (*Renovate Right*) pamphlet.

Effective April 22, 2010, renovation firms are required to be certified, have at least one certified renovator on staff who can train their other employees in the use of lead-safe work practices and follow lead-safe work practices that minimize occupants' exposure to lead hazards.

In general, anyone who is paid to perform work that disturbs paint in housing and child-occupied facilities built before 1978 is subject to the RRP rule. This may include, but is not limited to, remodelers of single- and multi-family housing; landlords; property managers and maintenance workers for residential buildings and dwellings; general contractors, special trade contractors including painters, plumbers, carpenters and electricians;

and window replacement workers.

For additional information, see the October 2008 *Legal Update*, "Lead-Based Paint Renovations, Repairs and Painting," at www.wra.org/LU0810.

Fire Safety

Wis. Stat. § 101.145 provides that the owner of a residential apartment building must install and maintain a functional smoke detector in the basement and at the head of any stairway on each floor level of the building and shall install a functional smoke detector either in each sleeping area of each unit or elsewhere in the unit within six feet of each sleeping area and not in a kitchen. All smoke detectors shall be approved by Underwriters laboratory.

The building owner must maintain any such smoke detector that is located in a common area. The tenant or occupant of a residential unit must maintain any smoke detector in that unit, except when a tenant or occupant (who is not an owner), or an authorized government officer, agent or employee gives the owner written notice that a smoke detector in the unit is not functional. The owner must then perform any maintenance necessary to make that smoke detector functional within five days of the owner's receipt of the notice. Maintenance includes the furnishing of replacement batteries. See the WRA Smoke Detector Notice Form.

Wisconsin Smoke Alarm Requirements: http://commerce.wi.gov/SBdocs/SB-SmokeAlarmBroch8282.pdf.

Fire Safety Information for people with disabilities: www.nfpa.org.

Carbon Monoxide

For a review of the new legislation mandating carbon monoxide detectors in most multi-family buildings, see Page 6 of the June 2008 *Legal Update*, "Legislative Update 2008," at www.wra.org'LU0806, and the Department of Commerce Carbon Monoxide Alarms brochure at http://commerce.wi.gov/SBdocs/SB-PubCarbMonoBroch209.pdf.

Entering the Rental Contract

What is the difference between the WRA Residential Lease and the WRA Residential Rental Contract?

Rental agreements can generally be divided into two main categories: (1) leases – those agreements where property is rented for a definite period of time, and (2) informal tenancies – those agreements with no definite termination date, including periodic tenancies and tenancies at will. Use of written leases or rental agreements minimizes disagreement and disputes.

The Residential Lease is a written lease form that includes some rules and regulations and was modeled after the old WB-20 Apartment Lease (DRL approval of this lease was rescinded in 1991). The Residential Rental Contract may be used for a month-to-month tenancy or for a lease. It provides for a rent discount (late fee in reverse) and has explanations of landlord-tenant law on the back. The choice between the two is one of familiarity, style and preference. Some attorneys believe that some small claims court commissioners prefer the WRA forms because they have come to be regarded as standard, familiar and capable of supporting uniform and efficient decisions.

What other forms are needed in a rental transaction?

Other than a rental agreement, the most important forms to use generally include the following:

- A rental application provides for the systematic gathering of uniform information from all tenant applicants and addresses the credit check fee.
- A rental disclosure helps the property manager or landlord ensure that all required disclosures are made when a tenant prospect applies and that all required steps are taken when entering into a rental agreement.
- A move-in/move-out report is critical for documenting unit condition and demonstrating any subsequent damages.
- Federal law mandates that tenants be given LBP disclosures if they are renting housing built before 1978 (if the property is target housing).

Additional helpful forms available from the WRA):

- Smoke Detector Notice
- Guarantee/Renewal/Assignment-Sublease
- Request for Maintenance/Consent to Enter/Notice of Potential Lead-Bearing Paint Hazard
- Notice of Storage or Disposition of Personality Left by Tenant

What are nonstandard rental provisions?

Nonstandard rental provisions for security deposit withholding, the landlord's right of entry upon the premises, lien agreements on the tenant's personal property and other issues may all be contained in one separate preprinted document. Such provisions cannot be part of a preprinted lease form or rental agreement and must be separately negotiated because there is a potential that they may not be in the tenant's best interest. The landlord must specifically identify and discuss each nonstandard rental provision with the tenant, and the tenant must separately sign or initial each such provision. If the tenant initials or signs a nonstandard rental provision, it is rebuttably presumed that the landlord has specifically identified and discussed it with the tenant and that the tenant has agreed to it.

Is it legal to state a late payment fee in a residential lease? If a tenant does not pay the late payment charge, but

the owner accepts the rent payments, may the landlord still assert his right to such fees in a small claims action?

A landlord may charge a late fee in a residential lease and deduct such late fees from the tenant's security deposit only if a provisions allowing for this are contained in a nonstandard rental provision within the lease. See Wis. Admin. Code § ATCP 134.09(8)(a) and § 134.06(3)(b), respectively.

If the landlord does charge a late fee, all prepayments of rent must first be applied to offset the amount of rent the tenant owes (§ 134.09(8)(b)), and the landlord may not charge late fees for previously unpaid late fees (§ ATCP 134.09(8)(c)). For example, the tenant pays July rent in full but pays it late and a $35 late fee is imposed. The tenant then pays August rent on time but does not pay the outstanding July late fee. The landlord cannot apply part of August rent to the outstanding July late fee and then charge the tenant another late fee for August because the August rent is now $35 short. Moreover, some local municipalities place limits on the amount of late fees a landlord may charge. Subject to these limitations, a landlord may assert a claim for unpaid late fees in small claims court.

Roommate Agreements

Tenants may have conflicts that often may spill over onto the landlord's lap: one may move out, lose a job or get into a financial or personal dispute. The Tenant Resource Center has a sample form that tenants should be encouraged to use at www.tenantresourcecenter.org/pdf/roommate_agreement_form.pdf. Visit www.tenantresourcecenter.org/housing_counseling/roommates/ for further discussion of this issue.

Renting to Minors

Can someone under 18 years old sign a lease?

A minor does not have the legal capacity to enter into a contract such as a lease. Unless the contract is for necessities, the minor may void the lease at the minor's option. That means that the minor may sign the lease, but may be able to void the lease later – at his or her option – unless the lease is necessary for the minor's subsistence. Thus, landlords may wish to request a statement from the minor that the rental unit is a necessity and enter into a new lease when the minor reaches 18. Another approach may be to have a co-signor or guarantor on the lease.

See Pages 4-5 of the September 2006 *Legal Update*, "Contract Law Basics," online at www.wra.org/LU0609.

During the Tenancy

Showings for Sale

Once a tenant moves into an apartment, landlords have limited rights to enter the apartment. Wis. Stat. § 704.05(2) establishes the tenant's right to exclusive possession of the premises. This statute requires landlords to give advance notice of entry, which may then be conducted at reasonable times to inspect the premises, make repairs or show the property to prospective tenants or purchasers. In the city of Madison and city of Fitchburg, landlords must give notice of entry at least 24 hours in advance. In those communities without applicable ordinances, landlords must give notice of entry at least 12 hours in advance per Wis. Adm. Code § ATCP 134.09(2).

Under § ATCP 134.02(5), "landlord" means the owner or lessor of a dwelling unit under any rental agreement, and any agent acting on the owner's or lessor's behalf. Thus the owner's real estate and property management agents may act on behalf of the owner.

The notice may be verbal or written, but it is preferable to give written notice to tenants and keep a copy of all entry notices for the file. Landlords may enter a rented apartment only at reasonable times. Early morning and late evening entry is arguably not reasonable. Entry during the normal business hours of 8:00 a.m. to 5:00 p.m. should usually be reasonable. It may be best to spend a few minutes trying to work out an entry time that both the landlord and the tenant agree is reasonable.

No landlord may enter a dwelling without first announcing his or her presence (by knocking or ringing the doorbell) and identifying himself or herself to anyone present in the dwelling.

Advance notice is not required if the tenant requests or consents to a proposed entry at a specified time, a health or safety emergency exists, the tenant is absent and the landlord reasonably believes that entry is necessary to protect the premises from damage or entry is authorized in writing in nonstandard rental provisions.

Repairs

Under Wis. Stat. § 704.07, the landlord is responsible for repairs necessary to comply with housing codes and to maintain tenant safety on the premises. The tenant is responsible for routine and minor repairs and damages caused by the tenant or the tenant's guests.

Rent Increases

With a month-to-month tenancy, a rent increase would require a termination of the existing tenancy and an agreement to enter onto a new tenancy at the changed rent amount. This month-to-month contract can only be terminated by law by either party with 28-days' written notice prior to the end of the rent-paying period, which in this case is the end of the month. While the landlord can terminate the contract in this fashion, there is no guarantee that the tenant will accept the new contract. Average month-to-month tenants, however, most likely believe that a rent increase letter is only informing them that the rent is going up, not that they will have to move if they disagree with the rent increase. For this reason, the landlord

may wish to clearly explain the implications and consequences of the 28-day termination/rent increase notice.

For a lease for a specified period of time, the rent may not be increased during the term of the lease.

Automatic Renewals Require Advance Notice

Under Wis. Admin. Code § ATCP 134.09(3), "no landlord shall enforce, or attempt to enforce, an automatic renewal or extension provision in any lease unless, as provided under s. 704.15, Stats., the tenant was given separate written notice of the pending automatic renewal or extension at least 15 days, but no more than 30 days before its stated effective date." Wis. Stat. § 704.15 provides, "Requirement that landlord notify tenant of automatic renewal clause. A provision in a lease of residential property that the lease shall be automatically renewed or extended for a specified period unless the tenant or either party gives notice to the contrary prior to the end of the lease is not enforceable against the tenant unless the lessor, at least 15 days but not more than 30 days prior to the time specified for the giving of such notice to the lessor, gives to the tenant written notice in the same manner as specified in s. 704.21 calling the attention of the tenant to the existence of the provision in the lease for automatic renewal or extension."

Interfering with Other Tenants' Rights

Landlords are often frustrated with tenants who cause disturbance problems like making noise all hours of the night, parking in another tenant's garage without permission for several days, etc. Other difficult situations are presented when tenants harass one another or steal from each other.

Wis. Stat. § 704.05(3) addresses this if the lease is silent:

"Use of premises, additions or alterations by tenant. The tenant can make no physical changes in the nature of the premises, including decorating, removing, altering or adding to the structures thereon, without prior consent of the landlord. The tenant cannot use the premises for any unlawful purpose nor in such manner as to interfere unreasonably with use by another occupant of the same building or group of buildings."

This may still be difficult because of the proof problems. The tenants who have been harmed have to be willing to testify and must be more convincing than the tenants the landlord is trying to evict.

Lease Invalidity

Landlords who have leases containing provisions that violate Wis. Admin. Code § ATCP 134.08 should not expect to be able to enforce those leases against their tenants. The Wisconsin Supreme Court held that a landlord cannot enforce a lease that contains a provision illegal under § ATCP 134.08(3) against the tenant in ***Baierl d/b/a Supreme Builders v. McTaggart***, 2001 WI 107 (www.wisbar.org/res/sup/2001/98-3329.htm). Because a lease contained a provision specifically prohibited by ATCP 134, the landlord could not enforce the lease against the tenant. The Court declined to sever the illegal provision and enforce the rest of the lease because that would undermine the policy behind ATCP 134. See further discussion in the article, "Illegal Provision Stops Landlord from Enforcing Lease," at www.wra.org/legal/wr_articles/wr0801_legal.htm.

In ***Dawson v. Goldammer***, the Court of Appeals held that a tenant may seek enforcement of a rental agreement that includes an attorney fee provision that violates Wis. Admin. Code § ATCP 134.08(3). The Court held that when a tenant seeks enforcement of such a lease, the tenant can sever the attorney fee provision and enforce the remainder of the lease. For further discussion, see Pages 9-10 of *Legal Update 03.01*, "Case Law Update," at www.wra.org/LU0301; ***Dawson v. Goldammer***, 2003 WI App 3, at www.wisbar.org/res/capp/2002/01-3075.htm, and ***Dawson v. Goldammer***, 2006 WI App 158, at www.wisbar.org/res/capp/2006/2004ap003335.htm.

Termination of Tenancy

Tenancies may terminate for many different reasons and in many different ways. A lease will naturally terminate of its own accord when the termination date arrives. A tenant may move out before the term of his or her tenancy has concluded or the parties may mutually agree to an early tenancy termination. It is important that this agreement be put in writing to lay out the terms and conditions and avoid misunderstandings.

The tenant may attempt to sublet. Tenants at will and periodic tenants cannot sublet, while all other tenants may unless the rental agreement or lease prohibits or restricts subletting. Some landlords have subletting procedures and subletting fees. A tenant who sublets will still be on the lease, remain responsible for the property and be financially responsible if the subtenant does not pay the rent or damages the property. Written subletting agreements should be used.

Either the landlord or the tenant may give notice to terminate a periodic tenancy such as a month-to-month tenancy, which by definition has no definite termination date. Either may terminate a periodic tenancy, without stating any reason, by giving written notice that meets the requirements of Wis. Stat. § 704.19. At least 28 days' advance notice is required for most tenancies, and the termination date stated in the notice must coincide with the end of the rent-paying period. For example, if Jane rents on a month-to-month basis and pays

her rent, in advance, on the first day of each calendar month, her rental period would end with the last day of the calendar month. If the landlord gives Jane notice on January 1 to terminate her tenancy on January 31, the notice is valid. If the landlord gives notice on January 15, the notice is valid but not effective until February 28 because the termination date must fall on the last day of the rent-paying period. When mailing notices, landlords must be careful of the § 704.19(7)(c) requirement to add two days when service of the notice is by certified or registered mail.

Notice of Default

In many cases, however, the tenancy ends because the tenant has breached his or her rental obligation, often by failing to pay the rent on time. The procedures for terminating a tenancy vary widely, depending upon the type and length of the tenancy, type of breach and reason for the termination. Landlords must carefully review these factors and Wis. Stat. § 704.17-19 to determine what notice to use and whether the tenant has the right to cure the default or must simply move out. Failing to give notices in strict accordance with Wis. Stat. § 704.21 may give the tenant a procedural objection that may be used to defeat the termination of the tenancy or the landlord's associated claim for rent or other damages. See *Legal Update 03.07*, "Residential Rental Primer," at www.wra.org/LU0307, and Wis. Stat. chapter 704 at www.legis.state.wi.us/statutes/Stat0704.pdf for discussion of this process.

When giving a notice of default, landlords may wish to consider the following pointers:

- In some counties eviction cases may be dismissed if a five-day notice specifies any fees in addition to the rent that is past due, such as late fees or security deposit.
- Some courts are throwing out cases where the five-day notice did not allow enough time for service by certified or registered mail. When mailing notices, landlords must be careful of the § 704.19(7)(c) requirement to add two days when service of the notice is by certified or registered mail.
- The date that service of a notice is effective is controlled by § 704.19(7). A notice from a landlord to a tenant is effective on the date the landlord hands the tenant the notice, the later of the date the notice is posted on the premises and mailed, and two days after mailing by certified or registered mail. The date the mail service delivers the letter is not part of the equation unless delivery is being proven based upon actual receipt under § 704.21(5).

Eviction

If the tenant does not cure the default and fails to move out by the date specified in the notice, the tenancy is terminated and the landlord must commence eviction proceedings in small claims court to remove the tenant from the premises. If the tenant fails to appear, the landlord can be awarded a judgment and a writ of restitution if the landlord can prove that the summons and complaint were properly served on the tenant. If the judge rules in favor of the landlord, the judge will order the tenant evicted. The landlord must obtain a writ of restitution that legally restores possession of the unit to the landlord. The landlord should work with the local sheriff to exercise the writ according to local practice.

See *Legal Update 03.07*, "Residential Rental Primer," at www.wra.org/LU0307, and Wis. Stat. chapter 799 at www.legis.state.wi.us/statutes/Stat0799.pdf for discussion of this process.

Duty to mitigate

After the eviction, a rent and damages hearing will be held to determine the tenant's liability for rents or damages. Wis. Stat. § 704.29 outlines the landlord's duty for mitigation of damages. The landlord must try to find a new tenant by advertising the unit in the same way used to normally advertise vacant units and showing the unit to interested prospects, although the landlord is not required to rent the defaulting tenant's unit first. The landlord may charge the defaulting tenant for the actual costs of re-renting the unit.

Self Help Evictions/Constructive Eviction

If a tenant is behind in rent in a residential rental property, can the landlord turn off the water?

No, the landlord cannot engage in constructive eviction by turning off the water, power or other utilities, by changing the locks, etc. Barring a tenant from a property without a writ of eviction from a court constitutes an illegal constructive eviction. The landlord also may not confiscate or remove personal property or belongings.

Military Service

A tenant who signed a one-year lease in October just informed the landlord that he has been called to duty in Iraq and must leave Feb. 1st. Is the tenant bound to find someone to sublet the unit or is he simply exempt from the lease?

The landlord must release him from the lease if the deployment will last 90 days or more per the Servicemember's Civil Relief Act (SCRA). See Page 18 of www.standingupforillinois.org/pdf/homefront/SCRA.pdf.

Security Deposit Withholding

Security deposits, their return and charges against them are the most frequent area of dispute in landlord tenant relations. The return of security deposits is regulated by Wis. Admin. Code § ATCP 134.06. Under this rule, a tenant "surrenders" the premises on the last day of the tenancy provided in the rental agreement (the

last day of the lease term) unless one of the following situations is present:

1. If the tenant vacates before the last day of the tenancy, as designated in the rental agreement, and the tenant gives the landlord written notice that the tenant has vacated, surrender occurs when the landlord receives the written notice. If the tenant mails the written notice to the landlord, the landlord is deemed to have received the written notice on the second day after it was mailed.
2. If the tenant vacates the premises after the last day of the tenancy, as designated under the rental agreement, surrender occurs when the landlord learns that the tenant has vacated.
3. If the tenant is evicted, surrender occurs when the writ of restitution is executed, or whenever the landlord learns that the tenant has vacated, whichever happens first.

Returning the keys is not the same thing as surrendering the premises.

Wis. Admin. Code § ATCP 134.06 also limits the basis upon which a landlord may withhold from security deposits.

The four general reasons for withholding from a security deposit include:

1. Tenant damage, waste or neglect of the premises.
2. Non-payment of rent.
3. Payment that the tenant owes under the rental agreement for utility services provided by the landlord but not included in the rent.
4. Non-payment of government utility charges.
5. Mobile home parking fees.
6. Other lawful reasons designated in NONSTANDARD RENTAL PROVISIONS.

§ ATCP 134.06 also establishes the timing and manner of giving notice when all or part of a security deposit is withheld. A detailed statement of claims must be given with a return of any security deposit balance owed within 21 days after the tenant surrenders the premises. This statement may be mailed by regular mail to the tenant no later than the 21st day after surrender of the premises. The statement shall describe each item of physical damage or other claim made against the security deposit and the amount withheld as reasonable compensation for each item or claim. The code does not allow for withholding for normal wear and tear, so any damage claimed by a landlord must be beyond the range of normal wear and tear. A landlord cannot charge a tenant for routine painting or carpet cleaning where there is no unusual damage caused by tenant abuse. Landlords failing to comply with security deposit rules may be sued for double the amount of deposit plus court costs and attorney fees per Wis. Stat. 100.20(5).

Landlords may not withhold for "normal wear and tear." Provisions to the contrary are not legal anywhere in the state according the DATCP interpretation of Wis. Stat. § 704.07 and § ATCP 134.06.

If an agent is renting a property, can she require the tenant to professionally clean the carpet before vacating the unit?

In 1999 the DATCP legal staff indicated the following to the WRA:

"It is not illegal per se for the landlord and tenant to agree that the tenant will clean the carpet or pay for the carpet to be cleaned at the end of the lease term. However, the landlord may not withhold the charges for such carpet cleaning from the tenant's security deposit, unless the tenant committed 'damage, waste or neglect.' Therefore, if the tenant does not clean the carpet at the end of the lease and there is only normal wear and tear on the carpet, the landlord's remedy for this breach is to seek damages through small claims court."

Since that time, the Wisconsin Attorney General's office has issued an informal opinion to DATCP regarding the applicability of Wis. Stat. § 704.07 to the carpet cleaning issue. That statute provides that it is a landlord's duty to keep the premises "in a reasonable state of repair." The opinion interprets this duty to include routine carpet cleaning at the end of a tenancy. In addition, § 704.07(1) states, "An agreement to waive the requirements of this section in a residential tenancy is void." Thus, the opinion concludes, any agreement that waives the landlord's duty to perform routine carpet cleaning at the end of a tenancy or attempts to shift this duty to the tenant is void.

Landlords who want to be certain that their leases will withstand any legal challenge from tenants or DATCP may find it advisable to consult with their attorneys and remove all provisions making tenants responsible for performing routine cleaning or painting or for paying for routine cleaning at the conclusion of the tenancy, whether through direct billing or a security deposit deduction. Leases with such provisions could be deemed invalid in their entirety.

See the article in the *Wisconsin REALTOR®*, online at www.wra.org/legal/wr_articles/wr0602_legal.htm#lm4.

Tenant Damage

Damage can entitle landlords to double damages if it reaches a level that would be considered waste. The Wisconsin Court of Appeals found that in ***Three & One Company v. Geilfuss***, 178 Wis. 2d 400, 504 N.W.2d 393 (Ct. App. 1993), the tenants who allowed their cats to use the unit as a litter box committed waste and awarded the owner double the damages pursuant to Wis. Stat. § 844.19. For a summary of this case see Pages 5-6 of *Legal Update 94.08*, "Case Law

Update," at www.wra.org/LU9408.

Landlords would be wise to document the damage, waste, neglect, etc., with photographic evidence, a requirement under the city of Madison ordinances.

Tenancy Termination Based on Imminent Threat of Serious Physical Harm

In the recently created Wis. Stat. §§ 704.01(3m), 704.16 and 704.44, Wisconsin has adopted the Safe Housing Act, which allows victims of domestic violence, sexual assault or stalking to terminate a lease if they are in imminent physical danger and have proper documentation. A residential tenant may terminate his or her tenancy and leave the premises if (1) the tenant or a child of the tenant faces an imminent threat of serious physical harm from another person if the tenant remains on the premises, and (2) the tenant provides the landlord with legal notice and certified documentation such as a domestic abuse injunction; child abuse restraining order; harassment restraining order or injunction; prison release condition; or criminal complaint alleging sexual assault, stalking or domestic abuse. The tenant is not liable for any rent after the end of the month following the month in which he or she provides the notice or leaves the premises, whichever is later.

A landlord may terminate the tenancy of an offending tenant if the offending tenant (1) commits one or more acts, including verbal threats, that cause another tenant or a child of another tenant in the rental unit or apartment complex to face an imminent threat of serious physical harm from the offending tenant if the offending tenant remains on the premises, or (2) is the named offender in any injunction protecting another tenant or another tenant's child (may or may not be based on sexual assault or stalking); prison release condition; or criminal complaint alleging sexual assault, stalking or domestic abuse against a tenant or a tenant's child. The landlord must give the offending tenant written notice that complies with statutory provisions requiring the offending tenant to vacate on or before a date that is at least five days after the notice is given.

More information is available on Page 8 of the June 2008 *Legal Update*, "Legislative *Update* 2008," online at www.wra.org/LU0806.

Personal Property Disposal

In the absence of inconsistent provisions in the lease, a landlord has the right to store the property left on the premises by a departed tenant per Wis. Stat. § 704.05(5). The property may be stored on or off the premises. The landlord will have a lien on the property for the actual and reasonable costs of such removal and storage; or, if stored by the landlord, for the actual and reasonable value of storage. The landlord's lien is superior to any security interest of a creditor of the tenant. The following procedures must be followed:

1. The landlord must give notice of the storage to the tenant within 10 days after the storage charges commence. Notice may be given personally or by ordinary mail to the tenant's last known address (do not use certified mail).

2. The notice shall state the daily storage charges, and may not include any costs of damages to the premises or present or future rent.

3. The landlord must give notice of his intent to dispose of the property. If the tenant or a secured party fails to redeem the property within 30 days following such notice, the landlord may sell the property by public or private sale or other appropriate means. Notice may be given personally or by ordinary mail to the tenant's last known address.

4. The landlord must hold the proceeds of sale (less costs of sale and storage charges) for 60 days after the sale. If the net proceeds are not claimed within that time, the landlord must send them to the Wisconsin Department of Administration for use in homeless assistance programs.

These rules apply in the absence of any inconsistent provisions in the lease. Thus, the landlord and tenant may agree to an alternative lien agreement concerning the rights and duties for storage and disposition of the tenant's property. Such agreement should clearly state whether net sale proceeds are payable to the state, tenant or landlord. This lien agreement must appear in NONSTANDARD RENTAL PROVISIONS in residential leases or rental agreements.

If a tenant leaves a ceiling fan behind, the landlord is not required to pay the tenant for the property. Upon the tenant's departure it becomes a fixture. If a tenant leaves an air conditioner, wash machine, dryer, etc., the landlord should ask the new tenant if he or she wants it removed or would like to purchase it. Then the landlord will not be required to make repairs or replace in the case of malfunction.

Resources

- Department of Agriculture Trade and Consumer Protection publication, *The Wisconsin Way, A Guide for Landlords and Tenants*, may be obtained at www.datcp.state.wi.us/cp/consumerinfo/cp/factsheets/pdf/cp-127web.pdf or ordered at 1-800-422-7128.
- Tenant Resource Center, Inc., publishes *Apartment Management in Wisconsin, A Self-Help Guide for Property Managers and Owners.* All brochures and information are available in Spanish: www.tenantresourcecenter.org/ or 608-257-0006.
- Small Claims Court: http://wicourts.gov.
- *Legal Update 03.07*, "Residential Rental Primer," at www.wra.org/LU0307.
- *Legal Update 98.10*, "Residential Rental Practice Rules," at www.wra.org/LU9810.


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