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The California Landlord's Law Book: Rights & Responsibilities

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Attorneys David Brown & Janet Portman, & Ralph Warner, J.D.

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Please note

We believe accurate, plain-English legal information should help you solve many of your own legal problems. But this text is not a substitute for personalized advice from a knowledgeable lawyer. If you want the help of a trained professional—and we'll always point out situations in which we think that's a good idea—consult an attorney licensed to practice in your state.

About the Authors

David Brown practices law in the Monterey, California, area, where he has represented both landlords and tenants in hundreds of court cases—most of which he felt could have been avoided if both sides were more fully informed about landlord/tenant law. Brown, a graduate of Stanford University (chemistry) and the University of Santa Clara Law School, is the author of *Fight Your Ticket & Win in California*, *Beat Your Ticket: Go to Court & Win,* and *The California Landlord's Law Book: Evictions,* and the coauthor of *The Guardianship Book for California*.

Ralph Warner is founder and publisher of Nolo, and an expert on landlord/tenant law. Ralph has been a landlord, a tenant, and, for several years, a property manager. Having become fed up with all these roles, he bought a single-family house.

Janet Portman, an attorney and Nolo's Co-Executive Editor, received undergraduate and graduate degrees from Stanford and a law degree from Santa Clara University. She is an expert on landlord/tenant law and the coauthor of *Every Landlord's Legal Guide, Every Landlord's Guide to Finding Great Tenants, Every Tenant's Legal Guide, Renters' Rights, Leases & Rental Agreements,* and *Negotiate the Best Lease for Your Business*. Janet writes a nationally syndicated column on landlord-tenant issues, "Rent It Right," which appears in the *Chicago Tribune* and *The Boston Globe*, among other newspapers.

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Appendixes

The California Landlord's Legal Companion

Here is a concise legal guide for people who own or manage residential rental property in California. It has two main goals: to explain California landlord/tenant law in as straightforward a manner as possible, and to help you use this legal knowledge to anticipate and, where possible, avoid legal problems.

California-Specific Legal Information

This book concentrates on the dozens of state legal rules associated with most aspects of renting and managing residential real property. For example, we include information on leases, rental agreements, managers, credit checks, security deposits, discrimination, invasion of privacy, the landlord's duty to maintain the premises (and tenant rights if you don't), liability for tenant exposure to mold, how to deal with bedbugs, how to increase the rent or terminate for nonpayment of rent, what you can legally do with a tenant's abandoned property, and much more. This book also covers key federal laws that affect landlords, such as lead-paint disclosure rules, and highlights important local rules, particularly rent control (see below) and health and safety standards.

California Legal Forms and Notices

We provide over 40 practical, easy-to-use, and legal forms, notices, letters, and checklists throughout this book, including rental applications, leases, repair notices, warning letters, notice of entry forms, security deposit itemizations, move-in and move-out letters, disclosure forms, three-day nonpayment of rent and other termination notices, and more. We clearly explain what form you need for different situations, with clear instructions on how to prepare the form (including how to provide proper legal notice when required). We also provide filled-in samples in the text.

All forms are available for download on the Nolo website on a special companion page for this book as described below.

TIP

Put it in writing. Using the forms, checklists, and notices included in this book will help you avoid legal problems in the first place, and minimize those that can't be avoided. The key is to establish a good paper trail for each tenancy, beginning with the rental agreement and lease through a termination notice and security deposit itemization. Such documentation is often legally required and will be extremely valuable if attempts at resolving disputes with your tenant fail.

California Rent Control Rules

Many of you will own rental properties in areas covered by rent control ordinances. These laws not only establish how much you can charge for most residential living spaces, they also override state law in a number of other ways. For example, many rent control ordinances restrict a landlord's ability to terminate month-to-month tenancies by requiring "just cause for eviction." We handle rent control in three ways: First, as we explain your rights and responsibilities under state law in the bulk of this book, we indicate those areas in which rent control laws are likely to modify or change these rules. Second, we provide a detailed discussion of rent control in Chapter 4. Third, we provide summaries (see Appendix A) of key rent control rules, particularly how they affect evictions, in 16 California cities with rent control. If you own rental property in a rent control city, it's crucial that you have a current copy of

the local ordinance. You can get a copy from your city rent control board or online.

How (and Why) to Use This Book

This book provides a roughly chronological treatment of subjects important to landlords—beginning with taking rental applications and ending with returning security deposits when a tenant moves out. But you shouldn't wait until a problem happens to educate yourself about the law.

With sensible planning, you can either minimize—or avoid—the majority of serious legal problems encountered by landlords. For example, in Chapter 11 we show you how to plan ahead to deal with those few tenants who will inevitably try to invent bogus reasons why they were legally entitled to withhold rent. Similarly, in Chapter 9 we discuss ways to be sure that you, your managers, and other employees know and follow antidiscrimination laws and, at least as important, make it clear that you are doing so. We take you through most of the important tasks of being a landlord. Most of these tasks you can do yourself, but we are quick to point out situations when an attorney's help will be useful or necessary.

We believe that in the long run a landlord is best served by establishing a positive relationship with tenants. Why? First, because it's our personal view that adherence to the law and principles of fairness is a good way to live. Second, your tenants are your most important economic asset and should be treated as such. Think of it this way: From a long-term perspective, the business of renting residential properties is often less profitable than is cashing in on the appreciation of that property. Your tenants are crucial to this process, since it is their rent payments that allow you to carry the cost of the real property while you wait for it to go up in value. And just as other businesses place great importance on conserving natural resources, it makes sense for you to adopt legal and practical strategies designed to establish and maintain a good relationship with your tenants.

Evicting a Tenant

This book, *The California Landlord's Law Book: Rights & Responsibilities,* is the first of a two-volume set. It explains how to terminate a tenancy, but if you need to evict a tenant, you'll want to consult the second volume, *The California Landlord's Law Book: Evictions.* The *Evictions* volume provides a step-by-step guide and all the necessary forms and instructions for ending a tenancy and doing your own evictions.

Renting Out a Condo or Townhouse

If you are renting out your condominium or townhouse, use this book in conjunction with your homeowners' association's CC&Rs (covenants, conditions, and restrictions). These rules may affect how you structure the terms and conditions of the rental and how your tenants may use the unit. For example, many homeowners' associations control the number of vehicles that can be parked on the street. If your association has a rule like this, your renters will need to comply with it, and you cannot rent to tenants with too many vehicles without running afoul of the rules.

You need to be aware that an association rule may be contrary to federal, state, or local law. For instance, an association rule that banned all persons of a certain race or religion from the property would not be upheld in court. And owners of condominium units in rent-controlled areas must comply with the ordinance, regardless of association rules to the contrary. Unfortunately, it's not always easy to know whether an association rule will pass legal muster. To know whether a particular rule is legally permissible is an inquiry that, in some cases, is beyond the scope of this book.

Who Should Not Use This Book

Do not use this book or forms in the following situations

- **Renting commercial property for your business.** Legal rules and practices vary widely for commercial rentals—from how rent is set to the length and terms of leases.
- **Renting out a space or unit in a mobile home park or marina.** Different rules often apply. For details, check out the California Department of Housing and Community Development publication, *2012*

Mobilehome Residency Law, available at www.hcd.ca.gov/codes/mp/2012MRL.pdf.

- **Renting out a live/work unit (such as a loft).** While you will be subject to state laws governing residential units, you may have additional requirements (imposed by building codes) that pertain to commercial property as well. Check with your local building inspector's office for the rules governing live/work units.

Get Updates, Forms, and More at This Book's Companion Page on Nolo.com

You can download the lease, rental agreement, and all of the other forms and agreements in this book at:
www.nolo.com/back-of-book/LBRT.html
When there are important changes to the information in this book, we'll post updates on this same dedicated page (what we call the book's companion page). You'll find other useful information on this page, too, such as author blogs, podcasts, and videos. See the end of the table of contents for a complete list of forms available on nolo.com.

Abbreviations Used in This Book

We make frequent references to the California Civil Code (CC) and the California Code of Civil Procedure (CCP), important statutes that set out landlords' rights and responsibilities. We use the following standard abbreviations throughout this book for these and other important statutes and court cases covering landlord rights and responsibilities. There are many times when you will surely want to refer to the complete statute or case. See Chapter 8 for advice on how to find a specific statute or case and do legal research.

California Codes	
CC	Civil Code
CCP	Code of Civil Procedure
UHC	Uniform Housing Code
B&P	Business and Professions Code
H&S	Health and Safety Code
CCR	California Code of Regulations
Ed. Code	Education Code
Federal Laws	
U.S.C.	United States Code
Cases	
Cal. App.	California Court of Appeal
Cal. Rptr.	California Court of Appeal and California Supreme Court
Cal.	California Supreme Court
F. Supp.	United States District Court
F.2d, F.3d	United States Court of Appeal
U.S.	United States Supreme Court
Opinions	
Ops. Cal. Atty. Gen.	California Attorney General Opinions

CHAPTER

1

Renting Your Property: How to Choose Tenants and Avoid Legal Pitfalls

FORMS IN THIS CHAPTER

Chapter 1 includes instructions for and samples of the following forms:

- Rental Application
- Consent to Background and Reference Check
- Application Screening Fee Receipt
- Disclosures by Property Owner(s)
- Tenant References
- Notice of Denial Based on Credit Report or Other Information, and
- Receipt and Holding Deposit Agreement.

The Nolo website includes downloadable copies of these forms. See Appendix B for the link to the forms in this book.

All landlords typically follow the same process when renting property. We recognize that a landlord with 40 (or 400) units has different business challenges than a person with an in-law cottage in the backyard or a duplex around the corner. Still, the basic process of filling rentals remains the same:

- Decide the terms of your rental, including rent, deposits, and the length of the tenancy.
- Advertise your property.
- Accept applications.
- Screen potential tenants.
- Choose someone to rent your property.

In this chapter, we examine the practical and legal aspects of each of these steps, with an eye to avoiding several common legal problems. Because the topic of discrimination is so important we devote a whole chapter to it later in the book (Chapter 9), including advice on how to avoid discrimination in your tenant selection process.

RESOURCE

For comprehensive information and over 40 forms on advertising, showing your rental, screening applicants, and accepting and rejecting prospects, see *Every Landlord's Guide to Finding Great Tenants,* by Janet Portman (Nolo).

Adopt a Rental Plan and Stick to It

Before you advertise your property for rent, you'll want to make some basic decisions, which will form the backbone of your lease or rental agreement—how much rent to charge, when it is payable, whether to offer a fixed-term lease or a month-to-month tenancy, and how much of a security deposit to require. You'll also need to decide the responsibilities of a manager (if any) in renting out your property.

RELATED TOPIC

If you haven't made these important decisions, the details you need are in Chapters 2, 3, 5, and 6.

In renting residential property, be consistent when dealing with prospective tenants. The reason for this is simple: If you don't treat all tenants more or less equally—for example, if you arbitrarily set tougher standards for renting to a racial minority—you are violating federal laws and opening yourself up to lawsuits.

Of course, there will be times when you will want to bargain a little with a prospective tenant—for example, you may let a tenant have a cat in exchange for paying a higher security deposit (as long as it doesn't exceed the legal limits set by law). As a general rule, however, you're better off figuring out your rental plan in advance and sticking to it.

Advertising Rental Property

In some areas, landlords are lucky enough to fill all vacancies by word of mouth. If you fit this category, skip to the next section.

There is one crucial point you should remember about advertising: Where you advertise is more important than how you advertise. For example, if you rent primarily to college students, your best bet is the campus newspaper or housing office. Whether you simply put a sign in front of your apartment building, post a notice on Craigslist, or work with a rental service or property management company, be sure the way you advertise reaches a sufficient number of the sort of people who are likely to meet your rental criteria.

Legally, you should have no trouble if you follow these simple rules:

Make sure the price in your ad is an honest one. If a tenant shows up promptly and agrees to all the terms set out in your ad, you may run afoul of the law if you arbitrarily raise the price. This doesn't mean you are always legally required to rent at your advertised price, however. If a tenant asks for more services or different lease terms, which you feel require more rent, it's fine to bargain and raise your price. And if competing tenants begin a bidding war, there's nothing illegal about accepting more rent—as long as it is truly freely offered. However, be sure to abide by any applicable rent limits in local rent control areas.

Don't advertise something you don't have. Some large landlords, management companies, and rental services have advertised units that weren't really available in order to produce a large number of prospective

tenants who could then be "switched" to higher-priced or inferior units. This type of advertising is illegal, and many property owners have been prosecuted for bait-and-switch practices.

Be sure your ad can't be construed as discriminatory. Ads should not mention age, sex, race, religion, disability, or adults-only—unless yours is senior citizens' housing. (Senior citizens' housing must comply with CC § 51.3. Namely, it must be reserved for persons over age 62, or be a complex of 150 or more units (35 in nonmetropolitan areas) for persons over age 55.) Neither should ads imply through words, photographs, illustrations, or language that you prefer or discriminate against renters because of their age, sex, race, and so on. For example, if your property is in a mixed Chinese and Hispanic neighborhood and if you advertise only in Spanish, you may be courting a fair housing complaint. In addition, any discrimination against any group that is unrelated to a legitimate landlord concern is illegal. For example, it's discriminatory to refuse to rent to unmarried couples, because the legal status of their relationship has nothing to do with whether they will be good, stable tenants.

> **EXAMPLE:** An ad for an apartment that says "Young, female student preferred" is illegal, since sex and age discrimination are forbidden by both state and federal law. Under California law, discrimination based on the prospective tenant's occupation also is illegal, since there is no legitimate business reason to prefer tenants with certain occupations over others.

If you have any legal and nondiscriminatory rules on important issues, such as no pets, it's a good idea to put them in your ad. This will weed out those applicants who don't like your terms. But even if you don't include a "no pets" clause, you won't be obligated to rent to applicants with pets. You can still announce the policy at the time you interview a prospective tenant—and you can use your discretion when deciding whether their pets are acceptable.

Dealing With Prospective Tenants

It's good business, as well as a sound legal protection strategy, to develop a system for screening prospective tenants. Whether you handle reference checking and other tasks yourself or hire a manager or property management company, your goal is the same—to select tenants who will pay their rent on time, keep their rental in good condition, and not cause you any legal or practical hassles later.

TIP

Never, never let anyone stay in your property on a temporary basis. Even if you haven't signed a rental agreement or accepted rent, giving a person a key or allowing him or her to move in as much as a toothbrush can give that person the legally protected status of a tenant. Then, if the person won't leave voluntarily, you will have to file a lawsuit to evict him or her.

The Rental Application

Each prospective tenant—everyone age 18 or older who wants to live in your rental property—should fill out a written application. This is true whether you're renting to a married couple sharing an apartment or to a number of unrelated roommates.

See the sample Rental Application below.

FORM

You'll find a downloadable copy (both PDF and RTF versions) of the Rental Application on the Nolo website. See Appendix B for the link to the forms in this book. You can use the PDF version (print as is and give it to your applicants) or the RTF version. You can edit the RTF version and add or delete questions, but be aware that extensive changes might affect the form's layout (the margins and available space for answers).

Complete the box at the top of the Rental Application, listing the property address, details on the rental term and amounts due before the tenants may move in.

Ask all applicants to fill out a Rental Application form, and accept applications from everyone who's interested in your rental property. Refusing to take an application may unnecessarily anger a prospective tenant, and will make him or her more likely to look into the possibility of filing a discrimination complaint. Make decisions about who will rent the property later.

The Rental Application form includes a section for you to note the amount and purpose of any credit

Rental Application

Separate application required from each applicant age 18 or older.

THIS SECTION TO BE COMPLETED BY LANDLORD

Address of Property to Be Rented: 178 West 8th Street, Apt. 6, Oakland, CA

Rental Term: ☐ month to month ☑ lease from March 1, 20xx to February 28, 20xx

Amounts Due Prior to Occupancy

First month's rent	$ 1,200
Security deposit	$ 1,800
Credit-check fee	$ 30
Other (specify):	$
TOTAL	$ 3,030

Applicant

Full Name—include all names you use(d): Hannah Silver

Home Phone: 510-555-3789 Work Phone: 510-555-4567 Cell Phone:

Fax (By providing this number, I agree to receive Fax transmissions from the landlord or landlord's agent):

Email: hannah@coldmail.com Social Security Number: 123-000-4567

Driver's License Number/State: CA V123456

Other Identifying Information:

Vehicle Make: Toyota Model: Camry Color: White Year: 2008

License Plate Number/State: CA 123456

Additional Occupants

List everyone, including children, who will live with you:

Full Name	Relationship to Applicant
Dennis Olson	Husband

Rental History

Current Address: 39 Maple Street, Oakland, CA

Dates Lived at Address: May 2000 – date Reason for Leaving: Wanted bigger place

Landlord/Manager: Jane Tucker Landlord/Manager's Phone: 510-555-7523

Previous Address: 1215 Middlebrook Road, Palo Alto, CA

Dates Lived at Address: June 1997 – May 2000 Reason for Leaving: New job in East Bay

Landlord/Manager: Ed Palermo Landlord/Manager's Phone: 650-555-3711

Previous Address: 152 Highland Drive, Santa Cruz, CA

Dates Lived at Address: Jan. 1996 – June 1997 Reason for Leaving: Wanted to live closer to work

Landlord/Manager: Millie & Joe Lewis Landlord/Manager's Phone: 831-555-9999

Employment History

Name and Address of Current Employer: Argon Works, 54 Nassau Road, Berkeley, CA

Phone: 510-555-2333

Name of Supervisor: Tom Schmidt Supervisor's Phone: 510-555-2333

Dates Employed at This Job: 2000 – date Position or Title: Marketing Director

Name and Address of Previous Employer: Palo Alto Tribune

13 Junction Road, Palo Alto Phone: 650-555-2366

Name of Supervisor: Dory Krossber Supervisor's Phone: 650-555-1111

Dates Employed at This Job: 1996 –2000 Position or Title: Marketing Associate

Income

1. Your gross monthly employment income (before deductions):	$ 5,000
2. Average monthly amounts of other income (specify sources):	$
husband's salary	$ 4,000
	$
TOTAL:	$ 9,000

Credit and Financial Information

Bank/Financial Accounts	Account Number	Bank/Institution	Branch
Savings Account:	1222345	Cal West	Berkeley, CA
Checking Account:	789101	Cal West	Berkeley, CA
Money Market or Similar Account:	234789	City Bank	San Francisco, CA

Credit Accounts & Loans	Type of Account (Auto loan, Visa, etc.)	Account Number	Name of Creditor	Amount Owed	Monthly Payment
Major Credit Card:	Visa	123456	City Bank	$1,000	$500
Major Credit Card:	Dept. Store	45789	Macy's	$500	$500

Loan (mortgage, car, student loan, etc.):

Other Major Obligation:

Miscellaneous

Describe the number and type of pets you want to have in the rental property: No pets

Describe water-filled furniture you want to have in the rental property: None

Do you smoke? ☐ yes ☒ no

Have you ever: Filed for bankruptcy? ☐ yes ☒ no Been sued? ☐ yes ☒ no

Been evicted? ☐ yes ☒ no Been convicted of a crime? ☐ yes ☒ no

Explain any "yes" listed above:

References and Emergency Contact

Personal Reference: Joan Stanley Relationship: friend, co-worker

Address: 785 Spruce Street, Berkeley

Phone: 510-555-4578

Personal Reference: Marnie Swatt Relationship: friend

Address: 785 Pierce Avenue, San Francisco

Phone: 415-555-7878

Contact in Emergency: Connie and Martin Silver Relationship: Parents

Address: 123 Gorham Street, Princeton, N.J.

Phone: 609-555-8765

I certify that all the information given above is true and correct and understand that my lease or rental agreement may be terminated if I have made any material false or incomplete statements in this application. I authorize verification of the information provided in this application from my credit sources, credit bureaus, current and previous landlords and employers, and personal references. I understand that if I have initiated a "security freeze" on my credit information with any of the credit reporting agencies, I will promptly lift the freeze for a reasonable time so that my credit report may be accessed by the Landlord/Manager; and I understand that if I fail to do so, the Landlord/Manager may consider this an incomplete application. (CC § 1785.11.2.) This permission will survive the expiration of my tenancy.

Feb. 15, 20xx — Date

Hannah Silver — Applicant

Notes (Landlord/Manager):

check fee. (Credit check fees are discussed below.) If you do not charge credit check fees, simply fill in "none" or "N/A."

Be sure all potential tenants sign the Rental Application, authorizing you to verify the information and references. (Some employers and others require written authorization before they will talk to you.) You may also want to prepare a separate authorization, so that you don't need to copy the entire application and send it off every time a bank or employer wants proof that the tenant authorized you to verify the information. See the sample Consent to Background and Reference Check, below.

FORM

You'll find a downloadable copy of the Consent to Background and Reference Check on the Nolo website. See Appendix B for the link to the forms in this book.

CAUTION

Don't take incomplete rental applications. Landlords are often faced with anxious, sometimes desperate people who need a place to live immediately. Some people tell terrific hard-luck stories as to why normal credit- and reference-checking rules should be ignored in their case and why they should be allowed to move right in. Don't believe any of it. People who have planned so poorly that they will literally have to sleep in the street if they don't rent your place that day are likely to come up with similar emergencies when it comes time to pay the rent. Always make sure that prospective tenants complete the entire Rental Application, including Social Security number (or an alternative; see below), driver's license number or other identifying information (such as a passport number), current employment, and emergency contacts. You may need this information later to track down a tenant who skips town leaving unpaid rent or abandoned property. (See Chapters 19 and 21.)

Consent to Background and Reference Check

I authorize Jan Gold

to obtain information about me from my credit sources, current and previous landlords and employers, and personal references, to enable Jan Gold

to evaluate my rental application. I authorize my credit sources, credit bureaus, current and previous landlords and employers, and personal references to disclose to Jan Gold

information about me that is relevant to Jan Gold's decisions regarding my application and tenancy. This permission will survive the expiration of my tenancy.

Sandy Meyer
Name

4 Elm Road, Sacramento, CA
Address

916-555-9876
Phone Number

May 2, 20xx
Date

Sandy Meyer
Applicant

An Alternative to Requiring Social Security Numbers

You may encounter an applicant who does not have an SSN (only citizens or immigrants authorized to work in the United States can obtain one). For example, someone with a student visa will not normally have an SSN. If you categorically refuse to rent to applicants without SSNs, and these applicants happen to be foreign students, you're courting a fair housing complaint.

Fortunately, nonimmigrant aliens (such as people lawfully in the United States who don't intend to stay here permanently, and even those who are here illegally) can obtain an alternate piece of identification that will suit your needs as well as an SSN. It's called an Individual Taxpayer Identification Number (ITIN), and is issued by the IRS to people who expect to pay taxes. Most people who are here long enough to apply for an apartment will also be earning income while in the United States. and will therefore have an ITIN. Consumer reporting agencies and tenant screening companies can use an ITIN to find the information they need to effectively screen an applicant. On the Rental Application, use the line "Other Identifying Information" for an applicant's ITIN.

Credit Check and Screening Fees

State law limits credit check or application fees you can charge prospective tenants, and specifies what you must do when accepting these types of screening fees. (CC § 1950.6.) You can charge only "actual out-of-pocket costs" of obtaining a credit or similar tenant "screening" report, plus "the reasonable value of time spent" by you or your manager in obtaining a credit report or checking personal references and background information on a prospective tenant. We cover credit reports and other screening efforts below.

To determine the maximum screening fee you can charge each applicant, go to the Consumer Price Index website at www.bls.gov/cpi and search for the article, "How to Use the Consumer Price Index for Escalation," which refers you to a calculator. (As of 2013, you can charge a screening fee up to $42.)

Upon an applicant's request, you must provide a copy of any consumer credit report you obtained on the individual. You must also give or mail the applicant a receipt itemizing your credit check and screening fees. If you end up spending less (for the credit report and your time) than the fee you charged the applicant, you must refund the difference. (This may be the entire screening fee if you never get a credit report or check references on an applicant.)

Finally, you cannot charge any screening or credit check fee if you don't have a vacancy and are simply putting someone on a waiting list (unless the applicant agrees to this in writing).

In light of state limits on credit check fees, we recommend that you:

- charge a credit check fee only if you intend to actually obtain a credit report
- charge only your actual cost of obtaining the report, plus $10, at most, for your time and trouble
- charge no more than $42 per applicant in any case (unless you include an adjustment based on the CPI)
- provide an itemized receipt at the same time you take an individual's rental application (a sample receipt is shown below), and
- mail each applicant a copy of his or her credit report as a matter of practice.

FORM

You'll find a downloadable copy of the Application Screening Fee Receipt on the Nolo website. See Appendix B for the link to the forms in this book.

CAUTION

Nonrefundable move-in fees are illegal. Any "payment, fee, deposit, or charge" that is intended to be used to cover unpaid rent or damage or that is intended to compensate a landlord for costs associated with move-in, is legally considered a security deposit and is covered by state deposit laws. Security deposits are *always* refundable. (Chapter 5 covers security deposits.)

Terms of the Rental

Be sure your prospective tenant knows all your general requirements and any special rules and regulations before you get too far in the process. This will help avoid situations where your tenant backs out at the last

Application Screening Fee Receipt

This will acknowledge receipt of the sum of $ 42.00 by Moe Manager
Terri D. Tenant [Property Owner/Manager] from
_____ [Applicant]
as part of his/her application for the rental property at 123 Polk Place #4,
Palo Alto, CA 94303 [Rental Property Address].

As provided under California Civil Code Section 1950.6, here is an itemization of how this $ 42.00 screening fee will be used: credit check and handling fee

Actual costs of obtaining Applicant's credit/screening report $ 25.00

Administrative costs of obtaining credit/screening report and checking Applicant's references and background information $ 17.00

Total screening fee charged $ 42.00

April 1, 20xx — Date
Terri D. Tenant — Applicant

April 1, 20xx — Date
Moe Manager — Owner/Manager

minute (he thought he could bring his three dogs and your lease prohibits pets) and help minimize future misunderstandings.

To put together a rental agreement or lease, see Chapter 2. Once you've signed up a tenant and want to clearly communicate your rules and regulations, see Chapter 7.

Landlord Disclosures

California landlords are legally obligated to make several disclosures to prospective tenants. You can add the military, utility, and environmental disclosures to the rental application or put them on a separate sheet of paper attached to the rental application. A sample form you can use to make written disclosures is shown below.

FORM

You'll find a downloadable copy of the Disclosures by Property Owner(s) form on the Nolo website. See Appendix B for the link to the forms in this book.

You can also decide to make disclosures part of your lease or rental agreement. (See Clause 27 in Chapter 2.) The Megan's Law disclosure must be on the lease or rental agreement. (See Clause 26, State Database Disclosure, in Chapter 2.)

Megan's Law Database

Every written lease or rental agreement must inform the tenant of the existence of a statewide database of the names of registered sexual offenders. Members of the public may view the state's Department of Justice website to see whether a certain individual is on

the list. You must use the following legally required language for this disclosure:

> **Notice:** Pursuant to Section 290.46 of the Penal Code, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the Department of Justice at www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides.

Chapter 12 explains your duties under this law in more detail. The rental agreement and lease in Appendix C include this mandatory disclosure (see Clause 16).

Location Near Former Military Base

If your property is within a mile of a "former ordnance location"—an abandoned or closed military base in which ammunition or military explosives were used—you must notify all prospective tenants in writing. (CC § 1940.7.) You can use the sample Disclosures by Property Owner(s) form shown below to do this.

It is not necessary to warn prospective tenants of the existence of current ordnance locations, such as presently existing army or navy bases.

Although there are no penalties stated in the law for failure to warn, and although the law applies only to former ordnance locations actually known by the owner, it's only a matter of time before someone sues their landlord for negligently failing to warn of a former military base the landlord "should have known about." Therefore, if you have the slightest idea your property is within a mile of a former military base or training area, check it out. You might start by asking the reference librarian at a nearby public library or by writing a letter to your local Congressional representative. If you have a particular location in mind, you can also check with the County Recorder, who will show you how to trace the ownership all the way back to the turn of the twentieth century for any indication the property was at one time owned or leased by the government.

Periodic and Other Pest Control

Registered structural pest control companies have long been required to deliver warning notices to owners and tenants of properties that were about to be treated as part of an ongoing service contract—but the warning notice had to be issued only once, at the time of the initial treatment. This meant that subsequent tenants would not receive the warning. Now, the landlord must give a copy of this notice to every new tenant who occupies a rental unit that is serviced periodically. The notice must contain information about the frequency of treatment. (B&P § 8538; CC § 1940.8.)

Landlords who apply pesticides on, in, or near a rental building or unit (including a children's play area) whose occupant is a licensed day care provider must provide advance written notice prior to doing so. See "Family Day Care Homes" in Chapter 2.

Shared Utility Arrangements

State law requires property owners to disclose to all prospective tenants, before they move in, any arrangements where a tenant might wind up paying for someone else's gas or electricity use. (CC § 1940.9.) This would occur, for example, where a single gas or electric meter serves more than one unit, or where a tenant's gas or electric meter also measures gas or electricity that serves a common area—such as a washing machine in a laundry room or even a hallway light not under the tenant's control. We address this issue in detail in Chapter 2. While you may use the Disclosures by Property Owner(s) form shown below, your lease or rental agreement is the more appropriate place to disclose shared utility arrangements. (See Clause 9 of our sample lease and rental agreement.)

Intentions to Demolish the Rental

If you plan on demolishing your rental property, you or your agent must give written notice to applicants, new tenants, and current tenants. (CC § 1940.6.) The steps you must follow depend on whether you're notifying applicants, new tenants, or current tenants.

- **Applicants and new tenants.** If you have applied for a permit to demolish their unit, you must disclose this before entering into a rental agreement or even before accepting a credit check fee or negotiating "any writings that would initiate a tenancy," such as a holding deposit. (CC § 1940.6(a)(1)(D).)
- **Existing tenants (including tenants who have signed a lease or rental agreement but haven't yet moved in).**

Disclosures by Property Owner(s)

The owner(s) of property located at 1234 State Avenue, Apartment 5, Los Angeles, California

make(s) the following disclosure(s) to prospective tenant(s) and/or employee(s):

Location near former military base. State law requires property owners to disclose to all prospective tenants, before they sign any rental agreement or lease, if the property they are seeking to rent is within one mile of a former ordnance area (military base) as defined by California Civil Code Section 1940.7.

Details regarding the former military base near the property listed above are as follows:

Between 1942–1945, the U.S. Army used the nearby area bounded by 6th and 7th Streets and 1st and 3rd Avenues in the City of Los Angeles as a reserve training area. Unexploded rifle ammunition has been found there.

9/19/20xx — Date

Daryl White — Owner's Signature

I have read and received a copy of the above Disclosures by Property Owner(s).

9/19/20xx — Date

Susan Johnson — Signature

9/19/20xx — Date

Thomas Johnson — Signature

These tenants are entitled to notice *before* you apply for a demolition permit (but the law doesn't specify how much advance warning you must give the tenant). The notice must include the earliest approximate date that you expect the demolition to occur, and the earliest possible date that you expect the tenancy will terminate (you cannot demolish prior to the estimated termination date).

This disclosure requirement packs a punch—if you fail to give written notification as explained above, a tenant or prospective tenant can sue you for damages (and attorney's fees, which makes such a suit attractive to a lawyer). You can be ordered to pay the tenant's actual damages (such as the cost of living in a motel while looking for a new residence) and moving expenses, as well as a civil penalty (payable to the tenant) of up to $2,500.

Environmental Hazards

Federal law requires landlords to warn tenants about the presence of asbestos and lead paint hazards in the rental property. The subject of landlord liability for environmental hazards is discussed in detail in Chapter 12, and a sample copy of the required lead-based paint disclosure form is included there.

FORM

You'll find a downloadable copy of the required lead-based paint disclosure form on the Nolo website. See Appendix B for the link to the forms in this book.

California landlords must also disclose the presence of dangerous mold. If you know that a rental unit has toxic mold levels exceeding California Department of Public Health (CDPH) guidelines, you must disclose that fact to current and prospective tenants. (H&S § 26147.) As of this writing, however, the CDPH has not yet adopted these guidelines. When they do, they will post them on their website at www.dhs.ca.gov. Chapter 12 discusses mold in detail.

Smoking

Landlords are free to specify that some parts (or all of) their property will be smoke free. (CC § 1947.5.) For example, you may want to prohibit smoking in individual units, but permit it in common areas or certain common areas. In Chapter 2, we explain how to use Clause 25 to describe your policy.

Before you get to the point of negotiating a lease or rental application with applicants, however, you may want to tell them about your policy. You don't want complaints later from a nonsmoker who didn't realize that you permitted smoking in the common areas. Nor do you want the complaint of a smoker who assumed that smoking in an individual unit would be okay.

Local Disclosures

Check your local ordinance, particularly if your rental unit is covered by rent control, for any city or county disclosure requirements. To find yours, check your local government website, or contact the office of your mayor, city manager, or county administrator.

Checking Background, References, and Credit History of Potential Tenants

If an application looks good, the next step is to follow up thoroughly. The time and money you spend are the most cost-effective expenditures you'll ever make.

CAUTION

Be consistent in your screening. You risk a charge of illegal discrimination if you screen certain categories of applicants more stringently than others. Make it your policy, for example, to always require credit reports; don't just get a credit report for a single-parent applicant.

Here are six steps of a very thorough screening process. You should always go through at least the first three to check out the applicant's previous landlords, income, and employment, and run a credit check.

Check With Previous Landlords and Other References

Always call previous landlords or managers for references—even if you have a written letter of reference from a previous landlord. Also, call previous employers and personal references listed on the rental application.

To organize the information you gather from these calls, use the Tenant References form, which lists key

questions to ask previous landlords, managers, and other references.

See the sample Tenant References form, below.

FORM

You'll find a downloadable copy of the Tenant References form on the Nolo website. See Appendix B for the link to the forms in this book.

Be sure to take notes of all your conversations and keep them on file. This information will come in handy should a rejected tenant ever ask why he wasn't chosen or file a discrimination charge against you. (These issues are covered in the discussion of record keeping, below.)

Bad tenants often provide phony references. Make sure you speak to a legitimate landlord or manager, not a friend of the prospective tenant posing as one. One suggestion is to call the number given for the previous landlord or manager and simply ask for the landlord or manager by name, rather than begin by saying that you are checking references. If the prospective tenant has really given you a friend's name, the friend will probably say something that gives away the scam.

If you still have questions, consider driving to the former address and checking things out in person. Finally, if you have any doubts, ask the previous landlord or manager to pull out the tenant's rental application so you can verify certain facts, such as the tenant's Social Security number. If the so-called landlord can't do this, you are perhaps being conned.

Verify a Potential Tenant's Income and Employment

You want to make sure that all tenants have the income to pay the rent each month. Call the prospective tenant's employer to verify income and length of employment. Again, make notes of your conversations on the Tenant References form, discussed above.

Some employers require written authorization from the employee. You will need to mail or fax them a copy of the release included at the bottom of the Rental Application form, or the separate Consent to Background and Reference Check form.

If you feel that verifying an individual's income by telephone or accepting a note from her boss is not reliable enough, you may require applicants to provide copies of recent paycheck stubs. It's also reasonable to require documentation of other sources of income (such as disability or other benefits checks). Where a large portion of an applicant's income is from child support or alimony payments, you might want to ask for a copy of the court decree for the support payments. However, don't go overboard by asking for copies of tax returns or bank statements, except possibly from self-employed persons.

How much income is enough? Think twice before renting to someone if the rent will take more than one-third of their income, especially if they have a lot of debts. Be careful, however, if you're dealing with an applicant who is disabled and who cannot meet the "one-third" standard. If that applicant is otherwise qualified and presents you with a cosigner, you will need to evaluate the cosigner's financial ability and trustworthiness, despite any rules you may have against dealing with cosigners. (*Giebeler v. M & B Associates*, 343 F.3d 1143 (2003).) Cosigners are discussed in detail in Chapter 2; your duty to provide accommodations for disabled renters is covered in Chapter 5.

Obtain a Credit Report From a Credit Reporting Agency

Many landlords find it essential to check a tenant's credit history with at least one credit reporting agency. These agencies collect and sell credit and other information about consumers—for example, whether they pay their bills on time or, if reported by prior landlords, whether they've failed to pay the rent. As long as you use the information only to help you decide whether to rent to that person, or on what terms, you do not need the applicant's consent.

However, many people *think* that you must have their written consent before pulling a credit report to evaluate them as prospective tenants. For that reason, we have explicitly called for applicants' consent in our application (and on a separate form). But there's another reason for our caution: This written consent should help you if later, when the applicant is a tenant (or an ex-tenant), you decide that you need an updated credit report. For example, you may want to consult a current report in order to help you decide whether to sue a tenant who has skipped out and owes rent. Without a broadly written consent, your use of a report

Tenant References

Name of Applicant: Will Berford

Address of Rental Unit: 123 State Street, Los Angeles, CA

Previous Landlord or Manager

Contact (name, property owner or manager, address of rental unit): Kate Steiner, 345 Mercer Street, Los Angeles, 310-555-5432

Date: February 4, 20xx

Questions

When did tenant rent from you (move-in and move-out dates)? December 2006 to date

What was the monthly rent? $ $750

Did tenant pay rent on time? ☐ Yes ☒ No A week late a few times

Was tenant considerate of neighbors—that is, no loud parties and fair, careful use of common areas? ☒ Yes ☐ No

If not, explain:

Did tenant have any pets? ☒ Yes ☐ No If so, were there any problems? Yes, he had a cat, contrary to rental agreement

Did tenant make any unreasonable demands or complaints? ☐ Yes ☒ No If so, explain:

Why did tenant leave? He wants to live someplace that allows pets

Did tenant give the proper amount of notice before leaving? Yes

Did tenant leave the place in good condition? Did you need to use the security deposit to cover damage?

No problems

Any particular problems you'd like to mention? No

Would you rent to this person again? ☒ Yes ☐ No Yes, but without pets

Other Comments:

Employment Verification

Contact (name, company, position): Brett Field, Manager, Chicago Car Company

Date: February 5, 20xx

Salary: $60,000 + bonus Dates of Employment: March 2004 to date

Comments: No problems. Fine employee. Will is responsible and hardworking.

Personal Reference

Contact (name and relationship to applicant): Sandy Cameron, friend

Date: February 5, 20xx How long have you known the applicant? five years

Would you recommend this person as a prospective tenant? ☒ Yes ☐ No

Comments: Will is very neat and responsible. He's reliable and will be a great tenant.

Credit and Financial Information

Mostly fine—see attached credit report

Notes, Including Reasons for Rejecting Applicant

Applicant had a history of late rent payments and kept a cat, contrary to the rental agreement.

at that time might be illegal. (FTC "Long" Opinion Letter, July 7, 2000.)

Never order a credit report unless you are doing so in order to evaluate a potential (or current or ex-) tenant. If you ask for a report for any other reason (such as a wish to check out the solvency of your future son-in-law or the resources of your ex-business partner whom you're considering suing), you could face a lawsuit and penalties of thousands of dollars.

Take Care Handling Credit Reports

Under federal law, you must take special care that credit reports (and any information stored elsewhere that is derived from credit reports) are stored in a secure place where only those who "need to know" have access. ("Disposal Rule" of the Fair and Accurate Credit Transactions Act of 2003, known as the FACT Act, 69 Fed. Reg. 68690.) In addition, you must dispose of such records when you're done with them, by burning them or using a shredder. This portion of the FACT Act was passed in order to combat the increasing reports of identity theft. It applies to every landlord who pulls a credit report, no matter how small your operation. The Federal Trade Commission (FTC), which interprets the Act, encourages you to similarly safeguard and dispose of any record that contains a tenant's or applicant's personal or financial information. This would include the rental application itself, as well as any notes you make that include such information. For more information, search "Disposal Rule" on www.ftc.gov.

Information covers the past seven to ten years. To run a credit check, you'll need a prospective tenant's name, address, and Social Security number (or other identifying information, such as a driver's license number, ITIN, or passport number).

Some credit reporting companies also gather and sell "investigative reports" or background checks about a person's character, general reputation, personal characteristics, or mode of living. If you order one of these background checks, federal law requires that you disclose certain information to the prospective tenant. (See "Background Checks Trigger Disclosures Under the Fair Credit Reporting Act," below.)

Background Checks Trigger Disclosures Under the Fair Credit Reporting Act

Almost all background checks come under the federal Fair Credit Reporting Act. (15 U.S.C. §§ 1681 and following.) If you order a background check on a prospective tenant, it will be considered an "investigative consumer report," and you must:

- tell applicants within three days of requesting the report that the report may be made, and that it will concern their character, reputation, personal characteristics, and criminal history, and
- tell applicants that more information about the nature and scope of the report will be provided upon their written request. You must provide this additional information within five days of being asked by the applicant.

If you own many rental properties and need credit reports frequently, consider joining a local credit reporting agency (they charge about $50 to $100 in annual fees plus $10–$25 per report). You can find tenant-screening companies in the yellow pages of the phone book under "Credit Reporting Agencies." Or, if you only rent a few units each year, see if your local apartment association (there are about two dozen in California) offers credit reporting services. With most credit reporting agencies, you can get a credit report the same day it's requested.

Landlords who have accounts or other ongoing business relations with the credit reporting agencies need not supply an applicant's date of birth (DOB) in order to get a report—a name and Social Security number or ITIN will suffice. However, consumers ordering their own credit report must supply their DOB; and, presumably, small-scale landlords, who have no reason to set up an account with a credit reporting agency, could order reports as if they were the applicant, after asking the applicant for their DOB. We urge you not to try this route, because once you have a DOB, you open the door to a discrimination claim if you reject an older applicant who decides to impute age discrimination motives to your decision. Instead, investigate setting up an account or join an apartment association.

Tenants With "Security Freezes" on Their Credit Reports

Consumers in California may place a "freeze" on their credit reports, preventing anyone but specified parties (such as law enforcement) from getting their credit report. (CC §§ 1785.11.2 and following.) Credit reporting agencies must implement the freeze within five days of receiving the request. However, the consumer can arrange for specified persons—such as a landlord or management company—to have access to their report; or the freeze itself can be suspended for a specified period of time. When a consumer arranges for a freeze, the agency must give the consumer information on how to arrange for selective access or how to lift the freeze. (CC § 1785.15(f).)

If an applicant has placed a freeze on his or her credit report, you'll need access. Our Rental Application advises applicants that they are responsible for lifting the freeze so that you can receive a copy of their report. If they fail to do so, the application will be incomplete, which is grounds for rejecting that application. (CC § 1785.11.2(h).)

See If Any "Tenant-Reporting Services" Operate in Your Area

Just as regular credit reporting agencies keep tabs on retail purchasers' creditworthiness, businesses such as UD Registry of Van Nuys keep tabs on eviction suits (called unlawful detainer, hence the "UD") filed against tenants. The fact that a tenant has been involved in an eviction lawsuit, regardless of the outcome, can be reported by the tenant-reporting services. (These agencies will have a difficult time, however, learning of eviction lawsuits that the tenant won, as explained below.) Your local apartment association may recommend other services of this type. Tenant-reporting services charge from $50 to $100. As with credit reporting agencies, if you don't rent to an applicant because of information from a tenant-reporting service, you must notify the applicant of the nature of the report and provide the name and address of the company.

Check With the Tenant's Bank to Verify Account Information

If an individual's credit history raises questions about financial stability, you may want to take this additional step. If so, you'll probably need an authorization form such as the one included at the bottom of the Rental Application, or the separate Consent to Background and Reference Check form. Banks differ as to the type of information they will provide over the phone. Generally, banks will at most only confirm that an individual has an account and that it is in good standing.

Be wary of an applicant who has no checking or savings account. Perhaps the bank dropped the individual after many bounced checks.

Review Court Records

If your prospective tenant has lived in the area, you may want to review local court records to see if the tenant has been sued in a collection or eviction lawsuit. Checking court records may seem like overkill, but now and then it's an invaluable tool if you suspect a prospective tenant may be a potential troublemaker. Since court records are kept for several years, this kind of information can supplement references from recent landlords. You can get this information from the superior court for the county in which the applicant lived.

Tenant-friendly legislation narrows your ability to learn whether an applicant has been involved in an eviction lawsuit. Courts are required to keep records on eviction lawsuits secret and sealed for 60 days from the date the landlord filed the unlawful detainer complaint. If the tenant wins the case within that 60 days, the court must keep the records sealed indefinitely. For eviction lawsuits following foreclosure of rental property, the court must keep the records sealed indefinitely, unless the new owner obtains a judgment after trial against the tenant within 60 days of bringing suit. (See Chapter 9, "Civil Lawsuits Involving a Tenant.")

You'll need to go in person and ask the civil clerk to show you the Defendants' Index, often available electronically at court terminals for public use, or in microfiche form. If a prospective tenant's name is listed, jot down the case number so you can check

the actual case file for details on the lawsuit and its resolution. You can often determine if a prospective tenant asserted a reasonable defense and if any judgment against the tenant was paid off.

Checking the Megan's Law Database

For many years, the California Department of Justice ("DOJ") has maintained a database on the names and whereabouts of felons who have been convicted of violent sexual offenses and offenses against minors. The DOJ has made the information available on its website, which should be viewed only by those seeking to "protect a person at risk." (Penal Code § 290.46(j)(1).)

Unfortunately, the law does not define the term "at risk." Common sense would suggest that women and children fit within this category, and that, at the very least, landlords who have multiunit properties in which women and children already reside would be permitted to check the database to protect these tenants. But what about a landlord whose current tenants happen to be men, but who correctly realizes that it's quite possible that subsequent tenants will be women and families? (After all, it's illegal to discriminate against women or families.) Must this landlord use the website to screen applicants in order to protect future tenants? And suppose a landlord rents a single-family residence, but there are women and children next door or nearby? Can this landlord use the website to look out for the safety of these neighbors?

We don't know the definite answers to these questions. The issue is troubling because the law makes landlords liable for large money damages if they knowingly or even carelessly expose tenants to dangerous conditions, including dangerous neighbors—and to avoid lawsuits, smart landlords check the backgrounds of prospective tenants very carefully. For example, a landlord who rented to a repeat pedophile and failed to check references might be liable if that applicant later injured another tenant. Yet landlords may also be liable if they deny housing to someone whose name they've found on the website database unless they are acting to protect someone at risk. It seems that landlords are caught between their duties to protect other tenants and also not to use the website database for an illegal purpose.

You'll need to evaluate each situation on its own, keeping in mind that your duty to watch out for the welfare of others begins with your own tenants and is somewhat less with respect to neighbors or strangers or future tenants.

CAUTION

The usefulness of California's Megan's Law database is debatable. Investigative reports by journalists suggest that the records are outdated and incomplete. Although the Department of Justice is charged with updating the website on an "ongoing basis," there's no guarantee that the information going up will be current. The lesson for landlords is clear: Make sure that you don't stint on checking with references, prior landlords, and employers. Thorough checking on all fronts will usually reveal the facts.

Do Not Request Proof of, or Ask About, Immigration Status

Some of you may wish to make sure that every person you rent to has a legal right to be in the United States. However sensible you might think it is to know about the legal status of your tenants or prospects, it is illegal to ask them. (CC § 1940.3.) Do not, under any circumstances, ask any actual or prospective tenants about their immigration status, including whether they are legally in this country or what kind of visa they hold. Any local law that requires landlords to make such inquiries has been invalidated by state law.

However, if you hire a tenant as an employee (such as a resident manager) you must take certain steps to determine whether the employee has the right to work in the United States. Even then, all you can do is ask an employee, once hired, to fill out IRS Form I-9. All employers are required by federal law to check right-to-work status by giving new hires this form to fill out. Do not ask any questions about immigration status. Just hand your employee the form and make sure that the employee has shown you documents that appear to satisfy the requirements on the form.

Choosing—And Rejecting—An Applicant

After you've collected applications and done some screening, you can start sifting through the applicants.

Start by eliminating the worst risks: people with negative references from previous landlords or a history of nonpayment of rent, poor credit, or previous evictions. Then make your selection.

Assuming you choose the candidate with the best qualifications (credit history, references, income), you should have no legal problem. But what if you have several more or less equally qualified applicants? The best response is to use an objective tie-breaker. Give the nod to the person who applied first. But be extra careful not to always select a person of the same age, sex, or ethnicity among applicants who are equally qualified. For example, if you are a large landlord who frequently chooses among lots of qualified applicants, and who always avoids an equally qualified minority or disabled applicant, you are exposing yourself to charges of discrimination.

See Chapter 9 for a detailed discussion on how to avoid illegal discrimination when choosing an applicant.

Record Keeping

A crucial reason for any tenant-screening system is to document how and why you chose a particular tenant. Be sure to note your reasons for rejection—such as poor credit history, pets (if you don't accept pets), insufficient income relative to the rent, a negative reference from a previous landlord, or your inability to verify information—on the Tenant References form or

Federal Disposal Rule

All businesses, including landlords and employers, must take steps to safeguard and eventually destroy applicants' and tenants' credit reports and any information the landlord keeps that's derived from these reports. This "Disposal Rule" was issued by the Federal Trade Commission (FTC), which was charged with implementing the Fair and Accurate Credit Transactions Act (the "FACT Act"). The rule applies to all businesses, even one-person landlords. Here are the important rules:

Safe retention. Anyone in possession of a credit report is legally required to keep these reports in a secure location, in order to minimize the chance that someone will use the information for illegal purposes, including identity theft. Store these reports, and any other documents that include information taken from them, in a locked cabinet. Give access only to known and trusted people, and only on a need-to-know basis. Use a closely guarded password if you put reports (or information derived from them) on your computer or PDA (such as a BlackBerry).

Destroy unneeded reports. The FACT Act requires you to dispose of credit reports and any information taken from them when you no longer need them. Determine when you no longer have a legitimate business reason to keep an applicant's or tenant's credit report. Unfortunately, you may need these reports long after you've rejected or accepted an applicant—they may be essential in refuting a fair housing claim. Under federal law, such claims must be filed within two years of the claimed discrimination, but some states set longer periods. Keep the records at least two years and longer if your state gives plaintiffs extra time to sue.

Destroy reports routinely. Establish a system for dumping old credit reports. Don't rely on haphazard file purges to keep you legal. Establish a purge date for every applicant for whom you pull a report and use a tickle system to remind you.

Choose an effective destruction method. The Disposal Rule requires you to choose a level of document destruction that is reasonable in the context of your business. For example, a landlord with a few rentals would do just fine with an inexpensive shredder, but a multiproperty owner might want to contract with a shredding service.

Don't forget computer files. You must delete computer files that include credit reports or information from them when you no longer need them. Use a utility that will erase the data completely, by deleting not only the directory, but the text as well.

The Disposal Rule comes with teeth for those who willfully disregard it—those who know about the law and how to comply, but deliberately refuse to do so. You could be liable for a tenant's actual damages (say, the cost of covering a portion of a credit card's unauthorized use), or damages per violation of between $100 and $1,000, plus the tenant's attorney fees and costs of suit, plus punitive damages. The FTC and state counterparts can also enforce the FACT Act and impose fines.

separate paper. Keep organized files of applications, credit reports, and other materials and notes on prospective tenants for at least three years after you rent a particular unit (but see "Federal Disposal Rule," above, for your duties for disposal).

These Tenant References forms may become essential evidence in your defense if a disappointed applicant complains to a fair housing agency or sues you for discrimination. With your file cabinet full of successful and unsuccessful applications, you can:

- find the applicant's form and point to the stated, nondiscriminatory reason you had for denying the rental. Of course, the rejection must be supported by the facts—you can't reject on the basis of a negative employer reference if you never called the employer, and
- pull out other applications that show that you consistently rejected applicants with the same flaw (such as insufficient income), regardless of color, religion, and so on. This kind of documentation will make it difficult for someone to claim there was a discriminatory motive at work.

Another reason to back up your decisions and keep applications on file is that a rejected applicant may want you to explain your reasons, apart from any claim of discrimination, as explained below.

TIP

Make sure you organize and update your records after a tenant moves in. Set up an individual file for each new tenant, including the tenant's rental application, references, credit report, signed lease or rental agreement, and the Landlord/Tenant Checklist (discussed in Chapter 7). After a tenant moves in, keep copies of your written requests for entry, rent increase notices, records of repair requests and how and when they were handled, and any other correspondence or relevant information. A good system to record all significant tenant complaints and repair requests will provide a valuable paper trail should disputes develop later—for example, over your right to enter a tenant's unit or the time it took for you to fix a problem. Be sure to keep up to date on the tenant's phone number, place of work, and emergency contacts. You should also note the tenant's bank. (You can get this information from the monthly rent check.) If a tenant leaves owing you money above the security deposit amount and you sue and receive a court judgment, you may be able to collect that money from wages or a bank account.

Information You Must Provide Rejected Applicants

The Fair Credit Reporting Act, as amended by the Fair and Accurate Credit Transactions Act of 2003, requires you to give certain information to applicants whom you reject (or take other negative action toward) as the result of a report from a credit reporting agency (credit bureau), a tenant-screening or reference service, or any other third party (except your own employees). (15 U.S.C. §§ 1681 and following.) Known as "adverse action reports," these notices must be given not only to applicants who are rejected, but also to those whom you accept with qualifications, such as requiring a cosigner on the lease, a higher deposit, or more rent than others pay based on the report. The federal requirements do not apply if your decision is based on information that you (or your employee) gathered on your own.

If you do not rent to someone (or you impose qualifications) because of negative information (even if other factors also played a part in your decision) or due to an insufficient credit report, you must give the applicant the name and address of the agency that provided the credit report. You must tell applicants that they have a right to obtain a copy of the file from the agency that reported the negative information, by requesting it within the next 60 days. You must also tell rejected applicants that the credit reporting agency did not make the decision to reject them as a tenant and cannot explain the reason for the rejection. Finally, you must tell applicants that they can dispute the accuracy of their credit report and add their own consumer statement to their report.

Use the Notice of Denial Based on Credit Report or Other Information form, (see the sample shown below), to comply with the federal Fair Credit Reporting Act when you reject an applicant because of an insufficient credit report or negative information in the report.

FORM

You'll find a downloadable copy of the Notice of Denial Based on Credit Report or Other Information on the Nolo website. See Appendix B for the link to the forms in this book.

Notice of Denial Based on Credit Report or Other Information

To: Ryan Lester
1 Main Street
Vallejo, CA 94503

Your rights under the Fair Credit Reporting Act and Fair and Accurate Credit Transactions (FACT) Act of 2003.
(15 U.S.C. §§ 1681 and following.)

THIS NOTICE is to inform you that your application to rent the property at 3 Field Street, Vallejo, CA 94503 has been denied because of [*check all that apply*]:

☑ Insufficient information in the credit report provided by: ABC Credit Bureau, 310 Gonzales Way, Oakland, CA 94607; Phone: 510-555-1234; www.abccredit.com

☐ Negative information in the credit report provided by: _____

☑ The consumer-credit-reporting agency noted above did not make the decision not to offer you this rental. It only provided information about your credit history. You have the right to obtain a free copy of your credit report from the consumer-credit-reporting agency named above, if your request is made within 60 days of this notice or if you have not requested a free copy within the past year. You also have the right to dispute the accuracy or completeness of your credit report. The agency must reinvestigate within a reasonable time, free of charge, and remove or modify inaccurate information. If the reinvestigation does not resolve the dispute to your satisfaction, you may add your own "consumer statement" (up to 100 words) to the report, which must be included (or a clear summary) in future reports.

☐ Information supplied by a third party other than a credit-reporting agency or you. You have the right to learn of the nature of the information if you ask me in writing within 60 days of learning of this decision. This information was gathered by someone other than myself or any employee.

10-01-20xx — Date

Jan McGillis — Landlord/Manager

Holding Deposits

Accepting a holding deposit is legal, but we don't advise it. This type of deposit is usually offered by applicants who want to hold a rental unit pending the result of a credit check, or until they can come up with enough money for the rent and a formal deposit. Why not take a holding deposit? Simply because it does you little or no good from a business point of view, and all too often results in misunderstandings or even legal fights.

> **EXAMPLE:** A landlord, Jim, takes a deposit of several hundred dollars from a prospective tenant, Michael. What exactly is Jim promising Michael in return? To rent him the apartment? To rent Michael the apartment only if his credit checks out to Jim's satisfaction? To rent to Michael only if he comes up with the rest of the money before Jim rents to someone who comes up with the first month's rent and deposit? If Jim and Michael disagree about the answers to any of these questions, it can lead to needless anger and bitterness. This can sometimes even spill over into a small claims court lawsuit alleging breach of contract.

Another prime reason to avoid holding deposits is that the law is very unclear as to what portion of a holding deposit a landlord can keep if a would-be tenant changes his mind about renting the property or doesn't come up with the remaining rent and deposit money. The basic rule is that a landlord can keep an amount that bears a "reasonable" relation to the landlord's costs, for example, for more advertising and for prorated rent during the time the property was held vacant. Keeping a larger amount will amount to an unlawful penalty.

If, contrary to our advice, you decide to take a holding deposit, it is essential that both you and your prospective tenant have a clear understanding. The only way to accomplish this is to write your agreement down, preferably on the holding deposit receipt, including the amount of the deposit, the dates you will hold the rental property vacant, the term of the rental agreement or lease, and conditions for returning the deposit.

We've provided you with a sample Receipt and Holding Deposit Agreement that you can adapt to your situation—it will work for a lease or a month-to-month agreement. If your agreement to rent property to a particular individual is not contingent upon your receiving a credit report and satisfactory references, simply delete this sentence from the last paragraph of the form.

FORM

You'll find a downloadable copy of the Receipt and Holding Deposit Agreement on the Nolo website. See Appendix B for the link to the forms in this book.

Receipt and Holding Deposit Agreement

This will acknowledge receipt of the sum of $ 500 by Jim Chow ("Landlord") from Michael Blake ("Applicant") as a holding deposit to hold vacant the rental property at 123 State Street, City of Los Angeles, California, until February 5, 20xx at 5 P.M. The property will be rented to Applicant on a month-to-month basis at a rent of $ 2,000 per month, if Applicant signs Landlord's written rental agreement and pays Landlord the first month's rent and a $ 2,000 security deposit on or before that date, in which event the holding deposit will be applied to the first month's rent.

This Agreement depends upon Landlord receiving a satisfactory report of Applicant's references and credit history. Landlord and Applicant agree that if Landlord offers the rental but Applicant fails to sign the Agreement and pay the remaining rent and security deposit, Landlord may retain from this holding deposit a sum equal to the prorated daily rent of $ 67 per day until the unit is rerented, plus a $ 50 charge to compensate Landlord for lost rents and the time and expense incurred by the need to rerent.

February 2, 20xx	Michael Blake
Date	Applicant
February 2, 20xx	Jim Chow
Date	Landlord

CHAPTER

2

Understanding Leases and Rental Agreements

FORMS IN THIS CHAPTER

Chapter 2 includes instructions for and samples of the following forms:

- Fixed-Term Residential Lease
- Month-to-Month Residential Rental Agreement
- Attachment to Lease or Rental Agreement
- Attachment: Agreement Regarding Use of Waterbed, and
- Amendment to Lease or Rental Agreement.

The Nolo website includes downloadable copies of these forms (the lease and rental agreement forms are in both English and Spanish). See Appendix B for the link to the forms in this book.

It is essential that every landlord understand California law as it applies to rental agreements and leases. Let's begin with the basics. There are three legal ways to create residential tenancies:

- oral rental agreements
- written leases, and
- written month-to-month rental agreements.

We'll look at each of these types of agreements in detail and provide sample lease and rental agreement forms with a description of each specific clause. We'll also point out illegal lease and rental agreement provisions.

Oral Agreements Are Not Recommended

Oral (spoken) leases or rental agreements are perfectly legal and enforceable for month-to-month tenancies and for leases for a year or less (although there's some information you must write down, as explained below). (CC § 1624.) Typically, you agree to let the tenant move in, and the tenant agrees to pay a set amount of rent, once or twice a month or even weekly. Years ago, the amount of notice that you needed to give a tenant to raise the rent or terminate the tenancy was pretty simple—it corresponded to the frequency of the rent payment. Now, however, the notice periods vary considerably, depending on the size of the rent raise and, for terminations, the duration of the tenancy and the identity of who's doing the terminating (landlord or tenant). These complications (explained in Chapters 14 and 18) are powerful reasons to use our written rental agreement, in which the rules are specified.

While oral agreements are easy and informal, it is rarely wise to use one. As time passes and circumstances change, people's memories (including yours) have a funny habit of becoming unreliable. You can almost count on tenants claiming that certain oral promises weren't kept or "forgetting" key agreements.

Most landlords choose to impose conditions on the tenancy, such as regulating or prohibiting pets and subletting. In addition, landlords often include a clause providing the landlord with the right to recover attorney fees if it is necessary to evict a tenant.

Oral leases, while legally enforceable (for up to one year), are even more dangerous than oral rental agreements, because they require that one important term—the length of the lease—be accurately remembered by both parties over a considerable time. If something goes wrong with an oral agreement, the parties are all too likely to end up in court, arguing over who said what to whom, when, and in what context.

This book is based on the assumption that you will always use either a written rental agreement or a lease.

Information You Must Provide the Tenant in Writing

Even if every other aspect of your rental agreement or lease is reflected in an oral agreement, you must write down certain information and give it to the tenant:

- the name, phone number, and address of the manager, if any
- the name, phone number, and address of the owner or someone authorized to accept service of process and all notices and demands from the tenant
- the name, phone number, and address of the person authorized to receive rent (if rent may be paid personally, include the days and hours that the person will be available to receive payments), and
- the form in which rent may be paid, such as check, money order, or cash.

The law also specifies how to deliver this information. You can include it in a written document that you give to the tenant (such as a lease, rental agreement, or other writing), post it in an elevator and one additional conspicuous place on the property, or post it in two conspicuous places. This information must be supplied within 15 days of entering into an oral agreement and once a year, on 15 days' notice, if requested by the tenant. You must keep the information up to date. (CC §§ 1962 and 1962.5.)

If you fail to give this notice, or to keep it current, you will be barred from evicting a tenant for nonpayment of rent that accrued during any period you were not in compliance with this request.

After you've gone to the trouble of supplying this written information (you could model your form on Clauses 5 and 23 of our written agreements), you'll realize that you may as well use our written rental agreement or lease, which provides places for you to convey the details.

Written Agreements: Which Is Better, a Lease or a Rental Agreement?

There are two kinds of written landlord/tenant arrangements:

- rental agreements, and
- leases.

Written rental agreements provide for a tenancy for an indefinite period of time, and can be terminated by either party by the giving of a written notice, very commonly 30 days. Where the rent is paid monthly, these are called "month-to-month" tenancies. They automatically renew each month (or other time period agreed to in writing) unless one of the parties gives the other the proper amount of written notice to terminate the agreement. The notice period is 30 days for a month-to-month tenancy that has lasted less than a year, 60 days if the tenant has rented for a year or more, and 90 days if the tenant's rent is government-subsidized under a contract between the landlord and a housing agency (CC § 1954.535), or in some cases, after a new owner has purchased the property at a foreclosure sale. See "Rental Properties Purchased at Foreclosure" in Chapter 18.

The rental agreements in this book are month to month.

With a written lease, you fix the term of the tenancy—most often for six months or a year, but sometimes longer. At the end of the lease term, you have a few options. You can:

- decline to renew the lease
- sign a new lease for a set period, or
- do nothing—which means your lease will convert to a month-to-month tenancy if you continue to accept monthly rent from the tenant.

There isn't much legal difference between a lease and a rental agreement—with the exception, of course, of the period of occupancy. To decide whether a lease or rental agreement is better for you, read what follows and carefully think about your own situation.

Month-to-Month Rental Agreement

When you rent property under a month-to-month rental agreement, these rules apply:

- **On 30 or 60 days' written notice, you may change the amount of rent (subject to any rent control ordinances).** You may increase (or decrease) the amount of rent in all areas that don't have rent control ordinances on 30 days' notice. For increases over 10%, 60 days' notice is required. (See Chapter 14 for guidance on understanding the 60-day situation.) Cities with rent control ordinances may restrict the amount of rent you may charge or add requirements for notifying the tenant of a rent increase. (See Chapter 4 for more on rent control.)
- **On 30 days' written notice, you may change other terms of the tenancy.** You may make other changes in the terms of the tenancy on 30 days' notice, such as increasing the deposit amount (if you're not charging the maximum allowed by law), adding or modifying a no-pets clause, or making any other reasonable change. Again, however, cities with rent control ordinances may restrict your right to do this.
- **You may end the tenancy with 30 (or 60 or 90) days' written notice.** You may end a tenancy at any time on 30 days' notice if the tenant has stayed less than a year, and on 60 days' notice if the tenancy has lasted a year or more. However, there are some widespread exceptions: Rent control ordinances in some cities do not allow this type of termination; and government-subsidized tenancies require 90 days' notice. (See Chapter 18 for more information on the 60-day requirements.)

RENT CONTROL

Under just-cause eviction provisions of rent control ordinances in cities such as Los Angeles and San Francisco, you must have a good reason—one of those listed in the ordinance—to evict a tenant. We discuss rent control in detail in Chapter 4.

- **A tenant who wants to leave needs to give you only 30 days' notice.** A month-to-month tenancy might mean more tenant turnover. Tenants who know they may legally move out with only 30 days' notice may be more inclined to do so than tenants who make a longer commitment. If you live in an area where it's difficult to find tenants, you may wisely want tenants to commit for a longer time period, such as a year. But as discussed below, a fixed-term lease can't guarantee against turnover, either.

Fixed-Term Lease

With a fixed-term lease, these rules apply:

- **You can't raise the rent until the lease runs out.** The only exception is where the lease specifies a specific increase in rent (and local rent control laws don't limit rent increases). It's important that the rent increase date and amount be stated and certain (such as, "on June 1, 20xx, rent will increase by $50"). A court will not enforce a vague statement that the landlord has the right to increase the rent.
- **You can't change other terms of the tenancy.** A lease is a contract whose terms are fixed for the lease period. Changes are allowed only where the lease says they're allowed, or where the tenant agrees in writing to a modification of the terms.
- **You usually can't evict before the lease term expires.** Unless the tenant fails to pay the rent or violates another significant term of the lease, such as repeatedly making too much noise or damaging the property, you're stuck with the tenant until the lease term runs out. (The eviction process and rules are described in Chapter 18.)
- **You may reduce your turnover rate.** Many people make a serious personal commitment when they enter into a long-term lease, in part because they think they'll be liable for quite a few months' rent if they up and leave.

This last reason merits some explaining. It used to be that the major advantage of leasing for fixed terms, such as a year or more, was that a landlord obtained a fair degree of security. The tenant was on the hook to pay for a greater length of time than provided by month-to-month agreements. A tenant who broke the lease and left before it expired was still legally responsible for the rent for the entire lease term. And, if the tenant could be located, the landlord could sue and obtain a court judgment for the balance of the rent.

This is no longer true in most circumstances. Nowadays, landlords who sue the departing (lease-breaking) tenant for the rent due for the rest of the lease term are required to "mitigate" (or minimize) the financial consequences the tenant would suffer as a result of the broken lease. That means the landlord must use reasonable efforts to rent the unit to another suitable tenant. If the landlord rerents the unit (or if a judge believes it could have been rerented with a reasonable amount of effort), the lease-breaking tenant is off the hook except for the months that the unit was vacant while the landlord searched.

This all adds up to a simple truth: A lease no longer provides much income security to a landlord. Indeed, a lease is now something of a one-way street running in the tenant's direction. This is because, especially in a tight market, the mitigation-of-damages rule allows a tenant to break a lease with little or no financial risk. And, even if the tenant does end up owing the landlord some money for the time the unit was empty, collecting the money can be more trouble than it is worth. (We discuss tenants' moving out and breaking leases in detail in Chapter 19.) Not surprisingly, many landlords prefer to rent from month to month, particularly in urban areas where new tenants can often be found in a few days.

There can still be, however, practical advantages to leasing for a fixed period, despite these legal rules. You'll probably prefer to use leases in areas where there is a high vacancy rate or it is difficult to find tenants. Remember, if you can't find another suitable tenant to move in, the former tenant whose lease hasn't expired is still liable for the rent. So, if you are renting near a college that is in session only for eight months a year, or in a vacation area that is deserted for months, you are far better off with a year's lease. Remember, though, that a seasonal tenant is almost sure to try to get someone to take over the tenancy, and unless you have sound business reasons for rejecting the substitute, you'll be stuck with him—or you'll lose your legal right to ask for more damages from the departing tenant.

Offer a Lease in Palo Alto

The city of Palo Alto requires all landlords owning buildings of two or more units (except duplexes in which the owner occupies one of the units) to offer tenants one-year leases at the outset, and upon expiration of the previous lease. (Palo Alto Municipal Code §§ 9.68.010 through 9.68.050.) Tenants who don't want a one-year lease must decline it in writing. The landlord's failure to comply results in a defense for the tenant in an eviction lawsuit, even one based on nonpayment of rent.

Tenants Who May Break a Lease or Rental Agreement

Two groups of tenants have special rights to break a lease without responsibility for future rent.

- The Servicemembers' Civil Relief Act helps active duty military personnel handle legal affairs. (50 App. U.S.C.A. §§ 501 and following.) Among its provisions, it allows tenants who enter active military service (or are called up to the National Guard for more than one month at a time) *after* signing a lease or rental agreement to break the lease or agreement. Chapter 19 explains the procedures.
- Victims of domestic violence, stalking, or sexual assault may break a lease on 30 days' notice. (CC § 1946.7.) Chapter 19 explains the procedures.

Tenants may also have the right to break a lease and move out early due to defective conditions in the rental premises (as discussed in Chapter 11).

Variations on the Standard One-Year Lease

If you're planning to use a lease, chances are you'll select a standard one-year lease. But there are other options available. Here are a few.

Long-Term Leases

Most leases run for one year. This makes sense, as it allows you to raise the rent at reasonably frequent intervals if market conditions allow. Leasing an apartment or house for a longer period—two, three, or even five years—can be appropriate, for example, if you're renting out your own house because you're taking a two-year sabbatical.

One danger with a long-term lease is that inflation can eat away at the real value of the rent amount. A good way to hedge against this danger in all leases of more than a year is to provide for annual rent increases that are tied to Consumer Price Index (CPI) increases during the previous year.

Here is a sample clause:

> Landlord and Tenant agree that the rent will increase on the ___ day of the _____ month of each year by the same percentage as the regional and most local Consumer Price Index has increased during the previous twelve months.

The Consumer Price Index most commonly used is the "All-Urban Consumers" for the nearby large metropolitan area. The U.S. Department of Labor publishes figures for the Los Angeles/Long Beach/Anaheim/Santa Monica/Santa Ana area and the San Francisco/Oakland/San Jose area each May. In Los Angeles, the figure is published each May 30 by the Community Development Department. Other cities' rent control boards keep records of the applicable figure, even where the rent increase allowed each year isn't directly tied to the CPI. (See Chapter 4 on rent control.)

Stay on Top of the CPI

If you factor in a rent increase by tying it to the CPI, you'll need to get accurate information on the yearly increase. Go to the Bureau of Labor Statistics website at http://stats.bls.gov/news.release/cpi.toc.htm (or search on the Consumer Price Index page at www.bls.gov/cpi).

For this sort of rent increase, no formal notice is required. Simply send tenants a letter reminding them of the lease term calling for the increase. Demonstrate how you calculated the amount.

Options to Renew a Lease

An option to renew is essentially a standing offer to renew the lease, offered by the landlord to the tenant, which the tenant can accept or not in the manner and time frame set forth in the option. The option-to-renew concept is not commonly used in residential rentals, but a tenant occasionally requests one.

We usually advise against using renewal clauses, for several reasons. First, an option to renew a lease leaves it entirely up to the tenant as to whether to continue the tenancy. Without such an option, both the tenant and the landlord must agree on a renewal. Remember, by the time the lease is about to expire, you might

not want to continue the tenancy. Unless you receive a very high guaranteed rent for the initial term, or a lump-sum payment in consideration for including the option clause, you have very little to gain and a lot to lose by giving an option to renew.

Second, when the tenant exercises the option, the new tenancy often continues on the same terms as before, which may not be to your advantage. Here's what happens: To be legal, option clauses must clearly set forth the terms of the renewed tenancy, including the new term, the rent (which can be different from the rent for the first term if the option clause clearly says so), and so forth. Most clauses do this by simply referring to the initial lease terms. (An option clause that leaves any significant term, such as rent or length of term, to further negotiation, or words to that effect, is of no effect and is not legally binding.) Since you may be able to obtain a higher rent after the initial term of six or 12 months, it's obviously not in your best interest to include an option that allows the tenant to remain at the same rent. But since you don't know at the outset what a fair market rent would be—or whether you will become fed up with the tenant's dogs and decide to ban pets—you can't provide for these new terms.

Finally, drafting option clauses can be very tricky. Even the slightest mistake may do you a great deal of harm or, at the very least, render the option clause of no effect and add uncertainty to the entire situation. If you want to include a renewal or other option in a lease, contact an attorney.

Options to Purchase

An "option to purchase" is a contract where an owner leases a house (usually from one to five years) to a tenant for a specific monthly rent (which may increase during the contract term) and gives the tenant the right to buy the house for a price established in advance. Depending on the contract, the tenant can exercise the option to purchase at any time during the lease period, or at a date specified, or for a price offered by another person who makes a purchase offer, subject to the tenant's "right of first refusal" to match the offered price.

If your property should be easy to sell, why share your chance at future appreciation with a tenant? This, in addition to the fact that drafting option clauses is pretty difficult, should give you pause.

Here are some situations when you might consider a tenant's request for a lease option:

- you have a negative cash flow and think the short-run return (initial option fee, higher-than-normal rent, tax advantages) is worth it
- you plan to sell your property soon and think that it might be difficult to sell, or
- you think your tenant will take better care of your house, and perhaps even improve it.

Needless to say, never sign a purchase option, whether included in a lease or not, without consulting a lawyer. If you're thinking of selling, and a tenant or prospective tenant asks for an option to purchase, you might simply reply that you'll consider selling at the expiration of the lease. For a sample lease option contract, see *For Sale by Owner in California,* by George Devine (Nolo).

CAUTION

Don't provide for an "automatic renewal" of the lease term in your lease. Automatic renewals are valid only if they are printed in boldface, 8-point type, directly above the tenant's signature. (CC § 1945.4.) But even if you do it right, they are rarely a good idea. Tenants are likely to assume that if they stay in the rental with your permission past the lease's ending date, they've become month-to-month tenants. (This is, in fact, their legal status in the absence of a valid renewal clause.) If you really want the tenant on the hook for a longer period than specified in your lease, increase the lease term at the outset instead of using a renewal clause.

Foreign Language Note on California Leases and Rental Agreements

If you and your tenant discuss your lease or written month-to-month rental agreement primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, you must give the tenant an unsigned version of the rental document in that language before asking him to sign. This rule does not apply (that is, you may present your English version only) if the tenant has supplied his own translator who is not a minor and who can speak *and read* the particular language and English fluently. If the translator is supplied by the tenant but does not meet these two requirements, or if the translator is you

or someone in your employ or otherwise supplied by you (for example, your fluent daughter), you will have to present a foreign language version of your rental document. (CC § 1632.)

Common Legal Provisions in Lease and Rental Agreement Forms

This section discusses each clause in the lease and rental agreement forms provided in this book. The instructions explain how to fill in the blanks and refer you to the chapter that discusses important issues that relate to your choices.

Except for the important difference in how long they run (see Clause 4 in our forms), leases and written rental agreements are so similar that they are sometimes hard to tell apart. Both cover the basic terms of the tenancy (such as amount of rent and date due). Except where indicated below, the clauses are identical for the lease and rental agreements included here. You should use the one more appropriate to your rental needs.

A sample fixed-term lease is shown below; the only clause that is different in the month-to-month rental agreement (the term of the tenancy) is shown under Clause 4, below.

FORM

The Nolo website includes downloadable copies (in both English and Spanish) of the Fixed-Term Residential Lease and the Month-to-Month Residential Rental Agreement. See Appendix B for the link to the forms in this book.

CAUTION

Meet your legal responsibilities regarding foreign language leases. If you use the Spanish language version of the lease or rental agreement included on the Nolo website, you will have to provide your own Spanish language version of the information you add to the blanks. See "Foreign Language Note on California Leases and Rental Agreements," above.

CAUTION

Choose your lease or rental agreement carefully! In addition to the forms in this book, there are dozens of different printed forms in use in California, and provisions designed to accomplish the same result are worded differently. Unfortunately, some of these agreements are written so obtusely that it is hard to understand what they mean. Ambiguous terms, fine print, and legalese will only lead to confusion and misunderstanding with your tenants. Contrary to what many form writers seem to believe, it is not illegal to use plain English on lease and rental agreement forms. We have done our best to provide clearly written agreements. If you use a different form, be sure to avoid leases or rental agreements with illegal or unenforceable clauses (more on this below). You may need to use a special government lease if you rent subsidized housing. (See Chapter 9.)

Clause 1. Identification of Landlord and Tenants

Every lease or rental agreement must identify the landlord and the tenant(s)—usually called the "parties" to the agreement. Any competent adult—at least 18 years of age—may be a party to a lease or rental agreement. (Teenagers under age 18 may also be a party to a lease if they have achieved legal adult status through a court order, military service, or marriage.)

Fill in the date you'll be signing. Next, fill in the names of all adults who will live in the premises, including both members of a married couple or registered domestic partners. If anyone else will be financially responsible for paying the rent (even if they won't be living in the premises), list their names. See the discussion of cosigners below.

In the last blank, list the names of all landlords or property owners who will be signing the lease or rental agreement.

The last sentence states that all tenants are jointly and severally liable for paying rent and adhering to the terms of the agreement. This means that each tenant is legally responsible for the whole agreement and rent. (How cotenants divide that rent among themselves is up to them, not the landlord.) This protects the landlord, who can legally seek full compensation from any of the tenants (or terminate as to all for the misdeeds of one) should a problem arise. Chapter 10 discusses the legal obligations of cotenants.

Clause 2. Identification of Premises and Occupants

In this clause, you identify the property being rented and who will live in it. The words "for residential

purposes only" are to prevent a tenant from using the property for conducting a business that might affect your insurance or violate zoning laws.

In the first blank, fill in the street address of the unit or house you are renting. If there is an apartment number, specify that as well.

In shared housing situations, you'll need to clearly state, in your own words, what the rental includes.

> **EXAMPLE:** You are renting a small cottage in your backyard that comes with kitchen privileges in your house. You might fill in, "Back cottage at 1212 Parker St., Visalia, California, with kitchen privileges in main house."

If you need more room, perhaps to explain exactly what the kitchen privileges or other rental conditions include, start by filling in the address of the property. Then add the new information to the clause. Or you can add the words "as more fully described in Attachment 1 to this Agreement." Next, prepare a separate "Attachment 1" and define the particulars of what you are renting. Staple the attachment to the lease or rental agreement.

Note on garages and outbuildings. If any part of the property is not being rented, such as a garage or shed you wish to use yourself or rent to someone else, make this clear by specifically excluding it from your description of the premises. If you don't, the tenant has rented it.

> **EXAMPLE:** "Single-family house at 1210 Parker St., Visalia, California, except for the two-car garage."

In the last blank, list the names of any minor children who will be living in the rental property, or put "None," as appropriate. If you are worried about the possibility of overcrowding if the family has more children, you should state the number of minor children—"Two children, Adam and Amy." But avoid language that might be considered discriminatory against children (for example, never write "…and no children," or "… and only one child").

You can legally establish reasonable space-to-people ratios, but you cannot use overcrowding as an excuse for refusing to rent to tenants with children. Discrimination against families with children is illegal, except in housing reserved for senior citizens only.

To avoid discriminating against families with children, your safest bet is to adopt an across-the-board "two-plus-one" policy: You allow two persons per bedroom plus one additional occupant. Thus, a landlord who draws the line at three people to a one-bedroom, five to a two-bedroom, and seven to a three-bedroom unit will be on safe ground in this regard. (For a detailed discussion of occupancy limits and discrimination, see Chapter 9.)

Clause 3. Limits on Use and Occupancy

This clause lets the tenants know they may not move anyone else in as a permanent resident without your consent.

When it comes to restricting how long guests may stay, it usually makes sense to include a reasonable time limit in your lease or rental agreement. The agreements in this book allow up to ten days in any six-month period. Even if you do not plan to strictly enforce restrictions on guests, this provision will be very handy if a tenant tries to move in a friend or relative for a month or two, calling this person a guest. It will give you leverage either to ask the guest to leave or to request that the guest apply to become a tenant, with an appropriate increase in rent (unless any rent control ordinance forbids an increase). Restrictions on guests may not be based on the age or sex of the occupant or guest.

Clause 4. Defining the Term of the Tenancy

Clause 4 is the only clause that differs between the fixed-term lease and month-to-month rental agreement included in this book. See "Written Agreements: Which Is Better, a Lease or a Rental Agreement?" above, for details.

Lease Provision

The lease form contains the provision which sets a definite date for the beginning and expiration of the lease and it obligates both the landlord and the tenants for a specific term. It also includes a warning that explains the tenants' liability for breaking the lease. (See Chapter 19 for more details on tenant's liability for breaking a lease.)

In the blanks, fill in the starting date and the expiration date. Leases usually last six, 12, or 24 months, but of course this is up to you and the tenants.

See Clause 4 of the sample Fixed Term Residential Lease shown below.

Family Day Care Homes

Under state law (H&S § 1597.40), a landlord may not prevent a tenant from using rental premises as a licensed family day care home. A tenant who obtains a state license to run a family day care home may do so legally—even if your lease or rental agreement prohibits the operation of a business on the premises, or limits the number of occupants. Local zoning and occupancy limits don't apply to a state-licensed family day care home, though building codes do, as explained further below.

A tenant who wants to run a child care operation must obtain a state license to run a family day care home. Before the county's social services department will issue a license, it will send a fire inspector or other official to examine the space and determine whether the planned operation is consistent with state law, as set out in the Uniform Building Code (counties adopt this code, which is amended every three years). The rules are as follows (2001 California Building Code, California Code of Regulations Title 24, Part 2, Volume 1):

Small family day care. These are for eight or fewer children (any children under ten who live in the rental count toward the total). These day cares are exempt from state fire and life safety regulations. Though you must allow them, state law does not regulate their placement in the building, as is true for larger day cares.

Large family day care. These are for nine to 14 children (again, children of the tenant under the age of ten count toward the total). These operations are regulated depending on the nature of the rental property:

- **Single-family homes, duplexes, and townhouses.** Tenants may operate large day cares, but cannot have children above the first floor unless the building has fire sprinklers and a direct exit from the upstairs to the outside. Large Family Day Cares must have two exits remotely located from each other. The exits can't pass through a garage. Only one exit may be a sliding door. Inspectors have denied a permit to tenants in a townhouse whose second exit went to an enclosed back patio area with no way out.
- **Apartments and condominiums.** Tenants cannot operate a Large Family Day Care in rental units in these buildings, but can operate a Small Family Day Care, and can do so in upstairs units.

In addition to meeting the requirements explained above, you may condition a day care operation on the following reasonable and legal rules:

- The tenant must notify you in writing of his intent to operate a family day care home—after having first obtained a state license—30 days before starting the child care operation.
- You may charge a tenant who operates a family day care home a higher security deposit than you charge tenants with similar units, without being liable for illegal discrimination. The maximum dollar limits on deposits—two months' rent for unfurnished units and three months' rent for furnished units—still apply. (See Chapter 5.)

If a tenant operates a day care facility, consider the impact this may have on your insurance. If you have a commercial policy (you'll have one if landlording is your business), chances are that there is no problem (confirm this with your broker). But if you are renting out a home that is insured under a homeowners' policy, your policy may not cover damage or claims that result from the tenant's business. Check with your agent or broker to find out. (Unfortunately, you probably cannot require the tenant to obtain his own liability policy, though no court case has made this clear.)

A landlord who uses pesticides in a child care unit, in or about the building, within ten feet of the building, and on or near the day care facility's play area, must issue a written 120-hour advance warning notice of the spraying or other application of the pesticide. (Ed. Code § 17610(b).) This notice must specify the pesticide's name, manufacturer, active ingredients, the federal EPA product registration number, the date and locations of the application, and the reasons you're applying the pesticide.

This means that if you have reason to believe your tenant is operating such a day care facility, you should probably not apply any pesticides yourself, or have any manager or other person do it, except through a licensed pest-control company that can assure you such a notice will be delivered.

Investigate Before Letting a Tenant Run a Home Business

Millions of Californians run a business from their house or apartment. If a tenant asks you to modify Clause 2 to permit a business, you have some checking to do—even if you are inclined to say yes.

For one, you'll need to check local zoning laws for restrictions on home-based businesses, including the type of businesses allowed (if any), the amount of added car and truck traffic the business can generate, outside signs, on-street parking, the number of employees, and the percentage of floor space devoted to the business. In Los Angeles, for example, dentists, physicians (except for psychiatrists), and unlicensed massage therapists may not operate home offices. In addition, photo labs and recording studios are banned.

Keep in mind that you may not be able to restrict a child care home business in California. See "Family Day Care Homes," above, for details. Also, if your rental unit is in a planned unit or a condominium development, check the CC&Rs of the homeowners' association.

You'll also want to consult your insurance company as to whether you'll need a more expensive policy to cover potential liability of employees or guests. In many places, a home office for occasional use will not be a problem. But if the tenant wants to operate a business, especially one with people and deliveries coming and going, such as a therapy practice, jewelry importer, or small business consulting firm, your insurance coverage may become an issue. Also, you should seriously consider whether neighboring tenants will be inconvenienced. (Where will visitors park, for example?)

You may also want to require that the tenant maintain certain types of liability insurance, so that you won't wind up paying if someone gets hurt on the rental property—for example, a business customer who trips and falls on the front steps. And you may want to insist that you be added as "additional insured" on the tenant's policy, which will protect you if you are sued because your tenant acted carelessly toward his customer or client. (As noted earlier, you probably cannot make this a requirement for a licensed day care business.)

Finally, be aware that if you allow a residence to be used as a commercial site, your property may need to meet the accessibility requirements of the federal Americans with Disabilities Act (ADA). For more information on the ADA check the ADA website at www.ada.gov.

Rental Agreement Provision

Clause 4 is the only clause that differs between the fixed-term lease and month-to-month rental agreement included in this book. See "Written Agreements: Which Is Better, a Lease or a Rental Agreement?" above, for details.

Here's the language you'll see for Clause 4 of the rental agreement:

> 4. **Defining the Term of the Tenancy.** The rental will begin on _____, 20____, and will continue on a month-to-month basis. This tenancy may be terminated by Landlord or Tenants and may be modified by Landlord, by giving 30 days' written notice to the other, or 60 days' notice by Landlord to Tenant, in accordance with Civil Code Section 827 or 1946.1 (subject to any local rent control ordinances that may apply).

In the blank, fill in the date the tenancy will begin. With this clause, you'll normally need to give tenants 30 days' written notice before changing or terminating their tenancy. (You'll need to give 60 days' notice for a rent increase of more than 10% or to terminate a tenancy that's lasted a year or more, and 90 days to terminate a government-subsidized tenancy.) (See Chapters 14 and 18.) (CC §§ 827(b), 1946.1, 1954.535.)

While 30 or 60 days is the most common notice period, you may want to agree that the tenants get a longer notice period—say 75 or 90 days; if so, change the clause accordingly. Interestingly, when tenants have stayed for a year or more, they need give only 30 days' notice to terminate the tenancy—but the landlord must give 60 days'. Some landlords report that they file fewer eviction lawsuits when they give tenants a generous amount of time in which to find another place.

CAUTION

Don't reduce the tenant's notice period. Agreements reducing the notice period for terminating the tenancy to as few as seven days used to be legal under CC § 1946. We think such provisions are illegal as of January 1, 2007, when Section 1946.1 became effective. Section 1946.1 does not refer to the possibility of a shortened notice period.

RENT CONTROL

A landlord's right to terminate or change the terms of a tenancy, even one from month to month, is limited by local rent control ordinances. Such ordinances not only limit rent and other terms of tenancies, but usually also require the landlord to have a good reason to terminate a tenancy. (We discuss rent control in Chapter 4.)

Clause 5. Amount and Schedule for the Payment of Rent

In this provision, specify the amount of the monthly rent and when, where, and to whom the rent is paid.

We discuss how to set a legal rent and where and how rent is due in Chapter 3. Before you fill in the blanks, please read that discussion.

Specify the amount of monthly rent in the first blank. Then indicate when the monthly rent is to be paid—usually on the first of the month, but you can set another time frame. Next, specify to whom and where the rent is to be paid.

5a. You need to specify what form of payment you'll accept, such as cash, cashier's check, money order, or personal check. Be sure to check all boxes that apply. If you check the "cash" box, you'll also have to check at least one of the other options, too. You cannot demand that rent be paid only in cash, unless a tenant has previously given you a bounced check, has issued a stop payment on a rent check, or has given you a cashier's check or money order that was not honored and you gave the tenant written notice to that effect. (In that event, your demand for cash only may last no longer than three months. (CC § 1947.3.)) Since the tenancy is just getting started, obviously none of these events have occurred. See Chapter 14 for more information on how to demand "cash only" rent, and for a form to use when informing your tenant. (Neither may you demand rent via online payment or electronic funds transfer, unless you provide for an alternative other than cash; see 5c, below.)

5b. Check this box if the tenant will pay the rent in person at the address stated earlier in this clause. Under state law, you must indicate the days and hours when rent can be paid at this address—for example, "Monday through Friday, 9 a.m. to noon; 1 p.m. to 5 p.m."

5c. Check this box if you and the tenant decide that rent will be paid via electronic funds transfer. This is a convenient method that takes a bit of setting up, but its steadiness is well worth the time and effort. You cannot insist that tenants give you this option, unless you provide for an alternative other than cash.

5d. Check this box if your tenants will move in midway through the rental period—say, on the tenth of the month when rent will normally be due on the first. This clause allows you to specify the prorated rent due for that first, short month. (If the tenant is moving in toward the end of the rental period, consider asking for the prorated rent for those few days plus the next month's rent, as explained in Chapter 7.) Specifying prorated rent will avoid any question or confusion about what you expect to be paid. Specify the move-in date and the ending date of that rental period, such as "November 14, 20xx through November 30, 20xx." Divide the monthly rent by 30 (even for 31-day months or February—it's easier) and multiply by the number of days in the first rental period. For example:

$900 ÷ 30 days = $30

$30 × 22 days = $660.

Finally, fill in the prorated amount due.

New Ways to Pay the Rent

More and more owners, especially those with large numbers of rental units, are looking for ways to ensure that rent payments are quick and reliable. Here are two common methods:

Credit card. If you have enough tenants to make it worthwhile, explore the option of accepting credit cards. You must pay a fee for the privilege—a percentage of the amount charged—but the cost may be justified if it results in more on-time payments and less hassle for you and the tenants. Keep in mind that you'll need to have someone in your onsite office to process the credit card payments and give tenants receipts. And if your tenant population is affluent enough, consider automatic credit card debits.

Automatic debit. You can ask for permission to have rent payments debited automatically each month from the tenant's bank account and transferred into your account. (CC § 1962(a)(2)(B)(ii).) Be sure to provide the information necessary to establish an electronic funds transfer—the names on your account and its number, plus the name of your bank and branch, if any, including the address and phone number. Tenants may be leery of this idea, however, and it's not worth insisting on.

Fixed-Term Residential Lease

1. **Identification of Landlord and Tenants.** This Agreement is made and entered into on November 14, 20xx, between Sharon and Hank Donaldson ("Tenants") and Lionel Jones ("Landlord"). Each Tenant is jointly and severally liable for the payment of rent and performance of all other terms of this Agreement.

2. **Identification of Premises and Occupants.** Subject to the terms and conditions set forth in this Agreement, Landlord rents to Tenants, and Tenants rent from Landlord, for residential purposes only, the premises located at 123 Sendaro Street, Fresno, California ("the premises"). The premises will be occupied by the undersigned Tenants and the following minor children: Jan Donaldson.

3. **Limits on Use and Occupancy.** The premises are to be used only as a private residence for Tenants and any minors listed in Clause 2 of this Agreement, and for no other purpose without Landlord's prior written consent. Occupancy by guests for more than ten days in any six-month period is prohibited without Landlord's written consent and will be considered a breach of this Agreement.

4. **Defining the Term of the Tenancy.** The term of the rental will begin on November 14, 20xx and will expire on November 30, 20xx. Should Tenants vacate before expiration of the term, Tenants will be liable for the balance of the rent for the remainder of the term, less any rent Landlord collects or could have collected from a replacement tenant by reasonably attempting to rerent. Tenants who vacate before expiration of the term are also responsible for Landlord's costs of advertising for a replacement tenant.

5. **Amount and Schedule for the Payment of Rent.** Tenants will pay to Landlord a monthly rent of $ 900, payable in advance on the 1st day of each month, except when that day falls on a weekend or legal holiday, in which case rent is due on the next business day. Rent will be paid to Lionel Jones at 125 Sendaro Street, Fresno, California 93656, or at such other place as Landlord may designate.

   ☐ a. The form of payment will be ☐ cash ☒ personal check ☐ certified funds or money order ☐ credit card ☐ bank debit ☐ automatic credit card debit

   ☐ b. [*Check if rent will be accepted personally, not by mail.*] Rent is accepted during the following days and hours: _____

   ☐ c. [*Check if rent will be paid by electronic funds transfer.*] Rent may be paid by electronic funds transfer to account number _____ in the name of _____ at _____ (*institution*), _____ (*branch*), a financial institution located at _____ (*bank address*), and and can reached at _____ (*telephone number*).

   ☐ d. [*Prorated rent.*] On signing this agreement, Tenants will pay to Landlord for the period of November 14, 20xx, through November 30, 20xx, the sum of $ 660 as rent, payable in advance.

6. **Late Charges.** Because Landlord and Tenants agree that actual damages for late rent payments are very difficult or impossible to determine, Landlord and Tenants agree to the following stated late charge as liquidated damages. Tenants will pay Landlord a late charge if Tenants fail to pay the rent in full within five days after the date it is due. The late charge will be $10, plus $5 for each additional day that the rent continues to be unpaid. The total late charge for any one month will not exceed $35. Landlord does not waive the right to insist on payment of the rent in full on the date it is due.

Clause 6. Late Charges

Late charges provide an incentive for tenants to pay rent on time and make sense when used with discretion. Unfortunately, landlords sometimes try to charge excessive late fees and, by so doing, get themselves into legal hot water and incur tenant hostility. Your late fee must correspond as closely as possible to the real monetary consequences you suffer (called "actual damages") when the rent is late. See Chapter 3 for help in setting legal late fees.

RENT CONTROL

Some cities with rent control ordinances regulate the amount of late fees. Check any rent control ordinances or regulations applicable to your property before establishing a late fee.

In the first blank, specify when you will start charging a late fee. You can charge a late fee the first day rent is late, but many landlords don't charge a late fee until the rent is two or three days late. Next, fill in the late charge for the first day rent is late, followed by the amount for each additional day. Finally, fill in the maximum late charge.

Clause 7. Returned Check and Other Bank Charges

It's legal to charge the tenant an extra fee if a rent check bounces—assuming you agree to accept checks. (If you're having a lot of trouble with bounced checks, you may decide to change your agreement to accept only cash or money order payments for rent. See Chapter 3.) As with late charges, bounced check charges must be reasonable. You should charge no more than the amount your bank charges you for a returned check (such as $15 to $25 per returned item; check with your bank), plus a few dollars for your trouble.

In the blank, fill in the amount of the returned check charge. If you won't accept checks, fill in "N/A" or "Not Applicable."

For more detail on returned check charges, see Chapter 3.

Clause 8. Amount and Payment of Deposits

By law, any payment, fee, deposit, or charge that is paid by the tenant "at the beginning of the tenancy" (other than credit check fees; see Chapter 1) is a security deposit, as long as the landlord intends to use it for any of the purposes mentioned in (1) through (4) of Clause 8. A fee that is intended to "reimburse the landlord for costs associated with processing a new tenant" also comes within this definition of a security deposit. We think that this means that so-called "tenant initiation expense reimbursement" fees ("TIER" fees), which are up-front fees that cover the time spent moving the tenant in and processing the paperwork, are no longer legal.

In short, any "cleaning deposit," "cleaning fee," "security deposit," or "last month's rent," or anything paid by the tenant up front other than the first month's rent or a legitimate credit check fee, is a security deposit (CC § 1950.5(b)), and subject to the laws that control the amount and uses of security deposits.

The use and return of security deposits is a frequent source of disputes between landlords and tenants. For example, a tenant may assume that the deposit, if it is equal to one month's rent, is the same as "last month's rent" and try to apply it this way a month before moving out. To avoid confusion, our lease and rental agreements are clear on the subject. You should make the point again in a move-in letter. (See Chapter 7.)

The amount and use of security deposits are limited by state law. To determine the maximum amount of security deposit you can charge, read Chapter 5 before completing this section. Chapter 20 provides details on returning deposits, including requirements that a tenant be offered the option of an initial, pre-move-out inspection and the opportunity to correct problems before moving out, penalties for failing to return deposits within the three weeks required by state law, and a requirement that you provide receipts for cleaning and repairs.

Once you've decided how much security deposit you can charge, fill in that amount in the blank. Then check either "a" or "b." Check "a" if your property is not located in a city that requires payment of interest. Check "b" if interest payments must be made or credited, and summarize the requirement. You may copy the explanation from the chart of "Cities Requiring Interest or Separate Accounts for Security Deposits," found in Chapter 5.

TIP

Consider offering interest even if you aren't legally required to do so. Tenants will appreciate your willingness to give them the interest their money has earned. Since state law doesn't regulate the manner in which you should handle interest, you can choose any convenient and fair method. For example, you might use the same rate as offered by a major bank on savings accounts, and you could give a rent credit at the end of six months' residence.

Clause 9. Utilities

This clause helps prevent misunderstandings. Normally, landlords pay for garbage (and sometimes water, if there is a yard) to help make sure that the premises are well maintained. Tenants usually pay for other services, such as phone, gas, and electricity. In the blank, fill in the utilities you—not the tenants—will be responsible for paying. If you'll pay a portion of the utilities, indicate that—for example, "all utilities except phone" or "half of the electricity and half of the gas." If the tenant will pay all utilities, fill in "N/A" or "Not Applicable," or edit the clause accordingly.

As mentioned in Chapter 1, state law requires landlords to notify all prospective tenants, before they move in, if their gas or electric meter serves any areas outside their dwelling. (CC § 1940.9.) This law specifically applies where:

- there are not separate gas and electric meters for each unit, and
- a tenant's meter serves any areas outside his unit (even a lightbulb not under the tenant's control in a common area).

If both these conditions apply, you are required to do one of the following:

- pay for the utilities for the tenant's meter yourself, by placing that utility in your own name
- correct the situation by separately metering the area outside the tenant's unit, or
- enter into a separate written agreement with the tenant, under which the tenant specifically agrees to pay utilities on his own meter, knowing he's paying for others' utilities, too.

We prefer the first and second methods above. Regardless of how few dollars a month a tenant may be paying for another tenant's or the common area utilities, a tenant faced with this sort of uncertainty will usually demand a concession on rent; this will probably cost you more in the long run than if you either added a new meter or simply paid for the utilities yourself.

Here are some examples of ways to handle shared utility arrangements.

> **EXAMPLE 1:** "Landlord will pay for the utilities for the Tenants' meter, and will place that utility in Landlord's own name."

> **EXAMPLE 2:** "Tenants will pay for gas and electricity charged to their meter, with the understanding that they may be paying for others' utility charges."

In a situation where you share housing with the tenant, or where there is only one meter for several units, define who is responsible for what portion of the utilities in more detail. If you do, replace Clause 9 of our form with these words: "Tenants shall pay for utility charges as follows: *[fill in the charges]*."

Clause 10. Prohibition of Assignment and Subletting

Clauses 1–3 spell out the total number of adult occupants, and let tenants know that they may not move anyone else in as a permanent resident. Clause 10 enforces this with an antisubletting clause, breach of which is grounds for eviction.

Clause 10 won't stop a tenant from bringing in a spouse or child later; in fact, if you tried to do so, you could be sued for illegal discrimination as discussed in Chapter 9. You may not want to strictly enforce Clause 3's restriction on guests, but it will be very handy to have if a tenant tries to move in a friend or relative for a month or two, calling her a guest. Restrictions on guests may not be based on the age or sex of the occupant or guest, as discussed in Chapter 10.

Clause 10 is designed to prevent your tenant from leaving in the middle of the month or of a lease term and finding a replacement—maybe someone you wouldn't choose to rent to—without your consent. It also prevents a tenant from subleasing during a vacation or renting out a room to someone unless you specifically agree.

By including Clause 10 in your lease, you have the option not to accept a sublet or assignment if you don't like or trust the person your tenant proposes to take over the lease. If, however, the tenant wishes to leave

early and provides you with another suitable tenant, you can't both hold the tenant financially liable for breaking the lease and unreasonably refuse to rent to another tenant who is in every way suitable. (We discuss lease-breaking tenants in detail in Chapter 19.)

The issue of who is and who is not a tenant, and legal liability for paying the rent and meeting all the conditions of the lease or rental agreement, can be very confusing and cause all kinds of problems. See Chapter 10 for a discussion of this topic and how using California's "lock-in" option may limit your financial losses when a tenant leaves early.

Clause 11. Condition of the Premises

Clause 11 makes it clear that if tenants damage the premises (for example, by breaking a window or scratching hardwood floors), it's their responsibility to pay for fixing the problem.

In the blanks after the words "except as noted here," clearly describe any defects or damages to the premises. If there are none, state that. You and your tenants may find it easiest to go through the rental unit before the tenants move in and fill out a Landlord/Tenant Checklist, describing what is in the rental unit and noting any problems.

Chapter 7 provides details on the Landlord/Tenant Checklist and other means to minimize disputes about who's responsible for damage or repairs. If you decide to use the checklist, fill in the words "See Landlord/Tenant Checklist, attached."

FORM

You'll find a downloadable copy of the Landlord/Tenant Checklist on the Nolo website. See Appendix B for the link to the forms in this book.

Clause 11 requires tenants to alert you to defective or dangerous conditions. We can't emphasize enough the importance of establishing a system for tenants to regularly report on the condition of the premises and defective or dangerous conditions. This is covered in detail in Chapter 11.

CAUTION

Don't fail to maintain the property. If your tenants or their guests suffer injury or property damage as a result of poorly maintained property, you may be held responsible for paying for the loss. Chapter 12 covers liability-related issues.

Clause 12. Possession of the Premises

This clause explains that if the tenants choose not to move in after they have signed a lease or rental agreement, they will still be required to pay rent and satisfy other conditions of the lease or rental agreement. Of course, you would be legally required to begin reasonable efforts to rerent the unit, and would be able to collect rent from the original, would-be occupants only until you rented the unit to someone else. (See Chapter 19 for an explanation of the "mitigation of damages" rule.)

This clause also protects you if you're unable, for reasons beyond your control, to turn over possession after having signed the agreement—for example, if a fire spreads from next door and destroys the premises, or if you can't turn over possession because the current tenant refuses to leave (and becomes a "holdover tenant"). It limits your financial liability to new tenants to the return of any prepaid rent and security deposits (the "sums previously paid" in the language of the clause). A disappointed tenant would not be able to sue you for the cost of temporary housing while he waited for you to evict a holdover tenant. And if the only substitute rental the waiting tenant could find was more expensive than the rent he would have paid you, he could not sue you for the difference. You don't need to add anything to this clause.

Clause 13. Pets

This clause is designed to prevent tenants and their guests from keeping pets without your written permission. This is not to say that you will want to apply a flat "no-pets" rule. It does provide you with a legal mechanism to keep your premises from being knee-deep in Irish wolfhounds. Without this sort of provision, particularly in a fixed-term lease that can't be terminated on 30 days' notice, there's little to prevent your tenant from keeping dangerous or non-housebroken pets on your property (except for city ordinances prohibiting tigers and the like).

Check "a" if you want to forbid pets. You have the right to prohibit all pets, with the exception of trained

Fixed-Term Residential Lease (continued)

7. **Returned Check and Other Bank Charges.** In the event any check offered by Tenants to Landlord in payment of rent or any other amount due under this Agreement is returned for lack of sufficient funds, a "stop payment," or any other reason, Tenants will pay Landlord a returned check charge in the amount of $ 20 .

8. **Amount and Payment of Deposits.** On signing this Agreement, Tenants will pay to Landlord the sum of $ 1,000 as a security deposit. Tenants may not, without Landlord's prior written consent, apply this security deposit to the last month's rent or to any other sum due under this Agreement. Within three weeks after Tenants have vacated the premises, Landlord will furnish Tenants with an itemized written statement of the reasons for, and the dollar amount of, any of the security deposit retained by the Landlord, receipts for work done or items purchased, if available, along with a check for any deposit balance. Under Section 1950.5 of the California Civil Code, Landlord may withhold only that portion of Tenants' security deposit necessary to: (1) remedy any default by Tenants in the payment of rent; (2) repair damages to the premises exclusive of ordinary wear and tear; (3) clean the premises if necessary to restore it to the same level of cleanliness it was in at the beginning of the tenancy; and (4) remedy any default by tenants, under this Agreement, to restore, replace, or return any of Landlord's personal property mentioned in this Agreement, including but not limited to the property referred to in Clause 11.

   Landlord will pay Tenants interest on all security deposits as follows:

   ☒ a. Per state law, no interest payments are required.

   ☐ b. Local law requires that interest be paid or credited, or Landlord has decided voluntarily to do so, which will occur as follows: _____ .

9. **Utilities.** Tenants will be responsible for payment of all utility charges, except for the following, which shall be paid by Landlord: garbage and water .

   ☐ Tenants' gas or electric meter serves area(s) outside of their premises, and there are not separate gas and electric meters for Tenants' unit and the area(s) outside their unit. Tenants and Landlord agree as follows: _____ .

10. **Prohibition of Assignment and Subletting.** Tenants will not sublet any part of the premises or assign this Agreement without the prior written consent of Landlord.

11. **Condition of the Premises.** Tenants agree to: (1) keep the premises clean and sanitary and in good repair and, upon termination of the tenancy, to return the premises to Landlord in a condition identical to that which existed when Tenants took occupancy, except for ordinary wear and tear; (2) immediately notify Landlord of any defects or dangerous conditions in and about the premises of which they become aware; and (3) reimburse Landlord, on demand by Landlord, for the cost of any repairs to the premises, including Landlord's personal property therein, damaged by Tenants or their guests or invitees through misuse or neglect.

    Tenants acknowledge that they have examined the premises, including appliances, fixtures, carpets, drapes, and paint, and have found them to be in good, safe, and clean condition and repair, except as noted here: See Landlord/Tenant Checklist attached. .

animals used by physically or mentally disabled people. You may not charge an extra pet deposit on account of any trained service animal. (CC §§ 54.1, 54.2.)

To allow pets, check "b" and identify the type and number of pets—for example, "one cat." If you allow pets, you're wise to spell out your pet rules—for example, you may want to specify that the tenants will keep the yard free of all animal waste. You may also want to charge a higher security deposit, if you aren't already requiring the maximum allowed by law.

It is important to educate tenants from the start that you will not tolerate dangerous or even apparently dangerous pets, and that as soon as you learn of a worrisome situation, you have the option of insisting that the tenant get rid of the pet (or move). You may want to use the space under part "b" to advise tenants that their pets must be well trained and non-threatening; or you could set out your policy in your Rules and Regulations, if you have them. As long as you or your management follow through with your policy—by keeping an eye on what goes on and listening to and acting on any complaints from other tenants or neighbors—such a clause will help you evict if you discover a dangerous pet on your property. Your policy might look something like this:

"Tenant's pet(s) will be well behaved, will be under Tenant's control at all times, and will not pose a threat or apparent threat to the safety of other tenants, their guests, or other people on or near the rental premises. If, in the opinion of Landlord, tenant's pet(s) pose such a threat, Landlord will serve Tenant with a Three-Day Notice to Cure (remove pet from the premises) or Quit (move out)."

CAUTION

Enforce no-pets clauses. When faced with tenants who violate no-pets clauses, landlords often ignore the situation for a long time, then try to enforce it later when friction develops over some other matter. This could backfire. In general, if you know a tenant has breached the lease or rental agreement (for example, by keeping a pet) and do nothing about it for a long time, you risk having legally waived your right to object. You can preserve your right to object by promptly giving the tenant an informal written notice as soon as the pet appears, then following through with a Three-Day Notice to Perform Covenant or Quit. See Chapter 4 for details on rent control and Chapter 18 for a discussion of three-day and 30-day notices.

Renting to Pet Owners

Project Open Door, an ambitious program of the San Francisco Society for the Prevention of Cruelty to Animals (SPCA), seeks to show landlords how to make renting to pet-owning tenants a satisfying and profitable experience. The SPCA offers landlords:

- checklists to help screen pet-owning tenants
- pet policy agreements to add to standard leases and rental agreements, and
- free mediation if landlords and tenants have problems after moving in, such as neighbor complaints.

For more information, contact the San Francisco SPCA at 201 Alabama Street, San Francisco, CA 94103, 415-554-3000, or check their website at www.sfspca.org/program-services/open-door.

Should You Require a Separate Security Deposit for Pets?

Some landlords allow pets but require the tenant to pay a separate deposit to cover any damages caused by the pet. This is legal only if the deposit charged for the pet, when added to the amount charged for the security deposit, does not exceed the maximum amount that can be charged for a deposit. (See Chapter 5.)

Separate pet deposits are usually a bad idea because they limit how you can use that part of the security deposit. For example, if the pet is well behaved but the tenant trashes your unit, you can't use the pet portion of the deposit to clean up after the human. If you want to protect your property from damage done by a pet, you are probably better off charging a slightly higher rent or an undifferentiated security deposit to start with (assuming you are not restricted by rent control or the upper security deposit limits). It is also illegal to charge an extra pet deposit for legally disabled people with service animals.

Clause 14. Landlord's Access for Inspection and Emergency

The law limits your right to enter property in the tenant's absence or without the tenant's permission. Although these limits apply regardless of what an agreement or lease says, it's best to put the limits in writing to avoid problems later on.

This clause makes it clear to the tenant that you have a legal right of access to the property to make repairs or show the premises for sale or rental, provided you give the tenant reasonable notice, which is presumed to be 24 hours. However, the notice period is 48 hours if the purpose of the entry is a move-out inspection requested by the tenant regarding possible security deposit deductions. (See Chapters 5 and 20 for information on collecting and returning deposits.) Chapter 13 provides details on a landlord's right to enter rental property and notice requirements.

Clause 15. Extended Absences by Tenants

This clause requires that the tenants notify you when leaving your property for an extended time.

In the blank, fill in the number of consecutive days that you'd like to be notified of. Fourteen days is common, but you may opt for an altogether different period of time. For example, if you live in Truckee or anywhere else where it snows, checking your property on a daily basis during a snowstorm may be prudent, to make sure the pipes haven't burst.

Waste and Nuisance: What Are They?

In legalese, **waste** is the causing of severe property damage to real estate, including a house or apartment unit, which goes way beyond ordinary wear and tear. Punching holes in walls, pulling out sinks and fixtures, and knocking down doors are examples of "committing waste."

Nuisance means behavior that prevents neighbors from fully enjoying the use of their own homes. Continuous loud noise and foul odors are examples of legal nuisances that may disturb nearby neighbors. So, too, are selling drugs or engaging in other illegal activities that greatly disturb neighbors.

Clause 16. Prohibitions Against Violating Laws and Causing Disturbances

This type of clause is found in most form leases and rental agreements. Although it's full of legal gobbledygook, it's probably best to leave it as is, since courts have much experience in working with these terms. If the tenant causes a nuisance, seriously damages the property, or violates the law—for example, deals drugs—you may be able to evict even without such a provision in the agreement. It will, however, be easier to evict if you can point to an explicit lease provision.

If you want to add specific rules—for example, no loud music played after midnight—add them to Clause 25: Additional Provisions.

Take a moment to look again at the first sentence in this clause, which states that tenants are entitled to "quiet enjoyment." As just explained, this means that neighboring tenants are entitled to peace and quiet—and if the tenant who's signing this document seriously interferes with this right, you have the power to terminate his tenancy. It also means that you are promising to maintain an atmosphere of peace and quiet. So, if the tenant who signs this lease comes to you with credible proof that a neighboring tenant is making it impossible to reasonably enjoy his rented home, you must, according to your promise in the lease or rental agreement, take steps to calm things down (or clean them up). If you don't, your aggrieved tenant can point to your violation of this clause as grounds for breaking the lease (with no liability for future rent).

Clause 17. Repairs and Alterations

The first part of this clause forbids the tenant from rekeying the locks or installing a burglar alarm system without your consent, and provides that you are entitled to duplicate keys and instructions on how to disarm the alarm system. See Chapter 12 for more information on your responsibility to provide secure premises, and Chapter 13 for information on your right to enter rental property in an emergency.

The second part of Clause 17 makes it clear that alterations and repairs without the landlord's consent aren't allowed. The "except as provided by law" language is a reference to the "repair-and-deduct" remedy the tenants may use to repair health- or safety-

Fixed-Term Residential Lease (continued)

12. **Possession of the Premises.** If, after signing this Agreement, Tenants fail to take possession of the premises, they will be responsible for paying rent and complying with all other terms of this Agreement. In the event Landlord is unable to deliver possession of the premises to Tenants for any reason not within Landlord's control, including, but not limited to, failure of prior occupants to vacate or partial or complete destruction of the premises, Tenants will have the right to terminate this Agreement. In such event, Landlord's liability to Tenants will be limited to the return of all sums previously paid by Tenants to Landlord.

13. **Pets.** No animal, bird, or other pet may be kept on the premises without Landlord's prior written consent, except properly trained dogs needed by blind, deaf, or disabled persons and:

    [X] one cat , under the following conditions:

    _____.

14. **Landlord's Access for Inspection and Emergency.** Landlord or Landlord's agents may enter the premises in the event of an emergency or to make repairs or improvements, supply agreed services, show the premises to prospective buyers or tenants, and conduct an initial move-out inspection requested by tenants. Except in cases of emergency, Tenants' abandonment of the premises, or court order, Landlord will give Tenants reasonable notice of intent to enter and will enter only during regular business hours of Monday through Friday from 9:00 a.m. to 6:00 p.m. and Saturday from 10:00 a.m. to 1:00 p.m. The notice will include the purpose, date, and approximate time of the entry.

15. **Extended Absences by Tenants.** Tenants agree to notify Landlord in the event that they will be away from the premises for 10 consecutive days or more. During such absence, Landlord may enter the premises at times reasonably necessary to maintain the property and inspect for damage and needed repairs.

16. **Prohibitions Against Violating Laws and Causing Disturbances.** Tenants are entitled to quiet enjoyment of the premises. Tenants and their guests or invitees will not use the premises or adjacent areas in such a way as to: (1) violate any law or ordinance, including laws prohibiting the use, possession, or sale of illegal drugs; (2) commit waste or nuisance; or (3) annoy, disturb, inconvenience, or interfere with the quiet enjoyment and peace and quiet of any other tenant or nearby resident.

17. **Repairs and Alterations**

    a. Tenants will not, without Landlord's prior written consent, alter, rekey, or install any locks to the premises or install or alter any burglar alarm system. Tenants will provide Landlord with a key or keys capable of unlocking all such rekeyed or new locks as well as instructions on how to disarm any altered or new burglar alarm system.

    b. Except as provided by law or as authorized by the prior written consent of Landlord, Tenants will not make any repairs or alterations to the premises. Landlord will not unreasonably withhold consent for such repairs, but will not authorize repairs that require advanced skill or workmanship or that would be dangerous to undertake. Landlord will not authorize repairs unless such repairs are likely to return the item or element of the rental to its predamaged state of usefulness and attractiveness.

18. **Damage to the Premises.** In the event the premises are partially or totally damaged or destroyed by fire or other cause, the following will apply:

    a. If the premises are totally damaged and destroyed, Landlord will have the option to: (1) repair such damage and restore the premises, with this Agreement continuing in full force and effect, except that Tenants' rent will be abated while repairs are being made; or (2) give written notice to Tenants terminating this Agreement at any time within thirty (30) days after such damage, and specifying the termination date; in the event that Landlord gives such notice, this Agreement will expire and all of Tenants' rights pursuant to this Agreement will cease.

    b. Landlord will have the option to determine that the premises are only partially damaged by fire or other cause. In that event, Landlord will attempt to repair such damage and restore the premises within thirty (30) days after such damage. If only part of the premises cannot be used, Tenants must pay rent only for the usable part, to be determined solely by Landlord. If Landlord is unable to complete repairs within thirty (30) days, this Agreement will expire and all of Tenants' rights pursuant to this Agreement will terminate at the option of either party.

threatening defects. By law, landlords must maintain and repair their rental property in accordance with certain minimum standards. (CC § 1941.1.) If a landlord refuses to do so, after reasonable notification by the tenant, a tenant may arrange for certain repairs and deduct the cost from the next month's rent. (CC § 1942.) The tenant always has the right to use this statutory procedure, no matter what a lease says. (See below.) If you don't keep the property in habitable condition, tenants may also have the right to withhold rent and even sue. (See Chapter 11.)

If mutually agreeable to you and the tenants, the tenants may agree in writing to perform necessary repairs or maintenance such as mowing the lawn in exchange for a rent reduction. See below for more details on this type of arrangement.

Section b in this clause makes it clear that alterations and repairs without your written consent aren't allowed. If you wish, you may authorize a tenant improvement or alteration, such as the installation of a bookshelf or plantings in the backyard. Use the Tenant Alterations to Rental Unit form, which is fully explained in Chapter 11.

Clause 18. Damage to the Premises

This clause addresses what will happen if the premises are seriously damaged by fire or other calamity. This provision places responsibility on tenants for damage caused by their acts or by people they've allowed in the premises. Basically, it seeks to limit your risk to 30 days' rental value, even if the damage was your responsibility. You don't need to add anything to this clause. (See Chapter 11 for a discussion of liability for rent if the premises are partially or totally destroyed.)

Clause 19. Tenants' Financial Responsibility and Renters' Insurance

This clause forces the tenants to assume responsibility for damage to their own belongings. It also suggests that tenants obtain renters' insurance.

One change you may wish to make in this clause involves requiring renters' insurance. If you absolutely wish to require insurance, substitute the following paragraph for the last sentence of Clause 19:

Optional Insurance Paragraph for Clause 19

Landlord assumes no liability for such loss and requires Tenants, within 10 days of the signing of this Agreement, to obtain insurance that will:

a. reimburse Landlord for cost of fire or water damage and vandalism to the premises
b. indemnify Landlord against liability to third parties for any negligence on the part of Tenants or their guests or invitees and
c. cover damage to Tenants' personal possessions to a minimum of $_____ . Tenants will provide Landlord with proof of such insurance.

Your move-in letter (see Chapter 7) is the place to highlight your policy on renters' insurance.

Clause 20. Waterbeds

Whether you can refuse to rent to a tenant with a waterbed depends on when the property was built. Here are the rules.

Property built before January 1, 1973. If your property's "certificate of occupancy" (final approval of initial construction by local building department) was issued before January 1, 1973, you may legally refuse to rent to a tenant who has a waterbed. This isn't to say that you should ban waterbeds if your property was built before 1973. Wooden floors built to current standards, or even the standards 20 or 30 years ago, can withstand pressures of at least 60 pounds per square foot, and a typical queen-sized waterbed exerts about 50 pounds per square foot. (Poured concrete floors, of course, pose no problem.)

Property built on or after January 1, 1973. If your property was built after 1973, you may have no choice. State law prohibits landlords of such property from refusing to rent to (or renew leases with) tenants because they have waterbeds, or refusing to allow tenants to use waterbeds, if:

- the tenant obtains a replacement-value $100,000 waterbed insurance policy
- the pressure the waterbed puts on the floor does not exceed the floor's pounds-per-square-foot weight limitation (as stated above, this should be no problem for dwellings constructed after 1973)
- the waterbed is held together by a pedestal or frame

- the tenant installs, maintains, and moves the waterbed in accordance with the standards of the manufacturer's retailer or state, whichever are more stringent
- the tenant gives the landlord at least 24 hours' written notice of his intention to install, move, or remove the waterbed, and allows the landlord to be present when this occurs
- the waterbed conforms to construction standards imposed by the State Bureau of Home Furnishings and displays a label to that effect, and
- the waterbed was constructed after January 1, 1973. (CC § 1940.5.)

If your property was built before 1973 and you wish to ban waterbeds, you may cross off or delete the words "without Landlord's written consent."

If you choose to allow waterbeds, or your property was built in 1973 or later and your tenant plans to have a waterbed, check the box, fill in the number of the attachment, and complete the self-explanatory fill-in-the-blanks Attachment: Agreement Regarding Use of Waterbed, a sample of which is shown below.

FORM

The Nolo website includes a downloadable copy of the Attachment: Agreement Regarding Use of Waterbed. See Appendix B for the link to the forms in this book.

TIP

Security deposits may be increased. You can charge a higher security deposit for tenants with waterbeds, equal to an additional one-half month's rent. (See Chapter 5.)

Clause 21. Tenant Rules and Regulations

Many landlords don't worry about detailed rules and regulations ("R and Rs"), especially when they rent single-family homes or duplexes. However, in large buildings, rules are usually important to control the use of common areas and equipment.

Check the box if you plan to use tenant rules, and fill in the attachment number. Remember to also label the rules and regulations with the attachment number. This clause gives you the authority to evict a tenant who persists in seriously violating your code of tenant rules and regulations.

The final sentence in Clause 21 gives you the right to vary your rules and regulations, and to do so without needing to give notice. A word of caution here: Don't be tempted to push key provisions of the rental into your R and Rs, thinking that doing so enables you to change them at will (which you can't do when the provision is in a lease or rental agreement attachment). A judge will see this ruse for what it is and will side with a tenant who protests when, for example, you ban pets in your R and Rs (but the tenant's lease says nothing about pets). Instead, use your R and Rs to spell out day-to-day details of how your building works, as explained below in "What's Covered in Tenant Rules and Regulations."

What's Covered in Tenant Rules and Regulations

Tenant rules and regulations typically cover issues such as:

- elevator safety and use
- pool rules
- garbage disposal and recycling times and places
- parking garage regulations
- lockout and lost key charges
- security system use
- excessive noise
- pet behavior
- use of grounds
- maintenance of balconies and decks (for instance, no drying clothes on balconies)
- display of signs in windows, and
- laundry room rules.

Clause 22. Payment of Attorney Fees in a Lawsuit

Many landlords assume that whenever they sue a tenant over the interpretation of the lease (or to enforce it) and win, the court will order the losing tenant to pay the landlord's attorney fees and court costs, such as filing fees and deposition costs. However, this is true only if a written agreement specifically provides for it, or if the law underlying the landlord's winning case specifically provides for the loser to pay the winner's costs and fees. This is why it

Attachment: Agreement Regarding Use of Waterbed

Landlord and Tenants agree that Tenants may keep water-filled furniture in the premises located at _____

_____,

subject to the legal requirements of Civil Code Section 1940.5, key provisions of which are summarized as follows:

1. **Insurance**
   Tenants agree to obtain a valid waterbed insurance policy or certificate of insurance for property damage, with a minimum replacement value of $100,000. Such insurance policy shall be furnished to Landlord prior to installation of the waterbed and shall be maintained in full force and effect until the waterbed is permanently removed from the premises.
2. **Weight Limitation**
   The pressure the waterbed puts on the floor shall not exceed the floor's pounds per square foot weight limitation. The weight shall be distributed on a pedestal or frame which is approximately the same dimensions as the mattress itself.
3. **Installation, Moving, and Removal**
   Tenants shall install, maintain, and move the waterbed in accordance with the standards of the manufacturer, retailer, or state, whichever are most stringent.
4. **Notice to and Inspection by Landlord**
   Tenants agree to give Landlord at least 24 hours' written notice of their intention to install, move, or remove the waterbed, and shall allow Landlord to be present when this occurs. If anyone other than Tenants installs or moves the waterbed, Tenants shall give Landlord a written installation receipt that states the installer's name and address and any business affiliation.
5. **Waterbed Construction Standards**
   The waterbed shall conform to construction standards imposed by the State Bureau of Home Furnishings and shall display a label to that effect. The waterbed must have been constructed on or after January 1, 1973.
6. **Security Deposit**
   Landlord may increase Tenants' security deposit in an amount equal to an additional one-half month's rent.

_____	_____
Landlord or Manager	Date
_____	_____
Tenant	Date
_____	_____
Tenant	Date
_____	_____
Tenant	Date

can be important to have an "attorney fees" clause in your lease. That way, if you hire a lawyer to bring an eviction suit and win, the judge will order your tenant to pay your attorney fees.

By law, an attorney fees clause in a lease or rental agreement works both ways. (CC § 1717.) That is, if your tenants prevail in a lawsuit, and the lease or written rental agreement contains such a clause, you must pay their "reasonable attorney fees" in an amount determined by the judge. This is true even if the clause is worded so that it requires payment of attorney fees only by the tenant if you win and not vice versa.

Attorney fees clauses don't cover all legal disputes. They cover fees only for lawsuits that concern the meaning or implementation of a rental agreement or lease—for example, a dispute about rent, security deposits, or your right to access (assuming that the rental document includes these subjects). An attorney fees clause would not apply in a personal injury lawsuit.

You may not want to provide for attorney fees. Some landlords choose not to allow for attorney fees because of their experience that money judgments against evicted tenants are very often uncollectible. So, in practice, the clause does not help the landlord. And such a clause may actually hurt, because it works both ways: If the landlord loses a lawsuit, the landlord pays the tenant's attorney fees, and that judgment *will* be collectible.

If you intend to do your own legal work in any potential eviction or other lawsuit, even if the tenant hires a lawyer, you will almost surely conclude that it is wiser not to allow for attorney fees. You don't want to be in a situation where you'd have to pay the tenant's attorney fees if the tenant wins, but the tenant wouldn't have to pay yours if you won because you didn't hire a lawyer.

If you don't want to allow for attorney fees, check the first box before the words "will not" and cross out the word "will."

If you want to be entitled to attorney fees if you win—and you're willing to pay attorney fees if you lose—check the second box before the words "will recover" and cross out the words "will not."

Clause 23. Authority to Receive Legal Papers

By law, you must give your tenants information about everyone who is authorized to receive rent and notices and legal papers, such as lawsuits from the tenants. (CC §§ 1961–1962.7.) For this purpose, you must provide the name, phone number, and street address of:

- the manager, if any, or any other person who receives rent payments, and
- you or someone else you authorize to receive notices and legal papers on your behalf.

These written disclosures, as well as ones regarding where and how rent must be paid (Clause 5, above), are required even if the agreement is oral. You must provide this information to the tenant within 15 days of entering into an oral rental agreement, and once each year (if asked) on 15 days' notice. Since you must use a written document to convey this information, you may as well use the written rental agreement we provide. In the meantime, if your agreement with your tenant is oral, use the language above and in Clause 5 to draft the required written disclosure.

CAUTION

Do you trust your manager? It's unwise to have a manager you don't trust receive legal papers on your behalf. You don't, for example, want a careless apartment manager to throw away a notice of a lawsuit against you without informing you. That could result in a judgment against you and a lien against your property in a lawsuit you didn't even know about. (For more information on using property managers, see Chapter 6.)

Clause 24. Cash-Only Rent

As noted in the instructions for Clause 5, landlords may not insist on cash-only rent payments unless the tenant bounces a check or stops payment on a cashier's check or money order. This law presents an interesting problem for tenants with leases. By nature, a lease is a contract that can't be changed unless the parties mutually agree (or a judge declares part or some of it void because it violates a law or public policy). In other words, you can't use 30-day notices to change leases. Yet the law tells landlords they can do precisely that. We hope that clean-up legislation will address this issue some day, perhaps after tenants' lawyers have challenged the law. In the meantime, landlords whose leases include a clause like this one should be on solid ground if they need to demand cash only, since the tenant is agreeing in the lease that the lease can be changed via a 30-day notice in this situation only. (It's a bit like writing a rent increase into

Fixed-Term Residential Lease (continued)

c. In the event that Tenants, or their guests or invitees, in any way caused or contributed to the damage of the premises, Landlord will have the right to terminate this Agreement at any time, and Tenants will be responsible for all losses, including, but not limited to, damage and repair costs as well as loss of rental income.

d. Landlord will not be required to repair or replace any property brought onto the premises by Tenants.

19. Tenants' Financial Responsibility and Renters' Insurance. Tenants agree to accept financial responsibility for any loss or damage to personal property belonging to Tenants and their guests and invitees caused by theft, fire, or any other cause. Landlord assumes no liability for any such loss. Landlord recommends that Tenants obtain a renters' insurance policy from a recognized insurance firm to cover Tenants' liability, personal property damage, and damage to the premises.

20. Waterbeds. No waterbed or other item of water-filled furniture may be kept on the premises without Landlord's written consent.

☐ Landlord grants Tenants permission to keep water-filled furniture on the premises. Attachment _____ : Agreement Regarding Use of Waterbed is attached to and incorporated into this Agreement by reference.

21. Tenant Rules and Regulations

☐ Tenants acknowledge receipt of, and have read a copy of, tenant rules and regulations, which are labeled Attachment ___ and attached to and incorporated into this Agreement by reference. Landlord may change the rules and regulations without notice.

22. Payment of Attorney Fees in a Lawsuit. In any action or legal proceeding to enforce any part of this Agreement, the prevailing party ☐ will not / ☒ will recover reasonable attorney fees and court costs.

23. Authority to Receive Legal Papers. Any person managing the premises, the Landlord, and anyone designated by the Landlord are authorized to accept service of process and receive other notices and demands, which may be delivered to:

☐ a. the manager, at the following address and telephone number: _____

☒ b. the Landlord, at the following address and telephone number: 87 Skyview Terrace, Fresno, California. 123-456-8990

☐ c. the following: _____

24. Cash-Only Rent. Tenants will pay rent in the form specified above in Clause 5a. Tenants understand that if Tenants pay rent with a check that is not honored due to insufficient funds, or with a money order or cashier's check whose issuer has been instructed to stop payment, Landlord has the legal right to demand that rent be paid only in cash for up to three months after Tenants have received proper notice. (California Civil Code § 1947.3.) In that event, Landlord will give Tenants the legally required notice, and Tenants agree to abide by this change in the terms of this tenancy.

25. Additional Provisions

☒ a. None

☐ b. Additional provisions are as follows: _____

the lease.) In addition, it is unlawful for landlords to insist that rent be paid via electronic transfer.

Clause 25. Additional Provisions

In this clause, you may list any additional provisions you want to address in the lease or rental agreement. If there are no additional provisions, check "a."

If you want to include additional clauses in your lease or rental agreement, check "b." For example, if you agree that the unit will be repainted before the tenant moves in, with you supplying the paint and painting supplies and the tenant contributing labor, you could add a clause to the rental agreement like the one shown below.

> Landlord will pay for up to $150 worth of paint and painting supplies. Tenant will paint the living room, halls, and two bedrooms, using off-white latex paint on the walls, and water-based enamel on all wood surfaces (doors and trim). Paint and supplies will be picked up by Tenant from ABC Hardware and billed to Landlord.

Clause 26. State Database Disclosure

Every lease or rental agreement must include this disclosure regarding registered sex offenders (see the discussion "Checking the Megan's Law Database" in Chapter 1 for details). You need not add anything to this clause.

Clause 27. Lead-Based Paint and Other Disclosures

Under federal law, you must disclose any known lead-based paint hazards in rental premises constructed prior to 1978. California landlords are also legally obligated to make several other disclosures to prospective tenants, including the property's location near a former military base and any shared utility arrangements. For details on your legal disclosure responsibilities, see "Landlord Disclosures" in Chapter 1; this includes an overview of environmental hazard disclosures, but full details regarding these hazard disclosures (including the official lead-based paint disclosure form) are in Chapter 12.

You can add these disclosures to your rental application, using the Disclosures by Property Owner(s) form shown in Chapter 1 (and available for download on the Nolo website). Or you can make these disclosures part of your lease or rental agreement. If you make them part of your lease or rental agreement, follow the advice in Chapters 1 and 12 and fill in Clause 27 accordingly.

Clause 28. Grounds for Termination

This clause states that any violation of the lease or rental agreement by the tenants, or by the tenants' business or social guests, is grounds for terminating the tenancy, according to the procedures established by state or local laws. Making the tenants responsible for the actions of their guests can be extremely important—for example, you'll want to be able to take action if you discover that the tenant's family or friends are dealing illegal drugs on the premises or have damaged the property. Chapter 12 discusses terminations and evictions for tenant violations of a lease or rental agreement.

This clause also tells tenants that if they have made false statements on the rental application concerning an important fact—such as prior criminal history—you may terminate the tenancy. You don't need to add any language to this clause.

Clause 29. Entire Agreement

This clause states that all important aspects of the rental deal between you and the tenant have been addressed in the lease or rental agreement. It protects you against any claim by the tenant that there were additional oral understandings that you must comply with. Similarly, you will not be able to claim that the tenant orally agreed to an important provision that's not reflected in the document. Finally, it establishes that any changes must be in writing.

How to Modify and Sign Form Agreements

Our lease and rental agreement forms have been designed to protect your broad legal interests, but they may not fit your exact situation. For example, if your building has a garage, you may want to incorporate rules in the lease or rental agreement regarding specific parking requirements.

Fixed-Term Residential Lease (continued)

26. State Database Disclosure. Notice: Pursuant to Section 290.46 of the Penal Code, information about specified registered sex offenders is made available to the public via an Internet website maintained by the Department of Justice at www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides.

27. Lead-Based Paint and Other Disclosures. Tenant acknowledges that Landlord has made the following disclosures regarding the premises:

☐ Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards

☐ Other disclosures: _____

_____

_____ .

28. Grounds for Termination of Tenancy. The failure of Tenants or Tenants' guests or invitees to comply with any term of this Agreement, or the misrepresentation of any material fact on Tenants' Rental Application, is grounds for termination of the tenancy, with appropriate notice to Tenants and procedures as required by law.

29. Entire Agreement. This document constitutes the entire Agreement between the parties, and no promises or representations, other than those contained here and those implied by law, have been made by Landlord or Tenants. Any modifications to this Agreement must be in writing signed by Landlord and Tenants.

Lionel Jones	555-1234	November 5, 20xx
Landlord/Manager	Phone	Date
87 Skyview Terrace,		
Landlord/Manager's Street Address, City, State, & Zip		Phone
Fresno, California 95123		
Sharon Donaldson	555-9876	November 5, 20xx
Tenant	Phone	Date
Hank Donaldson	555-9876	November 5, 20xx
Tenant	Phone	Date
Tenant	Phone	Date

Additional Provisions You May Want to Add

Some landlords find it helpful to spell out exactly how they expect their tenants to take care of the premises. Here are some key areas:

Smoking

Under CC § 1947.5, all landlords have the right to restrict or even completely ban smoking on all or part of the premises, as specified in a lease. In the case of a month-to-month tenancy, you can also specify this in the rental agreement, or by giving a 30-day notice of change of terms of tenancy. You can allow smoking in certain common areas, if you want, but must specify that in the lease, rental agreement, or notice of change of terms of tenancy.

If you decide to impose a no-smoking policy, and have multiple units in the same building, we suggest you treat everyone the same, subject to honoring existing lease terms though the date of lease expiration, to avoid being accused of discriminating.

If your property offers a children's play area or a "tot lot" sandbox area, you must prohibit smoking within 25 feet. (H&S § 104495.)

Smoke detectors (frequency for checking and replacing batteries)

> Tenants agree to test all smoke detectors at least once a month and to report any problems to Landlord in writing. Tenants agree to replace all smoke detector batteries as necessary.

Yard work and other maintenance

> Tenants agree to regularly water and maintain the grounds, including lawn, shrubbery, and flowers.

Rules for taking care of furniture or other items on the premises

> Tenants will keep the hot tub covered when not in use. Tenants will use and clean the hot tub regularly, according to the manufacturer's instructions attached to this Agreement as Attachment 1.

How to Edit or Add a Lease or Rental Agreement Clause

It's easy to make changes to the lease or rental agreement form by using the electronic versions available for download on the Nolo website—for example, if you want to:

- edit or add something to a clause
- delete a clause (for example, Clause 21 on tenant rules and regulations, if you don't have a separate set of these), or
- add a new clause.

However, if you want to make the changes at a later date (after all parties have signed the lease or rental agreement), you'll have to use a separate document—an Attachment—as described below, and attach it to the original. (If your additions or modifications are very slight, and can be done in the margins of the lease or rental agreement, you may want instead to enter them there. If you do this, be sure that you and all tenants initial and date the insertions.)

1. At the first place that you run out of room, or want to add a clause or change a clause, begin your entry and then write "Continued on Attachment 1." Similarly, if there is another place where you run out of room, add as much material as you can and then write "Continued on Attachment 2," and so on.
2. Fill in the relevant section that applies on the Attachment form (Continued, Modified, or Augmented) and delete the sections that don't apply.
3. Using the Attachment to Lease/Rental Agreement form included on the Nolo website, number the attachment "1," "2," and so on, in the form's title. You'll need a separate attachment page every time you continue a clause, modify a clause, or add a new clause.
4. Be sure to have everyone who signs the original lease or rental agreement sign and date the attachment.
5. Staple the Attachment page to the lease or rental agreement.

Attachment 1 to Lease/Rental Agreement

This Attachment is made by Lenny D. Landlord,
Landlord and Terrance D. Tenant,
_____, and
_____, Tenant(s).
It pertains to the residential lease/rental agreement signed on March 1, 20xx for the property at 4567 Monterey Rd., Gilroy, CA.

Landlord and Tenant(s) agree that clauses specified below of the lease/rental agreement are:

☑ **Continued.** Clause 2 continues as follows:

Specifically excepted from the rented premises is an outdoor tool shed in the backyard, which shall be reserved for landlord's exclusive use.

☑ **Modified.** Clause 14 is modified as follows:

Landlord may access the outdoor tool shed without written notice, but shall give reasonable telephoned notice in advance.

☐ **Augmented.** New Clause _____ is added as follows:

Lenny D. Landlord	3-1-20xx
Landlord or Manager	Date
Terrance D. Tenant	3-1-20xx
Tenant	Date
Tenant	Date
Tenant	Date

FORM

You'll find a downloadable copy of the Attachment page on the Nolo website. See Appendix B for the link to the forms in this book.

Before the Agreement Is Signed

The easiest way to change one of the form agreements included here is to edit the electronic version included on the Nolo website. For example, if you do not have any additional provisions in your lease, you would delete Clause 25 of our form agreement and renumber the remaining clauses. If the changes are lengthy, you may want to add a separate attachment page, rather than just rewrite a particular clause. See "How to Edit or Add a Lease or Rental Agreement Clause," above, for advice.

Remember, that if you and your tenant discuss your lease or rental agreement primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, you must give the tenant an unsigned version of the rental document in that language before asking him or her to sign. See "Foreign Language Note on California Leases and Rental Agreements," earlier in this chapter, for more details.

Finally, if you make fundamental changes to a lease, rental agreement, or rental form, be sure to have your work reviewed by an experienced landlords' lawyer, especially if your property is covered by rent control. See Chapter 8 for advice on finding and working with a lawyer.

Signing the Lease or Rental Agreement

Prepare two identical copies of the lease or rental agreement to sign, including all attachments. You and each tenant should sign both copies. At the end of the lease or rental agreement, there's space to include the signature. phone number, and street address at which the landlord and anyone authorized to manage the premises may receive rent, notices, or legal papers. There's also space for the tenants' signatures, phone numbers, and the dates they signed.

Be sure your tenants review the lease or rental agreement before signing and are clear about all your terms and rules and regulations. Chapter 7 discusses how to get your new tenancy off to the right start.

If you've altered our form after the tenant originally renewed it, be sure that you and all tenants initial the changes when you sign the document.

Give each tenant a copy of the signed lease or rental agreement, and keep one signed copy for your files.

After the Agreement Is Signed

All amendments to your lease or rental agreement must be in writing to be legally binding.

If you want to change one or more clauses in a month-to-month rental agreement, there is no legal requirement that you get the tenant's consent (although it's always a good idea to do so). You can simply send the tenant a 30-day notice of the change, unless a local rent control ordinance requires more notice or prohibits the change you want to make. However, if the change is a rent increase of more than 10%, you must give 60 days' notice, as explained in Chapter 14. Also, if you use a lease, you cannot unilaterally change the terms of the tenancy. We discuss the mechanics of changing terms of a rental agreement by use of such notice in Chapter 14.

If you wish to make mutually agreed-upon changes to a written rental agreement or lease after it is signed, there are two good ways to accomplish it. The first is to agree to substitute a whole new agreement for the old one. The second is to add the new provision as an amendment to the original agreement. An amendment need not have any special form, so long as it clearly refers to the agreement it's changing and is signed by the same people who signed the original agreement.

A sample Amendment to Lease or Rental Agreement form is shown below.

FORM

You'll find a downloadable copy of the Amendment to Lease or Rental Agreement on the Nolo website. See Appendix B for the link to the forms in this book.

Cosigners

Some landlords require cosigners on rental agreements and leases, especially when renting to students who depend on parents for much of their income. The cosigner signs a separate agreement or the rental

Amendment to Lease or Rental Agreement

This is an Amendment to the lease or rental agreement dated March 18, 20xx (the "Agreement") between Olivia Matthews ("Landlord") and Steve Phillips ("Tenants") regarding property located at 123 Flower Lane, San Diego, California ("the premises").

Landlord and Tenants agree to the following changes and/or additions to the Agreement:

1. Beginning on June 1, 20xx Tenant shall rent a one-car garage, adjacent to the main premises, from Landlord for the sum of $75 per month.

2. Tenant may keep one German Shepherd dog on the premises. The dog shall be kept on a leash in the yard unless Tenant is present. Tenant shall clean up all animal waste from the yard on a daily basis. Tenant agrees to repair any damages to the yard or premises caused by his dog, at Tenant's expense.

In all other respects, the terms of the Agreement shall remain in effect.

Olivia Matthews	May 20, 20xx
Landlord or Manager	Date
Steve Phillips	May 20, 20xx
Tenant	Date
Tenant	Date
Tenant	Date

agreement or lease, agreeing to pay any rent or damage-repair costs the tenant fails to pay.

The Practical Value of a Cosigner

In practice, a cosigner's promise to guarantee the tenant's rent obligation often has little value, because the threat of eviction is the primary factor that motivates a tenant who's reluctant to pay the rent. The problem is, you cannot sue a cosigner along with the tenant in an eviction suit. The cosigner must be sued separately either in a regular civil lawsuit or in small claims court. So as far as going after the cosigner on the tenant's rent obligation is concerned, your best weapon—the possibility of an eviction lawsuit—is unavailable.

Another legal obstacle to enforcing a cosigner's promise is that the promise is not enforceable if the lease or rental agreement has been changed without the cosigner's written approval. (See *Wexler v. McLucas,* 48 Cal. App. 3d Supp. 9 (1975).) Even the simple renewal of a lease involving the signing of a new document by the landlord and the tenant (but not by the cosigner) will eliminate the cosigner's liability—so may a rent increase or other change in the terms of tenancy. Taking this one step further, a court might refuse to hold a cosigner liable for any period beyond that of the original lease term, where the tenancy has since become a month-to-month agreement. Since lease expirations, renewals, and rent increases usually occur over the life of a residential tenancy, a landlord who forgoes the nuisance of getting the cosigner's signature every time an element of the tenancy changes may wind up with a worthless promise.

In sum, the benefits of having a lease or rental agreement cosigned by someone who won't be living on the property are almost entirely psychological. A tenant who thinks you can look to the cosigner—usually a relative or close friend of the tenant—may be less likely to default on the rent. Similarly, a cosigner asked to pay the tenant's debts may persuade the tenant to pay.

Cosigners and Disabled Applicants

Because of the practical difficulties associated with cosigners, many landlords refuse to consider them, which is legal in every situation but one: If a disabled tenant with insufficient income (but otherwise suitable) asks you to accept a cosigner who will cover the rent if needed, you must relax your blanket rule at least as far as investigating the suitability of the proposed cosigner. If the proposed cosigner is solvent and stable, federal law requires you to accommodate that applicant by allowing the cosigner, despite your general policy. (See Chapter 9 for more on accommodating disabled applicants and tenants.)

Accepting Cosigners

If you decide to accept a cosigner, you may want to have that person fill out a separate rental application and agree to a credit check—after all, a cosigner who has no resources or connection to the tenant will be completely useless. Should the tenant and the prospective cosigner object to these inquiries and costs, you may wonder how serious they are about the guarantor's willingness to stand behind the tenant. Once you are satisfied that the cosigner can genuinely back up the tenant, add a line at the end of the lease for the dated signature, phone, and address of the cosigner.

Illegal Lease and Rental Agreement Provisions

Some landlords have used leases and rental agreements that contain provisions that attempt to take away various tenant protections of California law. The Civil Code expressly forbids the use of many types of illegal provisions. (CC § 1953.)

Unfortunately, a few landlords intentionally include illegal provisions to try to intimidate tenants. Doing this is counterproductive, because a lease or rental agreement containing too many illegal clauses may be disregarded in its entirety should you ever end up in court. In addition, several district attorneys have sued landlords who routinely and flagrantly use leases with illegal clauses. Here's a lineup of the most egregious illegal clauses:

Waiver of Rent Control Laws

Cities that have rent control ordinances specifically forbid lease or rental agreement provisions by which

a tenant gives up (or waives) any rights granted by the rent control ordinance. California's statewide rent control law, which limits the ability of cities to impose certain aspects of rent control (such as vacancy control), does nothing to change this rule. Thus, any rental agreement provision excusing the landlord from complying with rent ceilings or just-cause-for-eviction requirements would be of no legal effect. Moreover, attempting to do so may result in fines and even criminal prosecution.

RENT CONTROL

See Chapter 4 for a detailed discussion of rent control.

Liquidated Damages Clauses

If your tenant breaks an important lease provision or house rule, such as the promise to use only a certain parking space, and you suffer economic damages as a result of the tenant's lease violation, you can sue the tenant to recoup those losses. For example, a tenant who deliberately uses the parking spot reserved for delivery trucks, making it impossible for supplies to be delivered, could reasonably be asked to cover your cost of sending your manager to pick up the supplies offsite.

Landlords sometimes attempt to deter tenant rule-breaking, and save themselves a trip to court, by announcing in the lease or rental agreement—in advance of any misbehavior by the tenant—that violations of lease clauses or rules and regulations will result in a predetermined monetary penalty. The effect of a clause like this is to put a definite money value on the violation, regardless of the *actual* monetary damages suffered by the landlord. In legalese, these clauses are called "liquidated damages" clauses. (CC § 1671.) You can successfully use them only if it would be extremely difficult to measure the actual damages—if and when they occur; and you must make that statement in your lease clause (see Clause 6 on late fees, for example). But landlords are rarely in this position—if your tenant violates a lease provision that ends up costing you money, you can usually calculate the amount after the dust has settled—which means that a liquidated damages clause is rarely appropriate in your business. (See *Orozco v. Casimiro*, 121 Cal. App. 4th Supp. 7 (2004).)

This said, the fact is that many California landlords routinely use uncalled-for liquidated damages clauses in their leases and rental agreements—and get away with it. Practically speaking, if the amount you charge is reasonably close to your actual losses, a tenant gains little by challenging it. The reason: A judge might throw out the clause, but you can still sue for your actual damages—which means that, in the end, the tenant will end up paying your actual losses if you can prove your case. The lesson here is that if you choose to use a liquidated damages clause, be fair and reasonable when setting the amount.

CAUTION

Be prepared to prove that your liquidated damages amount is fair. Even if your lease or rental agreement states that the parties have agreed that liquidated damages are called for (see the language in Clause 6), this doesn't mean that you'll automatically get this amount if you sue. You'll still have to prove that it represents your losses. If you have to go to this trouble to enjoy the benefits of this clause, why bother—you might as well just sue for the amount directly. There may, however, be a psychological advantage in having the tenant know, from the start, what late rent is likely to cost.

EXAMPLE: Martin allowed his tenant Sonya to keep a dog, but because he was concerned about his landscaping, he wanted to make sure the dog was on leash at all times. The pet clause in Martin's lease included a statement that damages were extremely difficult to determine and, for that reason, the parties had agreed to a liquidated damages amount, specified a $100 fee if a tenant's dog was observed off leash, and a $150 fee for subsequent incidents.

Sonya's terrier Moka got loose one day and tore up a tulip bed near the rental office. When Martin attempted to collect, Sonya protested, arguing that there was much less than $100 worth of damage. Martin sued in small claims court, but the judge agreed with Sonya and awarded Martin only $50, representing the actual cost of replacing the bulbs and one hour of the gardener's time for replanting.

The next time Martin spied Moka on the loose, he got smart. Since his lease provided that repeated and serious violations of the lease were grounds for termination, Martin terminated Sonya's lease.

Waiver of Repair-and-Deduct Rights

Landlords must maintain and repair their rental property in accordance with certain minimum standards. (CC § 1941.) If a landlord refuses to do so, a tenant may arrange for certain repairs and deduct the cost from the next month's rent. (CC § 1942.) Further, a tenant cannot give up or modify those rights in a lease or rental agreement. (CC § 1942.1.)

There is one exception to this rule, however: If the tenant specifically agrees to repair and maintain all or part of the property in exchange for lower rent, the repair-and-deduct rule can be waived. Although in principle this would seem to be a broad exception, it is not broad in practice. Judges look to see if the tenant's promise to keep the premises in repair was really in exchange for lower rent and was not just a way for the landlord to avoid legal responsibilities. Chances are the tenant's waiver will be upheld if, in the written lease, a tenant handy with tools agrees to repair or maintain the property in exchange for rent that's considerably lower than fair market rent, but not otherwise.

Following is an example of a valid clause that could be included in your lease or rental agreement.

> **EXAMPLE:** Tenants agree to be responsible for all routine repairs and maintenance to the premises covered by this lease in exchange for a monthly rent of $900. This amount is approximately $200 less than the fair market rent for the premises, which is agreed to be $1,100.

All said and done, we advise against this sort of arrangement. For one thing, even if you include this provision, it doesn't relieve you of your obligation to the city or county to comply with local housing codes. You retain this obligation even if tenants breach a rental agreement or lease provision requiring them to maintain the premises in compliance with city and county regulations. In other words, the city and county have no interest in what you and the tenant agree to, but will hold you responsible if there is a code violation problem.

A better approach is this: If you want your tenant to fix up the property, fine, but pay the tenant by the hour or the job for work agreed on in advance. It's better to pay the tenant separately and collect the regular market rent. That way, if you're unhappy with the tenant's work, you can simply fire the tenant and still be entitled to the full rent. If, on the other hand, you agree to reduce the rent in exchange for work, you may be stuck for a long time with reduced rent in exchange for the tenant's poor-quality work. (Chapter 11 discusses landlords' liability and tenants' repair-and-deduct rights in detail.)

Right of Inspection

A landlord can't just walk in any time to inspect or repair the property or to show it to prospective renters or buyers. Except in an emergency, the law requires a landlord to give a tenant reasonable notice, which is generally 24 hours (though you must give 48 hours' notice when scheduling an initial move-out inspection). Nevertheless, some leases and rental agreements have provisions that purport to allow a landlord to enter with little or no notice. This type of provision is illegal. (CC § 1953.) (Chapter 13 covers landlords' right of entry and tenants' privacy.)

Provision That the Landlord Is Not Responsible for Tenant Injuries or Injuries to a Tenant's Guests

Often called an "exculpatory clause," this provision says that if the landlord fails to maintain the property and the tenant or her guests suffer injury or property damage as a result, the landlord can't be held responsible for paying for the loss. This provision is void and of absolutely no use to a landlord, and will not be upheld in court if a tenant or a guest suffers personal injury or property damage that results from the landlord's negligence. (For more on landlords' liability, see Chapter 12.)

Provision Giving Landlord Self-Help Eviction Rights

Some leases and rental agreements contain a clause that appears to allow the landlord to come in and throw the tenant out, or at least change the locks and remove property, if the tenant doesn't pay the rent. This clause is void. (CC § 1953.) If you do resort to illegal means to evict a tenant, this type of clause won't protect you in a tenant's lawsuit for unlawful eviction. No matter what the lease says, you have to sue and get a court order to

remove an unwilling tenant legally. (See Chapters 17 and 18 and *The California Landlord's Law Book: Evictions* for details on evictions.)

Waiver of Right to Legal Notice, Trial, Jury, or Appeal

A lease or rental agreement clause under which a tenant gives up any procedural right in a lawsuit you or the tenant might bring to enforce the lease or rental agreement is also void. This protects the tenant's right to proper service of a Three-Day Notice to Pay Rent or Quit (three-day notice periods cannot be reduced by agreement) or other termination notice, and the right to present a defense in a lawsuit, trial by jury, appeal, and so on. (CC § 1953; *Grafton Partners LP v. Superior Court (Pricewaterhouse Coopers LLP)*, 36 Cal. 4th 944 (2005).) You also cannot include a clause forcing the tenant to submit personal injury claims to binding arbitration (though if a dispute or a lawsuit were to develop over such an issue, you and the tenant could always agree later to abide by binding arbitration). (*Jaramillo v. JH Real Estate Partners, Inc.*, 3 Cal. Rptr. 3d 525 (2003).) The *Jaramillo* case leaves you free to require in the lease or rental agreement that tenantability claims (habitability claims raised under CC § 1941.2) be handled through binding arbitration, but we strongly recommend against doing so. By the time you're done with arbitration (including, if you win, a trip to court to record the arbitrator's decision), you may as well have initiated an eviction lawsuit.

Waiver of Right to Deposit Refund

A landlord must, within three weeks after the tenant vacates the property, mail the tenant a refund of his deposit or, if the deposit is not completely refunded, a written itemization as to how it was applied to back rent, costs of cleaning, repairs, and the like. (See Chapter 20 for details on returning security deposits.) Any provision waiving or modifying the tenant's rights in this respect is void and of no effect. (CC § 1953.)

Restricting Tenants' Access to Other Tenants' Units for Distributing Literature

A clause in a lease or rental agreement that attempts to prevent or restrict a tenant from communicating with other tenants (for the purpose of organizing a tenants' association, for example) is illegal. However, under very limited circumstances, you may be able to legally limit the posting or dropping of flyers or other advertisements, political in nature or not, on, near, or under tenants' doors. Proceed with extreme caution, however. First, by law any person invited by a residential tenant to provide "information regarding tenants' rights" or to participate in a tenants' association, may not be barred from the common areas. (CC § 1942.6.) Also, the California Supreme Court has ruled that a landlord may properly forbid the posting and delivery of flyers only where access to common hallways is forbidden to all solicitors, where locked doors secure common hallways from visitors, and only if the lease, rental agreement, or properly distributed house rules or regulations clearly state the prohibition. (*Golden Gateway Center v. Gateway Tenants' Assn.,* 26 Cal. 4th 1013 (2001).) Because this exception is so limited and this area is fraught with serious potential liability, we recommend that you contact a lawyer before attempting to limit access in this manner. Better still, especially if tenants are organizing in opposition to you, meet with them (and use a mediator if necessary) and deal with their concerns directly.

Shortening the Termination Notice Period

As we saw earlier in the discussion of Clause 4 of our form Agreement, your ability to shorten the notice periods when terminating a month-to-month tenant has been curtailed. If the tenant has resided in the unit for a year or more, you must give 60 days'; and for all others, you must give 30 days' notice. A court will not enforce any shorter periods—in other words, if you file an eviction lawsuit based on the tenant's refusal to move following your too-short notice period, your case will be tossed out of court by the judge and you'll have to start over, with the correct notice period.

Requiring the Tenant to Give Notice on a Specific Day

Some landlords want month to month tenants to give tenancy termination notices on a specific day of the month, typically the last day. Under this scheme, a

termination notice delivered on any other day won't take effect until the last day of the month, which means that a tenant who gives a 30-day notice on, say, the tenth, will in effect be giving 50 days' notice (because the landlord won't recognize it until the 30th of the next month). The tenant can, of course, vacate at any time, but the landlord will argue that it is entitled to rent for the entire 50-day period. Typically, the landlord will deduct the unpaid rent from the security deposit.

No California statute or case directly addresses whether requiring notice on a specific day of the month is legal. We think that it is unlikely that a court would uphold such a requirement, especially if the rule applies to tenants only (that is, where the *landlord* remains free to deliver a 30-day notice at any time, and the 30 days begins as of the day of delivery). Even when the limitation applies to both parties however, the legality is iffy, because the provision has the effect of modifying the landlord's proper use of the security deposit (CC § 1950.5), which is unenforceable. In addition, the notice statute currently does not address whether the landlord can modify the 30- and 60-day rules in this manner (CC § 1946.1). (This statute replaced the older CC § 1946, which *did* allow landlords to shorten the notice period to as little as seven days; by implication, the new law's omission of this short-notice option means that the Legislature intended that no variations on the rules would be allowed.) Though it may be convenient for you to deal with tenant turnover on the day rent is due and avoid having to prorate rent (and though the prospect of requiring that rent be paid over an extended period is attractive), we urge you to resist this ploy and stick with "30 (or 60) days' notice, delivered at any time."

Requiring the Tenant to Pay Rent in Cash or Online

As mentioned in the discussion of Clause 5 (Amount and Schedule for the Payment of Rent) above, a landlord cannot initially insist that a tenant pay rent only in cash. Later, though, if the tenant bounces a rent check or stops payment on a rent check, you can insist on cash payment of the rent, but you must first give the tenant written notice, and the demand for cash payment may last no longer than three months.

Also, landlords may not insist that tenants pay rent only via electronic funds transfer. (CC §1947.3.) Specifically, the law allows you and the tenant to agree to pay rent in cash or via electronic funds transfer, but the landlord must allow another payment alternative, such as check unless, as explained above, the tenant bounces a check.

Other Illegal Provisions

Just because a particular type of lease clause isn't listed above doesn't mean it's legally enforceable. Courts can and do exercise the power to refuse to enforce what they consider to be illegal or outrageous clauses in leases and rental agreements. Some examples: provisions for excessive late charges (discussed in Chapter 3), and shortcuts the landlord can use to recover possession if he believes the property to be abandoned (covered in Chapter 21). Also, the legality of certain provisions may depend on such factors as the date your property was built (see, for example, Clause 20 of our lease or rental agreement regarding waterbeds).

CHAPTER

3

Basic Rent Rules

FORMS IN THIS CHAPTER

Chapter 3 includes instructions for and samples of the Notice of Reinstatement of Terms of Tenancy and the Agreement for Partial Rent Payments. The Nolo website includes downloadable copies of these forms. See Appendix B for the link to the forms in this book.

To state the obvious, one of your foremost concerns as a landlord is receiving your rent—on time and without hassle. It follows that you need a good grasp of the legal rules governing rent.

In this chapter, we review California's basic rent laws. However, several topics we discuss in other chapters can affect your rights under these laws, including:

Condition of the premises. If a landlord fails to fulfill his obligation to keep up the premises, the tenant's duty to pay rent is affected correspondingly. Under state law, a tenant may claim that the landlord's failure to repair and maintain the property justifies withholding rent. The validity of such claims, and the amount of rent, if any, that can legally be withheld, may ultimately be determined by a judge in an eviction lawsuit. We discuss this process in detail in Chapter 11.

How and when you notify tenants of rent increases. Chapter 14 describes the legal process for raising rents.

How you enforce rent payments. You can give tenants who don't pay their rent on time a Three-Day Notice to Pay Rent or Quit. We show you how in Chapter 16.

Local rent control laws. Sixteen California cities have rent control ordinances that dictate how much rent you can charge (and cover many other aspects of your business). These ordinances are in turn affected by a statewide law, the Costa-Hawkins Rental Housing Act. We discuss rent control in Chapter 4.

RENT CONTROL

Cities With Rent Control Ordinances

Berkeley
Beverly Hills
Campbell (mediation only)
East Palo Alto
Fremont (mediation only)
Gardena (mediation/arbitration)
Hayward
Los Angeles
Los Gatos (mediation/arbitration)
Oakland
Palm Springs
San Francisco
San Jose
Santa Monica
Thousand Oaks
West Hollywood

How Much Can You Charge?

There is no state or federal law that dictates how much rent landlords can charge. In other words, you can legally charge as much rent as you want (and a tenant will pay) unless your premises are subject to a local rent control ordinance. You may wish to check Craigslist for comparable rents in your area, or contact local real estate and property management companies.

Many wise landlords choose to charge slightly less than the going rate as part of a policy designed to find and keep excellent tenants.

As with any business arrangement, it usually pays in the long run to have your tenants feel they are getting a good deal. In exchange, you hope the tenants will be responsive to your needs as a landlord. This doesn't always work, of course, but it's our experience that tenants who feel their rent is fair are less likely to complain over trifling matters. Certainly, it's obvious that tenants who think you are trying to squeeze every last nickel out of them are unlikely to think twice before calling you about a clogged toilet at 11 p.m.

When Rent Is Due

Most lease and rental agreements, including the ones in this book, call for rent to be paid monthly, in advance, on the first day of the month. The first of the month is customary and convenient because many people get their paychecks on the last workday of the month, just in time to pay rent on the first of the following month. Also, beginning a new month itself reminds people to pay monthly bills that are due on the first. (Hopefully, your tenant will learn to associate flipping the calendar page with paying the rent on time.)

It is perfectly legal to require rent to be paid on a different day of the month, which may make sense if the tenant is paid at odd times. Some landlords make the rent payable each month on the date the tenant first moved in. We think it's easier to prorate rent for a short first month and then require that it be paid on the first of the next month. (See Chapter 7.) But if you only have a few tenants, and don't mind having different tenants paying you on different days of the month, it makes no legal difference.

You are not legally required to have your tenant pay rent on a monthly basis. If you wish, you and the tenant can agree that the rent be paid twice a month, each week or on whatever schedule suits you. The most common variation on the monthly payment arrangement is having rent paid twice a month. This

is a particularly good idea if you have tenants who receive government benefits or who have relatively low-paying jobs and get paid twice a month. Such tenants may have difficulty saving the needed portion of their midmonth check until the first of the month.

If your rental agreement (whether written or oral) is for an unspecified term (as opposed to a lease for a specific period), you should be aware that the length of time between rent payments affects other important rights. Specifically, the notice period you must give your tenant in order to change the terms of the tenancy (and the notice the tenant must give you to terminate it) is normally the same number of days as the period between rent payments—typically 30 days. The notice you must give the tenant to terminate such a tenancy is a minimum of 30 days, and a minimum of 60 days if the tenant has lived there a year or more. (CC §§ 827(a), 1946, 1946.1.) This is true unless your rental agreement specifically establishes a different notice period (but with a minimum of 30 or 60 days, for you to terminate the tenancy), or a local rent control ordinance changes the rules on termination (a topic covered in Chapter 4). This general rule also applies to the amount of notice you must give your tenants to raise the rent, subject, of course, to any rent increase limitations of local rent control ordinances. In addition, you must give 60 days' notice of a rent increase of more than 10%, as explained in Chapter 14. (CC § 827(b).)

EXAMPLE 1: On March 10, landlord Marion signs a month-to-month rental agreement with Carol. Carol rents an apartment for $550, payable on the tenth day of each month. Because the interval between rent payments is a month, Marion must give Carol at least 30 days' written notice if she wants to raise the rent, change any other term of the rental agreement, or terminate the tenancy. (However, Carol is entitled to 60 days' notice of termination if she stays for a year or more, as explained in Chapter 18.) If Carol wants to leave, she too must give 30 days' notice to Marion.

EXAMPLE 2: Ken rents out rooms on a weekly basis, with the rent payable every Friday. Because the interval between rent payments is one week, Ken must give his tenants one full week's notice if he wishes to raise the rent or have them move out. So for a rent increase or termination of tenancy to take effect the following Friday, Ken must give his tenants written notice to that effect no later than the Friday before.

Once you have established the rental amount and the day of payment, you should insist that rent be paid in advance to cover the following month or other period. For example, rent should be due on the first day of the month for that month, and it should be paid on or before that day. It may seem obvious to require tenants to pay rent in advance. You would probably never consider allowing a tenant who moved in on the first day of the month to wait to pay rent until the 31st. We belabor this point because California law, following an ancient rule traceable to feudal times, states that in the absence of an agreement to the contrary, rent is due at the end of the rental term. (CC § 1947.) In other words, unless the agreement states that rent is due in advance, you may have trouble getting the tenant to pay at the beginning of the rental period.

Weekends and Holidays

If the rent due-date specified in a lease or rental agreement falls on a weekend or holiday, the rule is that the tenant must still pay on the due-date specified in the agreement. For example, if the lease says that rent is due on the first day of each month, it is due on January 1, even though that day is a holiday, New Year's Day. As another example, if the rent is due on the 15th day of the month, but one month that day falls on a Saturday or Sunday, the rent is still legally due on the 15th. Although some laws might be read to give the tenant an extension of time to pay the rent if the due-date falls on a weekend or holiday (CC §§ 7, 11; CCP § 12a), the courts have ruled that these laws do not extend deadlines under a lease or rental agreement. (*Gans v. Smull*, 111 Cal. App. 4th 985 (2003).) This case, however, does not apply, in our opinion, to eviction procedures governed by the Code of Civil Procedure. See *LaManna v. Vognar,* 17 Cal. App.4th Supp. 4 (1993).

Of course, if the lease or rental agreement specifically gives the tenant the option of paying rent on the next business day—as do the lease and rental agreements in this book—then the due-date will be extended as provided in the rental document. (Returning to the example in the paragraph above,

under the Nolo lease and rental agreement, for example, rent would be due on January 2, as long as that day is a weekday. If January 1 is a Friday, however, rent isn't due until the following Monday.) In the absence of a "next business day" provision, the lease means what it says as far as the date on which the rent is due.

Figuring the exact due-date isn't really all that important unless you have to file an eviction lawsuit based on the tenant's nonpayment of the rent, where counting days correctly can be crucial. Chapter 16 covers starting the eviction process with a Three-Day Notice to Pay Rent or Quit; evictions are covered in detail in *The California Landlord's Law Book: Evictions.*

Grace Periods

Now let's clear up a giant myth. Lots of tenants are absolutely convinced that if they pay by the 5th (or sometimes the 7th or even the 10th) of the month, they have legally paid their rent on time and should suffer no penalty because they are within a legal grace period. Some states give tenants a grace period, but not California. Quite simply, there is no law in California that gives tenants a five-day or any other grace period when it comes to paying the rent. As we'll discuss more thoroughly in Chapter 16, a landlord can legally proceed with the first step necessary to evict a tenant—serving a Three-Day Notice to Pay Rent or Quit—the day after the rent is legally due but unpaid.

In practice, most tenants get a grace period, because landlords usually don't get upset about late rent until it's more than a few days late, and many rental agreements and leases do not begin assessing the tenant late charges until at least five days after the due-date. But you are definitely within your legal rights to insist that the rent be paid on the day it is due. In our opinion, if you wait more than five days to collect your rent, you are running your business unwisely, unless your particular circumstances warrant a longer period.

Where and How Rent Is Due

You should specify in your lease or rental agreement where and how the tenant should pay the rent. (See Clause 5 in Chapter 2.) Some form rental agreements require the rent to be paid personally at the landlord's place of business. This makes the tenant responsible for getting the rent to the landlord or manager at a certain time or place, and avoids issues such as whether a rent check was lost or delayed in the mail.

You should also specify whether rent should be paid by cash, check, or money order. Some landlords, concerned with security and the need to write receipts, accept checks only. Others are more concerned about bounced checks and will accept only certified checks or money orders. Be aware, however, that you cannot insist on cash rent unless the tenant has bounced a rent check, has issued a stop payment order on a rent check, or has given you a money order or cashier's check that was not honored. (Even then, you cannot insist on cash only for more than three months, and you must give the tenant proper notice of this change in the terms of his tenancy. See Chapter 14.)

Some landlords require tenants to deposit the rent into the landlord's bank account. Because of the difficulty of tracking deposits—and stopping them if necessary after terminating a tenancy—we urge you not to accept rent this way. If you must do this, your lease or rental agreement should specify the name and street address of the bank or other financial institution where rent deposits are to be made. The place of deposit must be within five miles of the property. (CC § 1962; CCP § 1161(2).)

Once in a while, when relations between a landlord and a tenant are beginning to break down for other reasons, there will be misunderstandings about where and how the rent must be paid. Sometimes a landlord who's been burned by late rent from a particular tenant will suddenly demand that rent must be paid in person and only during certain hours at the manager's office. Be careful. It may be illegal to suddenly change your terms for payment of rent. For example, if your lease or rental agreement doesn't say where and how rent is to be paid, the law states that past practice generally controls how rent is paid until you properly notify the tenant of a change.

It's not a good practice to accept rent by mail, except as an accommodation where the lease or rental agreement requires rent to be paid personally to the landlord or manager. In the absence of a provision requiring tenants to pay rent in person, a landlord's

practice of accepting rent by mail may enable the tenant to continue paying by mail, and to claim "the check's in the mail" in response to a Three-Day Notice to Pay Rent or Quit. If you want to require tenants to pay rent at your office, home, or other place, you should specify that in the lease or rental agreement, along with the days and hours someone will be present to accept the rent. If you want to change your practice and the tenancy is month to month, you must formally change the agreement with a written 30-day notice.

If you rent under a lease, you will have to wait until the lease runs out and change your terms for payment of rent in the new lease.

Do not accept postdated checks under any circumstances. A postdated check is legally a note promising to pay on a certain date. If you accept a postdated check, you have accepted a note, rather than cash, for the rent, and a tenant facing eviction could argue that you accepted the "note" in lieu of cash.

Rent "Allotments" From Servicemembers

If your tenant is a member of the United States military, you may be asked to accept a direct deposit, called an allotment, from the tenant's military pay. The procedure is explained in the Military Pay Manual, Chapter 42, Sections 4201 and following. Servicemembers can use an online tool, called "My Pay," to set up and change allotments.

Keep in mind that this rent payment method is not much different than agreeing that rent will be transferred directly from the tenant's bank account to yours, described earlier in this section. We cautioned against this rent payment method, since it's difficult to track (and stop) such payments. On the other hand, it is convenient for servicemembers who are overseas to pay the rent this way (and the allotment is taken out before the balance of the paycheck is available to the servicemember). Should you decide to accept allotments, be sure you understand how they work and whether the transfer can be timed to coincide with the rent due-date.

CAUTION

Be sure the tenant knows the details on how and where rent is to be paid. Before you prepare ANY three-day notice for nonpayment of rent (see Chapter 16), make sure you have previously complied with the requirement of CC §§ 1962 and 1962.5, to notify the tenant of the name and street address of the owner or manager responsible for collection of rent, how rent is to be paid, and who is available for service of notices; you can do this either in a separate writing or in a written rental agreement or lease. You may not evict for nonpayment of any rent that came due during any period you were not in compliance with this requirement. If you have not done so, provide the tenant the required information. You then will have to wait until the next month's rent comes due, and give the tenant a three-day notice demanding rent—but only after you've complied.

Late Charges

A common and effective way to encourage tenants to pay the rent on time is to impose a late charge or fee. You may safely do so only if your fee closely approximates your real losses, and only if your lease or rental agreement includes a sentence like this one:

> Because Landlord and Tenant agree that actual damages for late rent payments are very difficult or impossible to determine, Landlord and Tenant agree to the following stated late charge as liquidated damages.

You may be wondering how, if you can set a late fee that approximates your losses, you can also say that "actual damages" are extremely hard to gauge (after all, you just did it). We don't presume to understand, either. All we can say is that's the law. (*Orozco v. Casimiro*, 212 Cal. App. 4th Supp. 7 (2004).)

Be aware that, if your tenant refuses to pay and you end up suing, you'll have to "plead and prove" your damages—that is, prove to the judge that the amount is reasonable, and that you could not figure that amount after the rent was late. That's the same amount of work you'd have to do in the absence of a late fees clause (what you'd do if you were simply suing for your actual damages). The true value of a late fees clause lies in advising the tenant what rule-breaking is likely to cost, and in hoping that an errant tenant will just pay up and not, in fact, force you to go to court.

RENT CONTROL

Some cities with rent control ordinances explicitly regulate the amount of late fees. Check any rent control ordinances that affect your properties.

For these reasons, you must be very careful how you structure your late fee policy. Your fee should correspond as closely as possible to the real monetary consequences of getting the rent late. You should be on safe footing as long as you follow these principles:

- The late charge should not begin until after a reasonable grace period of three to five days. Imposing a stiff late charge if the rent is only one or two days late may not be upheld in court.
- If you use a flat fee, it should not exceed 4%–6% of the rent ($30 to $45 on a $750-per-month rental). A late charge much higher than this (say, a 10% charge of $75 for being one day late with rent on a $750-per-month apartment) would probably not be upheld in court.
- If you adopt a late charge that increases with each additional day of lateness, it should be moderate and have an upper limit. A late charge that increases without limit each day could be considered interest charged at a usurious rate. (Ten dollars a day on a $1,000 per month rent is 3,650% annual interest.) A more acceptable late charge would be $10 for the first day rent is late, plus $5 for each additional day, with a maximum late charge of 4%–6% of the rental amount.
- Don't try to disguise excessive late charges by giving a "discount" for early payment of rent. One landlord we know concluded he couldn't get away with charging a $100 late charge on a late $925 rent payment, so, instead, he designed a rental agreement calling for a rent of $1,025 with a $100 discount if the rent was not more than three days late. Ingenious as this ploy sounds, it is unlikely to stand up in court, unless the discount for timely payment is very modest. Giving a relatively large discount is in effect the same as charging an excessive late fee, and a judge is likely to see it as such and throw it out.
- If your tenant fails to pay the rent, let alone the late fee, and you have to serve a three-day notice to pay or quit, do not add the late fee to the amount due. If your lease or rental agreement describes the fee as "additional rent," you can take it from the security deposit (and then demand that the deposit be replenished). Landlords in rent control cities may not label late fees as additional rent, because doing so will probably increase rent beyond the permissible limit.

Anyway, we think all this fooling around with late charges is wasted energy. If you want more rent for your unit, raise the rent (unless you live in a rent control area). If you are concerned about tenants paying on time—and who isn't—put your energy into choosing responsible tenants. Be consistent about enforcing rent due-dates, following through with a Three-Day Notice to Pay Rent or Quit—the first legal step in a possible eviction—no later than six or seven days after the rent is due.

If you have a tenant with a month-to-month tenancy who drives you nuts with late rent payments, and a reasonable late charge doesn't resolve the situation, terminate the tenancy with a 30-, 60-, or 90-day notice, as described in Chapter 18.

Late Fees: Below the Legal Radar?

As this section on late charges explains, the practice of announcing a preset late fee is worky and arguably illogical (your lease or rental agreement has to state that the consequences to you of receiving the rent late are very hard to calculate—yet you must do that calculation if you want your preset fee to survive judicial scrutiny). But wait, there's more—an argument routinely used by legal aid attorneys in Southern California has real punch (frankly, we can't understand why it hasn't prevailed yet). Here's the deal:

Civil Code § 3302 provides that when a debtor fails to pay on time, the only damages available are principal and interest. How can a landlord prove that damages flowing from the tenant's failure to pay on time were "extremely difficult" to determine, when it's a simple mathematical calculation to figure simple interest from the principal amount of the unpaid rent? We think it's only a matter of time before a judge agrees. In the meantime, a landlord's practice of setting a fee that is reasonably low (and includes compensation for the landlord's time and trouble) will continue to skate by. (See "Late Fees in Residential Leases Are Questionable as Legal Remedies," *San Francisco Daily Journal*, April 12, 2006.)

RENT CONTROL

Local rent control ordinances may regulate the way you handle a termination. If you can't use a 30-, 60-, or 90-day notice, either because the tenant has a lease or because rent control laws are too restrictive, serve the tenant with a Three-Day Notice to Pay Rent or Quit the day after the rent is due, and follow through with an eviction if the rent isn't paid in full within the three-day period.

Returned Check Charges

In Chapter 2, we suggest a rental agreement provision requiring the tenant to pay bad check charges equal to what the bank charges you, plus a few dollars for your trouble (Clause 7 in Chapter 2). State law sets a limit of $25 for the first bounced check and $35 for subsequent checks. (CC § 1719.) State law also provides that anyone who fails to pay a bounced check is liable for a penalty equal to three times the amount of the check up to $1,500, plus the amount of the check, plus service charge. However, this penalty can be collected only by waiting 30 days after sending the person who wrote the check a demand letter, then filing a regular civil lawsuit in superior court or small claims court. This law is of little use to landlords for two reasons:

- First, a landlord faced with a check-bouncing tenant should never wait 30 days, but should give the tenant a Three-Day Notice to Pay Rent or Quit right away, then sue for eviction if the tenant doesn't make the check good within three days.
- Second, even if a landlord served a Three-Day Notice to Pay Rent or Quit on the tenant, plus a 30-day bad check demand letter, he would have to file two separate lawsuits: a fast-moving unlawful detainer lawsuit for eviction, and a regular civil lawsuit for the bounced check penalty. Two lawsuits are necessary because the law doesn't allow landlords to ask for any money other than rent in eviction lawsuits.

CAUTION

Don't call bounced check fees "additional rent," thinking you can collect them with the rent. This ploy might work for commercial leases, but it won't get you very far with a residential tenancy.

It's better to serve the tenant a three-day notice demanding the rent (but not a late charge or bad check charge) as soon as you find out a tenant's check bounces. Then follow through with an eviction lawsuit—well before 30 days have passed—and forget about penalties you may ultimately be unable to collect anyway.

CAUTION

Don't redeposit rent checks that bounce. It is a poor idea to let your bank redeposit rent checks that bounce, something they will normally do unless you request that bad checks be returned to you immediately instead. Why should you prevent resubmissions? Because this alerts you to the fact that the rent is unpaid much sooner than if the check is resubmitted and returned for nonpayment a second time. You can use this time to contact the tenant to ask that the check be made good immediately. If it is not, you can promptly serve a three-day termination notice. (See Chapter 18.)

CAUTION

Eviction warning! Do not demand late charges or bad check charges when you give a tenant a Three-Day Notice to Pay Rent or Quit. We discuss the proper procedures for giving a written three-day notice preceding an eviction lawsuit in Chapter 16.

Partial Rent Payments

On occasion, a tenant suffering a temporary financial setback will offer something less than the full month's rent, with a promise to catch up in partial payments as the month proceeds, or full payment at the first of the next month. Although generally it isn't good business practice to allow this, you may wish to make an exception where the tenant's financial problems truly appear to be temporary and you have a high regard for the person. But we recommend that you verify a tenant's hard-luck tale by asking questions and then calling the hospital, the employer, or anyone else the tenant says can back up the story.

Routinely Accepting Partial Payment

There is generally no legal problem if you accept partial rent payments. If you accept less than a full month's rent from a tenant, you certainly do not give

up the right to the balance. Indeed, you can normally accept a partial payment one day and demand full payment the next. Even the words "paid in full" on a tenant's check can be ignored if you're careful: You will not lose your right to more money owed you by cashing the tenant's check if you cross out the offending language before you cash the check. (CC § 1526.)

If you regularly accept rent in installment payments (despite a written agreement that rent is due in one payment in advance), you may have legally changed the terms of your rental agreement.

> **EXAMPLE:** You routinely allow your tenant Larry, whose $800 rent is due on the first of the month, to pay $400 on the first and the other $400 on the 15th. Nine months later, you get tired of this arrangement. After receiving $400 on the first day of the month, you give Larry a three-day notice on the second of the month to pay the rest of the rent or quit. This may not work. You may be stuck with getting $400 on the first and $400 on the 15th for the balance of the term of the lease or, in the case of a written or oral rental agreement, until you give him a written notice of change in the terms of tenancy. (See Chapter 14.)
>
> Why? Because a judge in an eviction lawsuit may rule that, by giving Larry this break every month for almost a year, coupled with his reliance on your practice, you in effect changed the terms of the lease or rental agreement. Viewed this way, your three-day notice to pay the full rent or leave would be premature, because the second $400 isn't due until the 15th.

If the tenancy is from month to month, you can reinstate the original payment terms by "changing" the terms back to what the rental agreement says they are, with a 30-day written notice. A sample form is shown below. You don't have to worry about this problem if you accept partial payments only a few times on an irregular basis. And accepting partial payments more often than this really isn't good landlording anyway, unless you truly are willing to change the terms of the lease or rental agreement. If you are, do it in writing.

FORM

You'll find a downloadable copy of the Notice of Reinstatement of Terms of Tenancy on the Nolo website. See Appendix B for the link to the forms in this book.

Notice of Reinstatement of Terms of Tenancy

To: Sam Jones (Name(s)),

Tenant(s) in possession of the premises at 123 Fourth Street (Street Address),

City of Los Angeles, County of Los Angeles, California.

When you rented the premises described above, the rental agreement specified that your rent would be due and payable on the first day of each month. Although the undersigned has allowed you to vary this payment arrangement, your late rental payments can no longer be tolerated.

Therefore, please be advised that effective 30 days from the date of service on you of this notice, your monthly rent will be due and payable on the first day of the month, for that month.

Roy Jefferson
Landlord or Manager

August 12, 20xx
Date

Accepting Partial Payment After a Three-Day Notice

It's a trickier situation if you accept partial rent payments after giving the tenant a three-day notice to pay the rent in full or quit. The basic legal rule is this: If your tenant responds to a three-day notice with less than the amount stated in the notice, you can either refuse to accept it or accept the lesser amount and serve a new three-day notice demanding the balance. You probably cannot accept the partial payment and base an eviction lawsuit on the original three-day notice. This is simply because the law requires that in any eviction lawsuit you file, the rent that's past due as of the date of filing must be the same as the rent demanded in the three-day notice.

For example, if you served a notice demanding the rent of $600, and the tenant paid $500, you would be filing a defective eviction suit based on a $600 three-day notice since only $100 was still due. Also, accepting rent after serving the tenant a three-day notice waives the breach complained of in the notice, which means you'll have to serve a new notice, demanding only the balance. *The California Landlord's Law Book: Evictions* gives a fuller explanation and provides step-by-step advice on how to do your own evictions.

Written Agreements to Accept Late Rent

If you do give a tenant a little more time to pay, monitor the situation carefully. You don't want to

Agreement for Partial Rent Payments

This Agreement is made between Betty Wong, John Lewis hereinafter "Tenant(s)," and _____, hereinafter "Landlord/Manager," who agree as follows:

1. That Betty Wong (Tenants) has/have paid one-half of her $1,000 rent for Apartment #2 at 111 Billy St., Fair Oaks, CA on March 1, 20xx, which was due March 1, xx.

2. That John Lewis (Landlord/Manager) agrees to accept all the remainder of the rent on or before March 15, 20xx and to hold off on any legal proceeding to evict Betty Wong (Tenants) until that date.

John Lewis	March 2, 20xx
Landlord or Manager	Date
Betty Wong	March 2, 20xx
Tenant	Date
Tenant	Date
Tenant	Date

provide extension after extension, until the tenant is three months in arrears with no chance to bring the account current. One way to prevent this is to put a payment schedule in writing. This binds you—you can't lose patience and demand the rent or initiate an eviction lawsuit sooner. But more important, it gives both you and the tenant a benchmark against which to measure the tenant's efforts to catch up on the rent. If you give the tenant two weeks to catch up but the rent remains unpaid, the written agreement precludes any argument that you had really said "two to three weeks."

A sample form you can use to accept partial rent payments is shown above.

FORM

The Nolo website includes a downloadable copy of the Agreement for Partial Rent Payments form. See Appendix B for the link to the forms in this book.

If the tenant does not pay the rest of the rent when promised, you can, and should, follow through with a Three-Day Notice to Pay Rent or Quit (covered in Chapter 16) and, if need be, initiate an eviction lawsuit if payment is still not forthcoming.

Oral Agreements to Accept Late Rent

Don't rely on an oral agreement with a tenant who promises to catch up on back rent. To be legally binding, an oral agreement must include a promise by the tenant to give you something of value over and above a promise to pay rent already due. For example, the tenant could agree to pay a late fee.

EXAMPLE 1: Nancy approaches her landlord Robin with a sad story about needing to send money to her ailing mother. Nancy asks if she can pay half the rent on the first of the month (the day it is due) and the remaining half two weeks late. Robin agrees, but nothing is written and Nancy does not promise to provide any extra payment or other advantage in exchange for Robin's forbearance. The next day, Robin finds out Nancy has lost her job and been arrested for possession of cocaine. He asks her to pay the full rent immediately. This is legal. Nancy's original promise was not legally binding because Robin received nothing of value in exchange for it.

EXAMPLE 2: Now let's change this example slightly and assume that in exchange for the right to pay half of the rent late, Nancy promised to sweep the parking lot twice a week and turn on the pool filter every morning. Now, Nancy and Robin have entered into a valid contract, and Robin has a legal obligation to stick to his end of the bargain as long as Nancy honors her agreement.

CHAPTER

4

Rent Control

California has no statewide law establishing rent control, nor does it have a state law preventing rent control. Consequently, cities may establish rent control on a local basis, either through the initiative process or by the act of a city council. However, California does have a state law that restricts the ability of local governments if they wish to enact rent control for their localities. This law, called the Costa-Hawkins Rental Housing Act, forbids the imposition of any rent control on new tenancies in single-family homes and condos (applies to tenancies that began after January 1, 1996) and requires that controls on rent be lifted when there is a voluntary vacancy or a vacancy following an eviction for a good reason (such as nonpayment of rent). (CC §§ 1954.50–1954.53.)

Some form of rent regulation now exists in 16 California cities. You'll need to read this chapter if your property is located in a city with rent control ordinances; see the list below.

RENT CONTROL

Cities With Rent Control Ordinances

Berkeley
Beverly Hills
Campbell (mediation only)
East Palo Alto
Fremont (mediation only)
Gardena (mediation/arbitration)
Hayward
Los Angeles
Los Gatos (mediation/arbitration)
Oakland
Palm Springs
San Francisco
San Jose
Santa Monica
Thousand Oaks
West Hollywood

Rent control ordinances generally control more than how much rent a landlord may charge. For example:

- Many cities' ordinances also govern how—and under what circumstances—a landlord may terminate a tenancy, even one from month to month, by requiring the landlord to have just cause to evict.
- Several cities, most notably Los Angeles, require landlords to register their properties with a local rent control agency.
- Finally, several cities regulate security deposits (by requiring interest) and impose notice requirements for rent increases and termination of tenancies that are different from the state law requirements we discuss in Chapters 5, 14, 16, and 18.

No two rent control ordinances are identical, even as to how rents may be increased. For example, some cities have elected or appointed boards that have the power to adjust rents; others automatically allow a certain percentage rent increase each year as part of their ordinances. We review basic rent control provisions in this chapter and how they compare among cities. We summarize each city's ordinance in a Rent Control Chart in Appendix A.

CAUTION

Get up-to-date information. Cities change their rent control laws frequently, and court decisions also affect them. In short, you should read the material here to get a broad idea of rent control. If the property you rent is in a city that has rent control, it is imperative that you also contact your city or county to get an up-to-date copy of the ordinance and any regulations interpreting it. Your city's website will likely also have useful information. (See the website information in Appendix A.)

Where to Get Information About Rent Control

The following organizations can help answer questions about rent control ordinances in your area:

- **Your city rent control board** can supply you with a current copy of the local ordinance, and sometimes also with a brochure explaining the ordinance. (Unfortunately, many cities' staffs don't provide much help over the phone on specific questions.) Check the Rent Control Chart in Appendix A for the address, phone number, and website of your local rent control board.
- **Your local apartment owners association** can also give you general information on rent control ordinances in the area it serves. For the name of your local association, contact the California Apartment Association, 980 9th Street, Suite 200, Sacramento, CA 95814, 800-967-4222, or check their website at www.caanet.org.
- **Local attorneys** can be an additional resource. See Chapter 8 for advice on finding attorneys who specialize in landlord/tenant law.

Property Exempt From Rent Control

Not all rental housing within a rent-controlled city is subject to rent control. Under state law, property that was issued a certificate of occupancy after February 1, 1995 is exempt from rent control. (CC § 1954.52.) Furthermore, almost all cities have exempted from rent control any "new construction" built after the effective date of the ordinance. Most cities also exempt owner-occupied buildings with four (or sometimes three or two) units. A few cities also exempt "luxury units" that rent for more than a certain amount. And all tenancies for single-family homes and most condos are exempt under state law if the tenancy began after January 1, 1996. Finally, most cities also exempt government-subsidized tenancies from rent control (Berkeley is an exception).

Unfortunately, an ordinance can sometimes be ambiguous, leaving the landlord and tenant to wonder whether the property is covered. If the local rent board can't give you a straight answer—or you're reluctant to contact them—you may need to consult an attorney who's familiar with your community's rent control ordinance.

Local Rent Control Administration

Most rent control ordinances are administered by a rent control board whose members are appointed (elected in Santa Monica and Berkeley) by the mayor or city council (board of supervisors in San Francisco). In some cities, these boards determine the amount of an allowable across-the-board rent increase each year, applicable to all properties covered by the ordinance. They also conduct individual hearings where landlords seek an additional increase over and above that amount. As a general rule, appointed boards are more evenhanded than elected ones. The name, address, phone number, and website of each board is given in the Rent Control Chart in Appendix A.

Registration of Rental Properties

The cities of Berkeley, East Palo Alto, Los Angeles, Palm Springs, Santa Monica, Thousand Oaks, and West Hollywood all require the owners of rent-controlled property to register the property with the agency that administers the rent control ordinance. This allows the rent board to keep track of the city's rental units, as well as to obtain operating funds from the registration fees.

These cities forbid landlords who fail to register their properties from raising the rent. In fact, cities may require a landlord to refund past rent increases if the increases were made during a period in which the landlord failed to register property. The courts have ruled that it is unconstitutional for rent control ordinances requiring registration to allow tenants to withhold rents just because the property isn't registered. (*Floystrup v. Berkeley Rent Stabilization Board,* 219 Cal. App. 3d 1309 (1990).)

Some cities, including Berkeley and Santa Monica, impose fines on landlords who fail to register property. However, both fines and refunding past increases are limited by state law (CC § 1947.7) when the landlord's failure to register was not in bad faith and was quickly corrected (that is, the landlord registered the property) in response to a notice from the city. To make things easier for landlords who make honest mistakes, state law requires cities to allow landlords to phase in, over future years, any rent increases that would have been allowed had the property been registered, if the following conditions are met:

- the landlord's original failure to register the property was unintentional and not in bad faith
- the landlord has since registered the property as required by the city and paid all back registration fees, and
- the landlord has paid back to the tenant any rents collected in excess of the lawful rate during the time the property wasn't properly registered.

EXAMPLE: Three years ago, Carla bought a triplex in a rent control city. She planned to live in one of the units three months out of the year, and rent it out the other nine months. Carla had been advised by her family lawyer (incorrectly) that her property was "owner occupied," and thus not subject to registration or rent controls, even

though she only lived there three months out of the year. Each time Carla rented her property to a new tenant for nine months, she increased the rent by 10%. She also increased the rent for the other units each year. A tenant complained to the rent board, which determined the property should have been registered. Since it hadn't been registered, Carla's three years of rent increases were illegal, and the proper rent was what she charged three years before. If Carla registers the property and refunds the excess rent she collected to all her tenants, she can phase in the increases the city would have allowed during her three years, had the property been registered. The city can't fine Carla for failure to register her property because she had acted in good faith on the poor advice of a lawyer.

This law is fairly complicated, as are the typical local ordinances and regulations in cities that require registration of units. Should you run afoul of your city's rent control board and be faced with having to refund back rent increases for a substantial period or pay other substantial penalties, you should probably see a lawyer familiar with the local rent control ordinance and regulations.

Rent Formula and Individual Adjustments

Each city has a slightly different mechanism for allowing rent increases. All cities allow periodic (usually yearly) across-the-board increases for existing tenants. The amount of the increase may be set by the rent control board, or the ordinance may allow periodic increases of either a fixed percentage or a percentage tied to a local or national consumer price index.

Mild Rent Control

Rent control is considered mild in the Bay Area cities of San Jose, Hayward, and Los Gatos. To begin with, none of these cities' ordinances require landlords to register units with the board.

Although the rent control ordinances of these areas set forth a certain formula by which rents can be increased each year (usually fairly generous, in the 5%–8% range), it is possible for landlords to raise the rent above this figure and still stay within the law. Each of these cities' ordinances requires a tenant whose rent is increased above the formula level to petition the board within a certain period (usually 30 days) and protest the increase. If no tenants protest the increase within the time allowed, the increased rent is legally effective, even though it is higher than the formula increase. If a tenant protests the increase, then the board schedules a hearing to decide if the entire increase should be allowed.

Rent Mediation

Some cities, most notably the Bay Area cities of Campbell and Fremont, have adopted voluntary rent guidelines or landlord/tenant mediation services. Voluntary guidelines, of course, do not have the force of law. However, it's often an excellent idea for you to comply with voluntary rent guidelines or to handle a dispute by mediation. The alternative may be hiring a lawyer to sue a tenant who refuses to pay a rent increase and going to court to obtain a money judgment you may never collect.

Keep in mind that several cities have rent control at least in part because some landlords completely ignored voluntary guidelines and mediation services, causing tenants to show up at polls and support rent control in record numbers.

We discuss mediation in more detail in Chapter 8.

Moderate-to-Strict Rent Control

Unlike the practice in cities with mild rent control, landlords in cities with moderate-to-strict rent control bear the burden of petitioning the rent board for an above-formula rent increase and of justifying the need for such an increase based on certain cost factors listed in the ordinance, such as increased taxes or capital improvements. These cities also require the landlord to show a good reason (called "just cause") to evict a tenant.

The rent control laws of Los Angeles, San Francisco, Beverly Hills, Oakland, Palm Springs, and Thousand

Oaks have traditionally been considered "moderate," while the rent control laws of Berkeley, East Palo Alto, Santa Monica, and West Hollywood have been considered "strict."

Until 1996, the main difference between moderate and strict rent control was that cities with the moderate approach allowed a landlord to raise the rent when a tenant vacated the property voluntarily or was evicted for just cause. This was known as "vacancy decontrol." Strict rent control cities did not allow for such increases (these cities practiced "vacancy control"). But, as of January 1, 1996, state law requires all cities to allow vacancy decontrol. (CC § 1954.53.) (We discuss vacancy decontrol in more detail below.) This means there is now little difference between rent control in moderate cities and rent control in strict cities. (One of the remaining differences is that landlords in strict rent control cities must register their properties with the rent control board. Berkeley and Santa Monica also allow tenants to petition for lower rents based on a landlord's failure to maintain or repair rental property.)

Landlords may not, however, raise rents (even after a voluntary vacancy or eviction for cause) where the landlord has been cited for serious health, safety, fire, or building code violations that the landlord has failed to remedy for six months preceding the vacancy. (CC § 1954.53(f).)

Hearings and Rent Adjustments

Almost all cities with rent control have a hearing procedure to handle certain types of complaints and requests for rent adjustments. The hearing procedures are described in detail below.

Rent Agreed to by the Tenant

In cities with moderate and strict rent control, which require the landlord to petition the board before increasing the rent over a certain amount, a landlord can't circumvent the ordinance by having the tenant agree to an illegal rent. Even tenants who agree in writing to pay a higher rent and pay it can sue to get the illegal rent back. (*Nettles v. Van de Lande,* 207 Cal. App. 3d Supp. 6 (1988).) This cannot happen, however, in cities with mild rent control that require the tenant to object to a rent increase or have it go into effect.

Security Deposits

Several local rent control ordinances require landlords to keep security deposits (including "last month's rent") in interest-bearing accounts and to pay interest on them. Several ordinances require landlords to not only pay interest, but to place the deposits in a bank insured by the FSLIC (Federal Savings & Loan Insurance Corporation) or the FDIC (Federal Deposit Insurance Corporation). If the interest-bearing accounts at these institutions pay less interest than that required by the ordinance, you do not have to abide by the ordinance—you need only pay the interest that the bank is paying. (*Action Apartment Association v. Santa Monica Rent Control Board,* 94 Cal. App. 4th 587 (2002).) However, at least one city—San Francisco—does not require landlords to place deposits in an account insured by these corporations. Because these landlords can theoretically invest the deposits in higher-yield ways, they must pay the rate of interest mandated by their ordinance, even if it is higher than the rate offered by money-market accounts that are insured by the FDIC or the FLSIC. (*Small Property Owners of San Francisco, et al. v. City and County of San Francisco*, 141 Cal. App. 4th 1388 (2006).) See "Other Features" in the Rent Control Chart in Appendix A for details on various cities' deposit laws.

Certification of Correct Rent Levels by Board

Cities that require registration must certify in writing, on request of the landlord or tenant, the correct rent level for the property under state law. (CC § 1947.8.) When the landlord or tenant requests such a certificate from the board, the board must send copies to both the landlord and tenant. Each of them then has 15 days to file an appeal with the board challenging the rent level, by filing a written notice on a form available from the board. The board must then decide the appeal within 60 days. If the certificate rent level is not appealed by the landlord or tenant within 15 days, it cannot be challenged later, except by the tenant if the landlord was guilty of intentional misrepresentation or fraud with regard to information supplied to the city in the request for the certificate.

Vacancy Decontrol

Landlords have free rein to raise the rent when a unit is vacated. This rule is called vacancy decontrol. In practice, it means that rent control applies to a particular rental unit only as long as a particular tenant (or tenants) lives there. If that tenant voluntarily leaves or is evicted for nonpayment of rent, the property will be subject to rent control again after the new (and presumably higher) rent is established. But in Hayward, Palm Springs, and Thousand Oaks, the property will no longer be subject to rent control following a voluntary vacancy.

The effect of this state law is unclear where the tenant is evicted for a reason other than nonpayment of rent (such as a violation of a lease clause). City ordinances with their own vacancy decontrol provisions generally allow increases, but state law doesn't seem to do so. So if your property is subject to rent control (and is not in Hayward, Palm Springs, or Thousand Oaks), check with your rent board before increasing rents following a vacancy for a lease violation (or illegal act) other than nonpayment of rent.

CAUTION

Tenants may try to get around vacancy decontrol. Some tenants try to keep the rent low by unofficially subletting part or all of the premises to a new tenant, who may in turn sublet to someone else, and so forth. Under some rent control ordinances, a landlord cannot raise the rent, and cannot evict the tenant, unless the lease or rental agreement forbids subleasing or assignment without your permission (as ours does). (See Clause 10 of our form agreements in Chapter 2.) As long as subletting is a breach of the lease or rental agreement, you can legally evict tenants who sublet, or, under the Costa-Hawkins law, you can legally raise the rent in accordance with the formula. A landlord's consent to a sublease cannot be unreasonably withheld. However, if the tenant's subleasing of the property is designed to circumvent the rent control ordinance's provision for higher rent when occupancy changes, the landlord's refusal to consent to the sublease isn't unreasonable. (For details on subtenants and subleasing, see Chapter 10.)

If, however, the tenant acquires a roommate, and you treat the new occupant as a tenant (by accepting rent from him or her, for example), you may not be able to raise the rent when the original tenant leaves. (CC § 1954.53(d).)

Tenant Protections: Just Cause Evictions

Unfortunately, some unscrupulous landlords have sought to evict tenants solely in order to take advantage of vacancy decontrol. In other words, in order to charge more rent, which could only be done with a new tenancy, the landlord would evict the current tenant, often for little or no reason beyond the desire for more rent. To guard against such abuse, most rent control ordinances require the landlord to show "just cause" for eviction. Cities that require landlords to show just cause to evict require the landlord, for example, to give a reason for eviction in a notice terminating a month-to-month tenancy, even though state law does not require it. Under such just cause eviction provisions, the landlord must also prove the reason in a court proceeding.

Most cities that require just cause for eviction also have rent control. However, two cities without rent control also require landlords to show just cause to evict: San Diego (for tenants renting two years or more) and Glendale. (See Chapter 18, Terminating Tenancies.)

Under CC § 1954.53(c), landlords whose property is subject to rent control may raise rents pursuant to state law only where the tenant left voluntarily or was evicted for nonpayment of rent. So, state law gives no advantage to landlords who evict for any reason other than nonpayment of rent.

RENT CONTROL

Cities That Require Just Cause for Eviction

Berkeley	Palm Springs
Beverly Hills	San Diego
East Palo Alto	San Francisco
Glendale	Santa Monica
Hayward	Thousand Oaks
Los Angeles	West Hollywood

San Jose and Los Gatos, two of the mild rent control cities, do not have just cause eviction. The ordinances, however, penalize a landlord who tries to evict a tenant in retaliation for asserting a tenant right. The

tenant has the burden of proving that the landlord's motive was retaliatory. (See Chapter 15 for details on retaliatory evictions.)

The cities of Richmond and Ridgecrest require just cause to evict, but only for properties purchased at foreclosure, so we do not list those cities above.

Rent control ordinances that require just cause for eviction list acceptable reasons for eviction. The common reasons are discussed below.

See Chapter 18 for more details and procedures on evicting tenants in rent control cities requiring just cause for eviction.

Tenant Violates Lease or Rental Agreement

If a tenant violates the lease or rental agreement, the landlord has just cause for eviction. The landlord must first serve the tenant with a three-day notice. (The particular type of notice depends on the violation—see Chapters 16 and 18.) City ordinances list violations that are just cause for eviction. Typical reasons are:

- Tenant has not paid rent after being served with a Three-Day Notice to Pay Rent or Quit. This is the most common way tenants violate their lease or rental agreement.
- Tenant continues to violate a lease or rental agreement provision, such as keeping a dog on the property in violation of a no-pets clause, after being served with a three-day notice to correct the violation or leave.
- Tenant has caused substantial damage to the premises and has been served with an unconditional three-day notice specifying the damage done and telling the tenant to vacate. Some cities require the landlord to give the tenant the option of repairing the damage.
- Tenant is seriously disturbing other tenants or neighbors, and has been given a three-day notice specifically stating when and how this occurred. Some cities require that the notice give the tenant the option of stopping the offending conduct.
- Tenant has committed an illegal activity on the premises and has been given a three-day notice setting forth the specifics. Minor illegal activity, such as smoking marijuana, is not sufficient cause, although dealing drugs is. In fact, landlords who fail to evict drug dealers can face serious liability. (See Chapter 12.)

Other activities that constitute cause for eviction include engaging in an illegal business (such as prostitution), or even an otherwise legal business that's in violation of local zoning laws, or overcrowding the unit in violation of local health codes.

Some just cause eviction provisions are more stringent than others. In Berkeley and Santa Monica, a tenant who violates a lease or rental agreement—for example, moves in too many people, damages the premises, makes too much noise—must first be notified of the problem in a written notice (often called a cease-and-desist notice) and given a "reasonable" time to correct it (even though state law does not always require this). What is reasonable depends on the circumstances. A tenant who makes too much noise should be able to stop doing so in a day at most, whereas a tenant who damages the premises by breaking a window might reasonably be given a week to fix the window. Only after such a notice is given, and the tenant still fails to correct the problem, can you evict the tenant for the lease or rental agreement violation, starting with a three-day notice.

Landlord or Immediate Family Member Wants to Move Into Rent-Controlled Property

All rent control cities that require just cause to evict allow a landlord to terminate a month-to-month or other periodic tenancy if the landlord wants to reside in the unit, or wants to provide it to an immediate family member. These cities generally require that no similar unit be available for the landlord or family member in the same or in another building the landlord owns, and that the landlord give the tenant a 30-day termination notice setting this out as the basis for eviction. San Francisco has a permanent moratorium on certain owner move-in evictions. For details, see the Rent Control Chart in Appendix A.

"Family member" is defined differently in different cities. In Berkeley and Santa Monica, family members include only parents and children. In cities with more inclusive definitions, such as San Francisco and Los Angeles, family members also include brothers, sisters, grandparents, and grandchildren. When several people

own property, either as cotenants or through a joint venture, small corporation, or partnership, cities have different ways of defining who qualifies for the status of a landlord for purposes of claiming priority over an existing tenant if the landlord, or a family member, wish to live in the property.

There has been some abuse of this provision by landlords who evict a tenant claiming they or a family member wants to rent the premises, but then, after the tenant has moved out, simply move in a nonfamily member—at a higher rent. Under the Costa-Hawkins law, no rent increase is allowed unless the tenant leaves voluntarily or is evicted for nonpayment of rent. In response, cities have amended their ordinances, and the Legislature has passed a law, to impose fines on landlords who do this. State law requires that in rent-controlled cities that mandate registration, landlords who evict tenants on the basis of wanting to move a relative (or the landlord) into the property must have the relative actually live there for six continuous months. (CC § 1947.10.) Some cities impose a longer residence period (notably San Francisco, which requires three years). If the relative stays a shorter time, the tenant can sue the landlord in court for actual and punitive damages.

If a court determines that the landlord or relative never intended to stay in the unit, the tenant can move back in. The court can also award the tenant three times the increase in rent the tenant paid while living somewhere else and three times the cost of moving back in. If the tenant decides not to move back into the old unit, the court can award three times the amount of one month's rent of the old unit and three times the costs incurred moving out of it. The tenant can also recover attorney fees and costs. (CC § 1947.10. See also *Zimmerman v. Stotter,* 160 Cal. App. 3d 1067, 207 Cal. Rptr. 108 (1984). In this case, the landlord had earlier won an eviction lawsuit, on the basis that he didn't use the phony relative ploy. Despite the landlord's win, the tenant was allowed to bring suit for damages, claiming that the landlord did use the phony relative ploy, although it didn't become obvious until after the tenant was evicted and the property rerented. The tenant won the case.) In another case, the court awarded a San Francisco tenant $200,000 for a wrongful eviction based on a phony relative ploy. (*Beeman v. Burling,* 216 Cal. App. 3d 1586, 265 Cal. Rptr. 719 (1990).)

Other Reasons for Just Cause Evictions

In cities that require landlords to show just cause for eviction, landlords can also terminate a month-to-month or other periodic tenancy for any of the following reasons. The landlord must, however, give the tenant a 30-day termination notice if the tenant has occupied the property for less than a year, 60 days' notice if the tenant has stayed a year or more, and 90 days' for certain government-subsidized tenancies. The notice must specifically set forth the basis for the eviction.

- The tenant refuses to enter into a new lease containing the same terms as a previous expired one.
- The tenant refuses, following a written request, to allow the landlord to enter the premises when the landlord has a right to do so. For example, the tenant refuses to allow the landlord access to fix a hazardous condition on the property, a reason for which the landlord has a legal right to enter. (See Chapter 13.)
- The landlord seeks to substantially remodel the property, after having obtained the necessary building permits. However, the current tenant must be allowed the right of first refusal to move back in after the remodeling is completed—at the original rent plus any extra "pass-through" increases allowed by the particular rent control ordinance. This provision is designed to allow the landlord to recoup part of the cost of capital improvements.
- The landlord, after having complied with any local condominium conversion ordinance and having applied for and received the necessary permits, seeks to convert an apartment complex to a condominium complex.
- The landlord seeks to permanently remove the property from the rental market under the Ellis Act. For this type of termination, 120 days' notice is required, and if the tenant is disabled or a senior citizen, one year's notice is needed. (Government Code §§ 7060–7060.7.)

Rent Control Board Hearings

Disputes over rent usually get hammered out in a hearing before the local rent board. The hearing may be initiated by a tenant who protests a rent increase that is higher than the formula amount in a mild rent control city, or by a landlord in a city that requires landlords to first obtain permission before exceeding the formula increase.

In either case, the landlord must demonstrate the need for a rent increase higher than that normally allowed. This most often means establishing that business expenses (such as taxes, maintenance, and upkeep costs or applicable utility charges), as well as the amortized cost of any capital improvements, make it difficult to obtain a fair return on the landlord's investment given the current rent.

Initiating the Hearing

A hearing is normally initiated by the filing of a petition or application with the rent board. In describing this process, let's assume that a landlord is filing a petition in a strict or moderate rent control city that requires landlords to obtain permission before raising rents above the formula increase allowed. This process is approximately reversed in mild rent control cities that require the tenant to protest such an increase.

In some cities, including Los Angeles and San Francisco, there are two types of petitions a landlord seeking an above-formula rent increase can file. If an increase is sought because of recent capital improvements, the landlord files a "petition for certification" of such improvements. If a rent increase is sought on other grounds, a "petition for arbitration" is filed. The rent board can tell you which document you need to file.

The application form will ask for your name and mailing address; the address of the property or properties for which you're seeking the increase, including the numbers of any apartments involved; the affected tenants' names and mailing addresses; the dollar amounts of the proposed increases; and the reason for the requested increase, such as higher repair, maintenance, or utility charges, or a pass-through of recent capital improvements. Make sure that your local ordinance justifies an increase.

Usually, you must pay a nominal filing fee, often based on the number of units or properties for which you're seeking an increase. After filing your application and paying your fees, you and the tenant (who in some cities may file a written reply to your request) will be notified by mail of the date and place of the hearing, usually within a few weeks. In Los Angeles, San Francisco, and some other cities, city employees may inspect your property before the hearing. You are, of course, well advised to cooperate as fully as possible with such inspections.

Preparing for the Hearing

As a general rule, you will greatly increase your chances of winning your rent increase if you appear at the hearing fully prepared and thoroughly familiar with the issues, and make your presentation in an organized way.

Here's how to prepare:

Step 1. Obtain a copy of the ordinance and any applicable regulations for the area in which your property is located. Then determine which factors the hearing officer must weigh in considering whether to grant your request. For example, in San Francisco, the hearing board will consider the cost of capital improvements, energy conservation measures, utilities, taxes, and janitorial, security, and maintenance services. Your job is to show that the increase you are requesting is allowed by the rent control ordinance. Sometimes an outline on a 3" x 5" index card will help you focus.

Step 2. Gather all records, including tax statements, employee pay statements, and bills for repairs, maintenance, and any other costs (remodeling, repairs, or other capital improvements) having to do with the property.

Step 3. Be prepared to testify how each item of documentation relates to your monthly operating costs. Also be prepared to produce witnesses who are familiar with any items you think might be contested. For example, if you know tenants are likely to argue that you didn't make major improvements to the building when in fact you did, arrange for the contractor who did the work to appear at the hearing.

If for some reason your witness cannot appear in person, you may still present a sworn written statement or declaration from that person. The declaration should be as specific as possible, including

a description of the work done, dates, costs, and any other relevant information. At the end of the declaration, the contractor or other person should write, "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct," putting the date and her signature afterward. A sample Declaration follows.

Step 4. Before your hearing, go and watch someone else's hearing. (If your city's hearings are not open to the public, you can almost always arrange to attend as an observer if you call ahead.) Seeing another hearing may make the difference between winning and losing at yours. This is because both your confidence and your capabilities will grow as you understand what interests the hearing officers who conduct the hearing. By watching a hearing, you will learn that while they are relatively informal, all follow some procedural rules. It is a great help to know what the common practices are so you can swim with the current, not against it.

Step 5. If you feel it's necessary, consult an attorney or someone else thoroughly familiar with rent board hearings to discuss strategy. You may have an attorney represent you at a rent adjustment hearing, but this is probably not a good idea. You might prefer to be represented by your apartment manager or management company. If you do a careful job in preparing your case, you will probably do as well alone as with a lawyer or other representative. And remember, hearing officers (and rent boards) are local citizens who may well react negatively to a landlord who pleads poverty while also able to pay a lawyer.

The Hearing

Once you've prepared for the hearing, it's time to make your case. Here's how to be most effective.

Before the Hearing Begins

Arrive at the hearing room at least a few minutes before it is set to begin. Check in with the clerk or other official. Ask to see the file that contains the papers pertaining to your application. Review this material to see if there are any comments by office workers, rent board investigators, or your tenants. Read the tenants' comments very closely and prepare to answer questions from the hearing officer on any of the points they raise.

Declaration of Terry Jarman, Contractor

I, Terry Jarman, Licensed Contractor, declare:

I am a general construction contractor, licensed by the California State Contractor's Licensing Board. My contractor's license number is A-1234567.

Between January 1 and February 1, 20xx, I contracted with Maria Navarro, the owner of the apartment complex at 1234 Fell Street, San Francisco, to replace plumbing, heating, and electrical systems installed in the 1930s and to repair a roof that had developed numerous leaks over six of the apartment units. The total cost was $75,000, which Ms. Navarro paid me in full.

Pursuant to the contract, I engaged the necessary plumbing, heating, electrical, and roofing subcontractors to perform the necessary work, which was completed on February 1, 20xx.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Terry Jarman, Licensed Contractor _____ Date

As you sit in the hearing room, you will probably see a long table, with the hearing officer seated at the head. In a few cities, the hearing is before several members of the rent board, and they may sit more formally on a dais or raised platform used by the city council or planning commission. In any event, you, any tenants who appear, your representative, and any witnesses will be asked to sit at a table or come to the front of the room.

A clerk or other employee may make summary notes of testimony given at the hearing. In some cities, hearings are taped. If your city does not keep records, you have the right to have the proceedings transcribed or tape recorded at your own expense.

The Hearing Officer's Role

Rent board hearings are usually heard by a "hearing officer" who is a city employee or volunteer mediator or arbitrator. In a few cities, the rent board itself conducts hearings, with the chairperson presiding over the hearing. The hearing officer or rent board chairperson will introduce himself or herself and any other people in the room. If you have witnesses, tell the hearing officer. The hearing officer, or sometimes an employee of the rent board, will usually summarize your application, taking the information from your file. At some point, you will be sworn to tell the truth; it is perjury to lie at the hearing. When these preliminaries are complete, you or your tenant, depending on who initiated the proceeding, will have an opportunity to speak. A rent adjustment hearing is not like court. There are no formal rules of evidence. Hearing officers will usually allow you to bring in any information that may be important, though it might not be admissible in a court of law. Relax and just be yourself.

Making Your Case

Present your points clearly, in a nonargumentative way. You'll normally have plenty of time to make your case, so don't rush. At the same time, don't get carried away in unnecessary details. The hearing officer may well ask you questions to help you explain your position. Make sure you present all documentary evidence and witnesses necessary to back up your case.

Later, the hearing officer will allow the tenant or the tenant's representative to present his case and to ask you questions. Answer the questions quietly. It is almost always counterproductive to get into an argument. Even if you feel the tenant is lying or misleading, don't interrupt. You will be given time later to rebut the testimony. Direct all your argument to the hearing officer, not to the tenant or the tenant's representative.

When your witnesses are given the opportunity to testify, the normal procedure is simply to let them have their say. You may ask questions if the witness forgets something important, but remember, this is not a court, and you don't want to come on like a lawyer. Very likely, the hearing officer will also ask your witnesses questions. The tenant has the right to ask the witnesses questions as well. Similarly, you have the right to ask questions of the tenant and any witnesses.

In rare instances, you may get a hearing officer or rent board chairperson who dominates the hearing or seems to be hostile to you or to landlords in general. If so, you will want to stand up for your rights without needlessly confronting the hearing officer. Obviously, this can be tricky, but if you know your legal rights and put them forth in a polite but direct way, you should do fine. If you feel that the hearing officer is simply not listening to you, politely insist on your right to complete your statement and question your witnesses.

Just before the hearing ends, the hearing officer should ask if you have any final comments to make. Don't repeat what you have already said, but make sure all your points have been covered and heard.

At the end of the hearing, the hearing officer will usually tell you when you can expect the decision. A written decision will usually be mailed to you within a few days or weeks of the hearing. Some cities, however, do not issue written decisions; the hearing officer just announces the decision at the end of the hearing.

Be assured that it is illegal for hearing officers and rent boards to unfairly penalize landlords who made innocent mistakes filing or serving legal notices. (CC § 1947.7.) A landlord's good faith ("substantial compliance") in attempting to obey an ordinance prevents a rent board from imposing penalties.

Appealing the Decision

In most cities in which applications for increases are heard by a hearing officer, you have the right to appeal

to the full rent board if you are turned down. Your tenants have this same right if you prevail. A form for making an appeal will be available from the rent board.

If you make an appeal, you must file it within a certain time. You may or may not have the opportunity to appear in person before the rent board.

The rent board will probably take as truth the facts as found by the hearing officer and limit its role to deciding whether the hearing officer applied the law to these facts correctly. (There is an exception to this general rule in some cities. If you arranged for a typed transcript of the original hearing at your expense or have paid to have the tape recording of the hearing made by the hearing officer typed, the rent board may review it.) On the other hand, the rent boards of some cities (including Los Angeles) will allow the entire hearing to be held all over again. (This is sometimes called a "de novo" hearing.) In addition, the board will not usually consider any facts you raise in your statement that you could have brought up at the hearing but didn't. If you've discovered a new piece of information since the time of the first hearing, however, the board may consider the new information.

If your tenants are appealing and you are satisfied with the earlier decision, you will want to emphasize the thoroughness and integrity of the earlier procedure and be ready to present detailed information only if it seems necessary.

The entire rent board will generally have more discretion to make a decision than does a single hearing officer. If your case is unique, the entire board may consider the implications of establishing a new legal rule or interpretation.

If you again lose before the entire board, or if your city permits only one hearing in the first place, you may be able to take your case to court if you are convinced the rent board or hearing board failed to follow the law or their own procedures. However, if yours is a situation where the hearing officer or board has broad discretion to decide issues such as the one you presented, you are unlikely to get the decision overturned in court. Speak to an attorney about this as soon as possible, as there is a time limit (usually 30 days) on how long you can take to file an appeal in court.

Legal Sanctions for Violating Rent Control

When rent control laws were first adopted in the 1970s, many landlords came up with imaginative ways to circumvent them. In cities with vacancy decontrol, landlords began terminating month-to-month tenancies so that they could raise rents. As noted above, this caused localities to enact just-cause-for-eviction protections. Similarly, where ordinances allowed landlords to evict tenants in order to make major repairs to the property or move in themselves or move in relatives, some landlords used these reasons to evict, but didn't follow through. That is, after evicting their tenants, they made few, if any, repairs, or failed to move themselves or a relative in for any length of time.

> **EXAMPLE:** After purchasing a duplex, a Los Angeles landlord immediately served a 30-day notice on the tenant, on the grounds that she (the landlord) wanted to move her mother into the unit. The landlord evicted the tenant, but did not move her mother into the vacant unit. Instead, the landlord put the duplex back on the market for a much higher price. The tenant who had been evicted sued the landlord for many thousands of dollars and ultimately received a substantial settlement.

Other landlords deliberately reduced services or adopted obnoxious behavior to encourage their tenants to leave "voluntarily." This, in turn, was followed by more amendments to close such loopholes, with landlords devising more refined ways to avoid the new rules, and so forth.

Many landlords did get rid of low-paying tenants and raised rents. However, newer rent control ordinances, as well as recent changes in state law, have closed many of the original loopholes and now assess heavy financial penalties against landlords who try to circumvent a rent control or just-cause eviction ordinance, such as by evicting tenants on false grounds of moving in relatives. A court case in Los Angeles gives an example of how much these loopholes have been tightened. A group of tenants obtained a $1.7 million settlement against the new owner of a

residential hotel. The tenants alleged that the owner tried to drive out low-income residents, in violation of Los Angeles' just-cause eviction laws, to make way for higher-paying tenants. (*Clark Hotel Tenants' Assn. v. May Wah International Enterprises, Inc.,* Los Angeles County Superior Court No. C-725383 (*L.A. Daily Journal*, August 1, 1991).)

Here are other penalties landlords may face for violating rent control ordinances:

- The law allows tenants to sue a landlord for having made life miserable, under the legal theory of "intentional infliction of emotional distress." The landlord's repeated refusals to repair (see Chapter 11), privacy violations (see Chapter 13), or threats can be the basis for such a lawsuit. (*Newby v. Alto Rivera Apartments,* 60 Cal. App. 3d 288, 131 Cal. Rptr. 547 (1976).)
- All rent control ordinances (except that of Palm Springs) forbid lease or rental agreement clauses where tenants supposedly give up or waive their rights under the law. Thus, lease clauses that say "tenant knowingly gives up all rights under any applicable rent stabilization ordinance" are of no legal effect. (See "Rent Agreed to by the Tenant," above.)
- State law provides that in rent-controlled cities that require registration, a landlord who charges illegally high rent can be sued by the tenant in court for up to three times the rent collected in excess of the certified level, plus attorney fees and costs. (CC § 1947.11.)

CAUTION

Don't count on your insurance company to defend you if you break rent control laws and are sued by your tenants. Berkeley landlords who evicted tenants under the pretense that they intended to move family members into the house were successfully sued by the former tenants after the landlords rented the unit to someone else. The landlords' attempts to get their insurance carrier to foot the bill (for lawyers' fees and the eventual settlement) were unavailing. The court ruled that the illegal eviction was not covered under the landlords' homeowners' insurance policy. (*Swain v. California Casualty Insurance Co.,* 99 Cal. App. 4th 1 (2002).)

The best way to avoid the possibility of legal hassles is to forget about trying to circumvent the intent behind a rent control law, if indeed you ever thought about it. Be aware that tenants and rent boards have become more sophisticated in spotting and countering landlord maneuvers.

Be extra careful to avoid a "retaliatory eviction." The few cities that don't require just cause for evicting a tenant do forbid evictions intended to retaliate against a tenant who exercised rights under the rent control law—by objecting to an illegal rent increase, for example. State law forbids this, too. The tenant has to prove in court that the landlord's reason for eviction was retaliation. (See Chapter 15 and *The California Landlord's Law Book: Evictions,* which covers evictions in detail, including all the causes allowed for eviction in rent control cities.)

Save your energies for working toward a repeal or amendment of any rent control law you think is unfair. If you live in a strict rent control city, you may want to consider selling your properties and buying others in areas that make it easier for you to operate. This may not be as difficult to do as you might imagine, given the number of groups of unrelated adults who are purchasing housing together as tenants-in-common.

CHAPTER

5

Security Deposits

FORMS IN THIS CHAPTER

Chapter 5 includes instructions for and a sample of the Notice of Sale of Real Property and Transfer of Security Deposit Balance. The Nolo website includes a downloadable copy of this form. See Appendix B for the link to the forms in this book.

Most landlords quite sensibly ask for a security deposit before entrusting hundreds of thousands of dollars worth of real estate to a tenant. But it's easy to get into legal trouble over deposits, because they are strictly regulated by state law, and sometimes also by city ordinance. State law dictates how large a deposit you can require, how you can use it, when you must return it, and more. Some cities also require landlords to pay interest on deposits, and a few require landlords to put deposits in a separate account. What's more, you cannot modify these terms—regardless of what you put in a lease or rental agreement. It goes almost without saying that it is absolutely essential that you know the laws on security deposits and that you follow them carefully.

Exception for short-term rentals. The rules on deposits discussed in this chapter do not apply to short-term rentals where the occupancy is for 30 days or less. Someone who frequently rents out a vacation house, for example, for short periods need not worry about the laws discussed in this chapter.

RELATED TOPIC

Issues regarding security deposits are also covered in other chapters. See:

- Lease and rental agreement provisions on security deposits: Chapter 2
- Highlighting security deposit rules in a move-in letter to the tenant: Chapter 7
- Importance of insurance as a backup to security deposits: Chapter 12
- Using 30-day notices to raise the security deposit: Chapter 14
- Procedures on returning tenants' deposits and how to deduct for cleaning, damages, and unpaid rent: Chapter 20.

Security Deposits Must Be Refundable

In the eyes of the law, a security deposit is money that a landlord collects from a tenant and holds in case the tenant fails to pay the rent or does not pay for damage the tenant has caused to the rental unit. It doesn't matter what the landlord calls this money—a "cleaning deposit," "pet fee," or "last month's rent"—it's legally a security deposit as long as it's held for that purpose *and* used for that purpose. In legal shorthand, failing to pay the rent and not paying for damage are known as "tenant defaults."

Landlords typically collect a security deposit when the tenant moves in, along with the first month's rent. But the first month's rent is not considered part of the security deposit—for the simple reason that this rent money is being paid on time. On the other hand, money collected in advance can cover the tenant's *last* month's rent, because the landlord holds it as a kind of insurance in case the tenant leaves without paying for the last month.

Just about any money the tenant pays up front is considered a security deposit, except the initial (usually first month's) rent payment and a legitimate credit check fee of up to $40. (See Chapter 1 for more on credit check or other screening fees.) Any other money you collect up front for administrative costs associated with choosing tenants or moving them into a rental unit, whatever you call such fees (cleaning deposits, cleaning fees, administrative charges, or "tenant initiation expense reimbursement" (TIER) fees), is also a security deposit, which means it must be returned to the tenant. To put it another way, it is no longer legal to ask the tenant to pay administrative costs.

It's also illegal to charge a hidden nonrefundable deposit by charging considerably more rent for the first month than for later months. (*Granberry v. Islay Investments,* 9 Cal. 4th 738 (1995); *People v. Parkmerced Co.,* 198 Cal. App. 3d 683, 244 Cal. Rptr. 22 (1988).) It is illegal to charge a fixed fee for cleaning drapes or carpets or for painting, or to charge administrative "move-in" fees. All such fees are legally considered security deposits and must be refundable. Finally, you cannot insist that a security deposit be made in cash. (CC § 1947.3.)

TIP

Recoup your administrative costs in your rent, not through move-in fees. It is not legal to charge your tenants for your administrative costs. To cover these overhead expenses, set the rent high enough.

How Landlords May Use Deposits

State law controls how landlords may use security deposits. (CC § 1950.5.) You can withhold all or part of the deposit if the tenant skips out owing rent or leaving the apartment filthy or damaged. The deposit may be used by the landlord "in only those amounts as may be reasonably necessary" to do the following four things only:

1. To remedy defaults in payment of rent.
2. To repair damage to the premises caused by the tenant (except for "ordinary wear and tear").
3. To clean the premises, if necessary, when the tenant leaves. For tenancies that began on or after January 1, 2003, the amount of cleaning you may require cannot be more than will "return the unit to the same level of cleanliness it was in at the inception of the tenancy." (CC § 1950.5(a)(3).) In other words, if you delivered a merely broom-clean unit, you can't require your tenant to return it antiseptically spotless.
4. If the rental agreement allows it, to pay for the tenant's failure to restore or replace personal property.

When a tenant moves out, you have three weeks to either return the tenant's entire deposit or provide an itemized statement of deposit deductions (along with invoices and receipts for work done or items purchased) and refund the deposit balance, if any. Chapter 20 provides detailed procedures for handling security deposits when the tenant leaves, including inspecting the premises, making proper deductions, notifying the tenant, supplying receipts, and dealing with small claims lawsuits.

Dollar Limits on Deposits

State law limits the amount you can collect as a deposit. (CC § 1950.5 (c).)

Unfurnished property. The deposit (including last month's rent) can't exceed two months' rent.

Furnished property. The deposit (including last month's rent) can't exceed three months' rent. Property is considered "furnished" if it contains at least essential furniture, such as a bed in each bedroom, a couch or chairs for the living area, an eating table with chairs, and a refrigerator and stove.

There are two situations where other deposit limits apply.

Cities with rent control or deposit restrictions. Many cities with rent control ordinances, as well as Santa Cruz and Watsonville (which aren't rent-controlled), place further restrictions on deposit amounts and increases. Before attempting to set or raise a deposit in a rent-controlled city, be sure to obtain a copy of the rent control ordinance.

Waterbeds. If the tenant has a waterbed, the maximum allowed deposit increases by half a month's rent. So, if a tenant has a waterbed, you can charge a total deposit (including last month's rent) of up to 2.5 times the monthly rent for unfurnished property and 3.5 times the monthly rent for furnished property. (CC § 1940.5(h).)

> **EXAMPLE 1:** Mario charges $1,000 per month rent for a two-bedroom apartment. Since Mario's apartment is unfurnished, the most he can charge is two months' rent, or $2,000 total deposit. It makes no difference whether or not the deposit is divided into last month's rent, cleaning fee, and so forth. In other words, if Mario charges a $400 cleaning deposit, a $600 security deposit, and $1,000 last month's rent (total $2,000), he is just within the law. Remember, the rent Mario collects for the first month doesn't count for this purpose.

> **EXAMPLE 2:** Lenora rents out a three-bedroom furnished house for $1,500 a month. Since total deposits on furnished property can legally be three times the monthly rent, Lenora can charge up to $4,500 for last month's rent and deposits. This is in addition to the first month's rent of $1,500 that Lenora can (and should) insist on before turning the property over to a tenant. Realistically, Lenora might not find any takers if she insists on receiving $4,500 in deposits plus the first month's rent, for a total of $6,000. In the case of furnished property, the market often keeps the practical limit on deposits lower than the maximum allowed by law.

How to Increase Deposit Amounts

Since the maximum amount of a deposit is tied to the rent, an increase in rent affects the allowable deposit. You can normally change the amount of rent for a month-to-month tenancy, as well as other terms of the agreement, by giving the tenant a written 30-Day Notice of Change of Terms of Tenancy. (See Chapter 14.) If you increase the rent with a 30-day notice (or a 60-day notice for rent increases above 10% in one year—see Chapter 14), you can also legally increase the amount of the deposit.

> **EXAMPLE:** A landlord who rents an unfurnished house or apartment to a tenant for $750 a month can charge total deposits (including anything called last month's rent) of two times that amount, or $1,500. If the deposit is for this amount, and the landlord raises the rent to $1,000, the maximum deposit the landlord is allowed to charge goes up to $2,000. The required deposit does not go up automatically. To raise the deposit amount, the landlord must use a 30-day notice.

If you have a fixed-term lease, you may not raise the security deposit during the term of the lease, unless the lease allows it and specifies the increase.

RENT CONTROL

The ordinances of cities with rent control typically define controlled rent so broadly as to include all security deposits and last month's rent paid by the tenant. This means that if the city restricts your freedom to raise rents, it probably restricts your right to raise deposits as well. Also, since most cities that have special security deposit laws have them as part of a rent control ordinance, any property that is subject to that city's rent control laws is also subject to the city's deposit law. In such cities, the ordinance may therefore restrict the amount and manner in which you can raise a tenant's security deposit.

Last Month's Rent

Don't use the term "last month's rent" unless you want to be stuck with its literal meaning. If you accept an up-front payment from a tenant and call it last month's rent, you are legally bound to use it for that purpose only. There's no advantage to using this term, since the total deposit you can collect (two or three times the monthly rent, depending on whether the property is furnished) does not increase.

Here are two examples:

- You give your tenant a year's lease, from January 1 to December 31, and require an up-front payment of last month's rent. In this case, the tenant has paid the rent for December in advance.
- If you rent to your tenant from month to month, the tenant's last month's rent will take care of the rent for the last month, after the tenant gives a 30-day notice or you give the tenant a 30- or 60-day notice.

In either case, you can't use last month's rent as a security deposit for damage or cleaning charges.

If, instead, you require a security deposit and do not mention last month's rent, the tenant will have to pay the last month's rent when it comes due and then wait until after moving out to get the security deposit back. If the tenant damages the premises or fails to pay rent, you can hold on to the appropriate amount of the entire deposit.

> **EXAMPLE 1:** Fernando's last tenant left his $900 per month apartment a mess when he moved out. Fernando wanted to charge his next tenant a nonrefundable cleaning fee, but couldn't because this is illegal. Instead, Fernando decided to collect a total of $1,800, calling $900 a security deposit and $900 last month's rent. His next tenant, Liz, applied this last month's rent when she gave her 30-day notice to Fernando. This left Fernando with the $900 security deposit. Unfortunately, when Liz moved out, she left $1,000 worth of damages, sticking Fernando with a $100 loss.

> **EXAMPLE 2:** Learning something from this unhappy experience, Fernando charged his next tenant a simple $1,800 security deposit, not limiting any part of it to last month's rent. This time, when the tenant moved out, after paying his last month's rent as legally required, the whole $1,800 was available to cover the cost of any repairs or cleaning.

Avoiding the term "last month's rent" also keeps things simpler if you raise the rent, but not the deposit, before the tenant's last month of occupancy. The problem arises when rent for the tenant's last month becomes due. Has the tenant already paid in full, or does the tenant owe more because the monthly rent is now higher? Legally, there is no clear answer. In practice, it's a hassle you can easily avoid by not labeling any part of the security deposit last month's rent.

> **EXAMPLE:** Artie has been renting to Rose for three years. When Rose moved in, the rent was $800 a month, and Artie collected this amount as last month's rent. Over the years he's raised the rent to $1,000, without collecting any more also for last month's rent. During the last month of her tenancy, Rose applies the $800 last month's rent to the current $1,000 rent. Artie thinks that Rose should have to pay the $200 difference. Rose, however, thinks that, by having previously accepted the $800 as last month's rent, Artie had implicitly agreed to accept the $800 as full payment for that month. They end up in court fighting over something that could have been avoided.

Interest, Accounts, and Record Keeping on Deposits

No state law requires landlords to pay interest on security deposits. In most localities, you don't have to pay tenants interest on deposits, or put them in a separate bank account—unless you require this in your lease or rental agreement. (*Korens v. R.W. Zukin Corp.,* 212 Cal. App. 3d 1054, 261 Cal. Rptr. 137 (1989).) In other words, you can simply put the money in your pocket or bank account and use it, as long as you have it available when the tenant moves out.

However, several cities require landlords to pay or credit tenants with interest on security deposits. A few cities require that the funds be kept in separate interest-bearing accounts.

Here are a few things you should keep in mind about local requirements for interest payments on security deposits:

- All cities that require landlords to pay interest on security deposits have rent control, except Santa Cruz and Watsonville.
- All cities that require landlords to pay tenants interest during the tenancy allow the landlord to either pay it directly to the tenant or credit it against the rent.
- For those cities that require landlords to put deposits in separate, interest-bearing accounts:
  - Only one account is required for all the landlord's deposits. You don't have to open one for each tenant's deposit.
  - All security deposits, including last month's rent, if collected, must be placed in the separate account.
- Several ordinances require landlords to not only pay interest, but to place the deposits in a bank insured by the FSLIC (Federal Savings & Loan Insurance Corporation) or the FDIC (Federal Deposit Insurance Corporation). If the interest-bearing accounts at these institutions pay less interest than that required by the ordinance, you do not have to abide by the ordinance—you need only pay the interest that the bank is paying. (*Action Apartment Association v. Santa Monica Rent Control Board*, 94 Cal. App. 4th 587 (2002).) However, at least one city—San Francisco—does not *require* landlords to place deposits in an account insured by these corporations. Because these landlords can theoretically invest the deposits in higher-yield ways, they must pay the rate of interest mandated by their ordinance, even if it is higher than the rate offered by money-market accounts that are insured by the FDIC or the FLSIC. (*Small Property Owners of San Francisco, et al. v. City and County of San Francisco*, 141 Cal. App. 4th 1388 (2006).)

The chart below summarizes the features of all California cities' deposit laws. If you own property in a rent control city (other than San Francisco) and your property is exempt from rent control, these provisions obviously do not apply. (See "Exceptions" for each city in the Rent Control Chart in Appendix A.)

Some landlords have found that it is good public relations to pay tenants interest on their deposits, even if there is no local law requiring it. This, of course, is up to you.

Cities Requiring Interest or Separate Accounts for Security Deposits				
City	**Ordinance**	**Interest-Bearing Acct**	**Payments During Tenancy**	**Notes**
Berkeley	Municipal Code § 13.76.070	Not required.	Landlord must pay interest equal to the 12-month average of six-month certificates of deposit, as determined by the Rent Board each November, with interest to be paid or credited each December. (Rent Board website shows ongoing 12-month interest-rate average applicable in other months, for tenant move-outs.) If interest not credited by January 10, tenant may, after notice to the landlord, compute the interest at 10% and deduct this from the next rent payment.	www.ci.berkeley.ca/rent
Hayward	Ordinance 83-023, § 13	Not required.	Landlord must pay interest on deposits held over a year, with payments made within 20 days of tenant's move-in "anniversary date" each year, and when deposit refunded at end of tenancy. Rate is set annually by city.	Violation can subject landlord to liability for three times the amount of unpaid interest owed.
Los Angeles	Municipal Code § 151.06.02	Not required.	Landlord must pay interest on deposits once a year and when deposit is refunded at end of tenancy, either directly or through rent credit. Rate is set annually by Rent Adjustment Commission.	
San Francisco	Administrative Code, §§ 49.1–49.5 (Not part of city's rent control law.)	Not required.	Landlord must pay interest on deposits held over a year, with payments made on tenant's move-in "anniversary date" each year, and when deposit refunded at end of tenancy. Rate is set annually by Rent Board.	Ordinance does not apply to government-subsidized housing but may apply in other situations, even though property not subject to rent control.
Santa Cruz	Municipal Code §§ 21.02.010–21.02.100	Not required.	Landlord must pay interest as set by resolution of the city council on deposits held over a year, with payments made on tenant's move-in "anniversary date" each year, and when deposit refunded at end of tenancy.	Santa Cruz has no rent control law.
Santa Monica	City Charter Article XVIII, § 1803(s)	Required. Account must be insured by FSLIC or FDIC.	Landlord must pay interest produced on deposits held for one year or more, each year by October 1, either directly or through rent credit.	Landlord cannot raise deposit during tenancy, even if rent is raised, unless tenant agrees.
Watsonville	Municipal Code §§ 5.40.01–5.40.08	Not required.	On deposits held over six months, landlord must pay interest or credit against rent. Payment or rent credit is due on January 1 and when deposit refunded at end of tenancy. Rate is set annually by city.	Watsonville has no rent control law.
West Hollywood	Municipal Code § 17.32.020	Not required.	Landlord must pay interest on deposits, with payments made or credit against rent in January or February of each year, and when deposit refunded at end of tenancy. Rate is set annually by city.	

Insurance as a Backup to Deposits

This isn't a book on how to buy landlord's insurance, but because insurance can compensate you for some damages caused by tenants, it is appropriate to mention insurance here. After all, the legal limits as to how much you can charge for deposits are so strict (and tenants' abilities to pay a judgment may be so limited) that you may want to get all the additional protection possible.

There are basically two broad types of policies that will protect you from damage caused by your tenant:

- Property insurance that you buy, which protects you from:
  - losses from fire and water damage, possibly including lost rents while the property is being rebuilt or repaired, and
  - personal liability for injury to a tenant or someone else and illegal acts by you and your employees.

You will need property insurance for many reasons (discussed in Chapter 12). You may also wish to include earthquake coverage in such a policy.

- Renters' insurance, purchased by your tenant, often called a "Tenant's Package Policy," which covers:
  - the tenant's liability to third parties—for example, injuries to guests that result from the tenant's neglect, such as a wet and slippery floor in the tenant's kitchen
  - damage to the tenant's own property caused by fire and water damage, and
  - certain types of damage to your building caused by the tenant's acts.

Our lease and rental agreements (see Clause 19 in Chapter 2) recommend that the tenant purchase renters' insurance. Our move-in letter (Chapter 7) highlights some of the risks tenants face unless they purchase insurance.

One advantage of requiring your tenants to buy renters' insurance is that if there is a problem caused by a tenant that is covered by the tenant's policy, your premium rate won't be affected even though your landlord's policy also covers the damage.

How does a tenant's policy help you if the place is damaged? Well, if damage is caused by fire or water (for example, the tenant leaves something burning on the stove, causing a kitchen fire), the tenant's policy, not yours, will be responsible. But what if a tenant simply moves out and destroys your property? In that case, a tenant's policy will not pay if it's clear the tenant committed the vandalism. Since it often isn't clear as to whether the tenant's conduct was due to deliberate vandalism, as opposed to carelessness and neglect, tenant's insurance companies often will pay at least part of a claim disputed in this respect.

When Rental Property Is Sold

When rental property is sold, what should the landlord do with the deposits already collected? After all, when tenants move out, they want their deposit back. Who owes them the money? The responsibility can be shifted to the new owner, if the seller either:

- refunds the deposits to the tenants, which will enable the new owner to collect them himself, or
- transfers the deposits to the new owner. (CC § 1950.5(h).)

Seller Refunds the Deposit to Tenants

The first option is for the seller to refund the deposits (including last month's rent), less proper deductions, to each tenant, with a detailed itemization of the reason for and amount of each deduction as you would with any security deposit. We don't recommend this, because you're refunding the deposit before the tenant moves out—and thus before you're aware of any necessary deductions for cleaning and damages. This makes little sense, and requires the new owner to ask tenants for new deposits in the middle of their tenancy. (You could, of course, inspect the premises before refunding the deposit, but this would be inconvenient for both landlord and tenant.)

Seller Transfers Deposit to New Owner

We recommend this second option, which requires the seller to:

- Transfer the deposit to the new owner (less any lawful deductions for back rent owed and for any necessary cleaning and damages in excess of ordinary wear and tear that you know about at the time of transfer), plus any interest in cities that require payment of interest on deposits, and

- Give the tenant a written notice of the change of ownership, itemizing all deductions and giving the new owner's name, address, and phone number. The notice should be sent by first-class mail (preferably certified, return-receipt requested) or personally delivered.

The way you should transfer money to the new owner depends on whether you have established a separate account for tenants' deposits. If you have a separate account, you can simply make the change at the bank by transferring the account to the new buyer. If you have mixed the deposit money with your own, be sure to include a provision in the real property sales contract that itemizes the deposits for all the units and says the buyer acknowledges receipt of them (perhaps through a credit against the sale price) and that the buyer specifically agrees to take responsibility for the repayment of all deposits.

FORM

You'll find a downloadable copy of the Notice of Sale of Real Property and of Transfer of Security Deposit Balance on the Nolo website. See Appendix B for the link to the forms in this book.

As we stated earlier, it's likely that you'll have no idea whether cleaning or damage deductions should be made. However, this type of notice can be used to deduct any back rent the tenant owes at the time of transfer. (Chapter 20 provides detailed instructions on how to itemize deductions and figure out rent due.)

If you don't properly transfer the deposit to the new owner and notify the tenants as required, the new owner will still be liable (along with you) to the tenants for any untransferred portion of the deposit. (One exception to this rule applies if the new owner can convince a judge that after making reasonable inquiry when buying the property, the buyer erroneously concluded that the deposits were in fact transferred, or that the seller refunded them to the tenants before selling.)

The new owner can't increase the tenants' deposits to make up for your failure to transfer the money. The new owner, if stuck with this situation, will be able to sue you for any unaccounted-for deposits caused by your failure to transfer and notify. (CC § 1950.5(j).) It's wise to make sure that the security deposit arrangement between you and the buyer is written into the sales contract. At the end of this section, we suggest two clauses that you can use, depending on the timing of the transfer. Use the first clause if you and the buyer have not yet transferred the funds; use the second clause if the transfer has already occurred or is taking place at the same time as the property sale itself.

When You're Purchasing Rental Property

When buying rental property, make sure the seller follows one of the two legal options outlined above, and that all tenants have been notified of the transfer. (To double-check, you might want to ask the seller to use the transfer forms and provide you with copies of each proposed notice.)

It's a good idea to make sure that the security deposit transfer is written into the sales contract. Below are two contract provisions you can use to suit the method you and the seller have chosen. Use the first clause if you and the seller have not yet transferred the funds; use the second clause if the transfer has already occurred or is taking place at the same time as the property sale itself.

Some other key points when you're buying rental property:

- Make sure you know the total dollar amount of security deposits. For a multiunit building, it could be tens of thousands of dollars. If it is substantial, and the seller is not transferring security deposit funds to you, you may want to negotiate an appropriate reduction in the sales price.
- You may not require the tenant to pay you an additional security deposit to replace any amount the seller failed to transfer, except for a legitimate deduction the seller made and of which the tenant has been notified. For example, if the seller deducted $125 for unpaid back rent, you can require the tenant to pay you an additional deposit of this amount.
- If you want to change the rental agreement or lease, you must use a 30- or 60-day notice (for month-to-month rental agreements, 60 days' for all rent increases over 10%) or wait until the end of the lease term. (See Chapter 14 for raising rents and changing other terms of tenancy.)

Notice of Sale of Real Property and of Transfer of Security Deposit Balance
Civil Code Section 1950.5(h)(1)

To: Robert Fisher (Name),

Tenant(s) in possession of the premises at 123 Main Street (street address), City of Placerville,

County of El Dorado, California.

The real property described above was sold on June 1, 20xx to

Jake Brummer (name of new landlord),

456 Gold Street, Placerville, California (Street Address), whose telephone number is 916-555-1234.

Your security deposit, less any deductions shown below, has been transferred to the new landlord, who is now solely responsible to you for it.

Deposit Amount:	$500.00
Deductions:	
Unpaid Back Rent for month of June 20xx:	$125.00
Other Deductions:	$-0-
_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____
Total Deductions:	$125.00
Net Deposit Transferred to New Landlord:	$375.00

Please contact the new landlord, whose address and phone number are listed above, if you have any questions.

Laurel Meyer
Landlord or Manager

June 15, 20xx
Date

Sample contract provision transferring tenants' deposits

1. Where Tenants' Deposits to Be Transferred to Buyer at Later Date

As part of the consideration for the sale of the property described herein, Seller shall transfer to Buyer all security, as that term is defined by Section 1950.5 of the Civil Code, deposited with Seller by tenants of the premises, after making any lawful deductions from each tenant's deposit, in accordance with Subdivision (h) of Section 1950.5. Seller shall notify Buyer and each tenant of the amount of deposit remaining on account for each tenant, and shall notify each tenant of the transfer to Buyer. Thereafter, Buyer shall assume liability to each tenant for the amount transferred after such lawful deductions.

2. Where Tenants' Deposits Already Transferred to Buyer

As part of the consideration for the sale of the property described herein, Buyer acknowledges transfer from Seller of all security, as that term is defined by Section 1950.5 of the Civil Code, deposited with Seller by tenants of the premises, after making any lawful deductions from each tenant's deposit, in accordance with Subdivision (h) of Section 1950.5. Seller shall notify Buyer and each tenant of the amount of deposit remaining on account for each tenant, and shall notify each tenant of the transfer to Buyer. Thereafter, Buyer shall assume liability to each tenant for the amount transferred after such lawful deductions.

CHAPTER

6

Property Managers

FORMS IN THIS CHAPTER

Chapter 6 includes instructions for and a sample of the Residential Rental Property Management Memorandum. The Nolo website includes a downloadable copy of this form. See Appendix B for the link to the forms in this book. Chapter 6 also includes sample instructions you can use as a template when preparing your own instructions for new managers, clarifying basic legal guidelines for property management.

If you've had enough of fielding tenants' repair requests, collecting rent, and looking after all the other day-to-day details of running a rental property business, you've probably thought about hiring a property manager.

You may not have a choice: State law requires that a manager reside on the premises of any apartment complex with 16 or more units. (Cal. Code of Regulations, Title 25, § 42.) But you may want to hire a resident manager even if you have a smaller number of units. If you own several apartment complexes (large or small), you may want to use a property management firm.

This chapter reviews the nuts and bolts of hiring and working with a manager or property management firm, including:

- how to select a manager or management company and delegate responsibilities
- whether your manager needs to be licensed
- contracts with managers
- your legal obligations as an employer
- how to protect yourself from liability for a manager's illegal acts, and
- how to fire or evict a manager.

Hiring Your Own Manager

Many owners of small (less than 16-unit) apartment complexes do much of the management work themselves, hiring their own resident managers as needed. When a small landlord does hire a manager, it's typically a tenant who lives in a multiunit building. The tenant-manager collects rents, relays complaints, and keeps the building and yard clean. Or, the landlord collects the rent directly, leaving the manager mostly in charge of low-level maintenance and overall supervision of the tenants and premises.

The tenant-manager may get a reduced rent in exchange for performing these duties. Or, the tenant-manager may pay full rent and receive a separate salary.

Selecting the Right Manager

The person you hire to manage your property should be honest and responsible and have a good credit history. Careful screening is crucial. Follow the system we recommend for choosing tenants in Chapter 1. Look for a manager who communicates well—both with you and other tenants. The manager will receive legal documents and papers on your behalf, so make sure you can trust that person to notify you immediately.

If you select a manager from current tenants, pick one who pays rent on time and who you think will be meticulous about keeping records, particularly if collecting rent will be part of the job.

Avoid anyone who harbors biases based on race, national origin, religion, sex, sexual preference, or other group characteristics. This is especially important if the manager will be showing apartments, taking rental applications, or selecting tenants. And you'll need someone with a backbone—a manager who will be collecting overdue rents and serving three-day notices to pay rent or quit should not be fearful of minor confrontations with tenants.

If you want to delegate routine maintenance, make sure the person you choose knows how to do minor repairs, such as unclogging toilets, unsticking garbage disposals, and replacing light switches.

Finally, you should of course refrain from wrongful employment discrimination when hiring managers. Given that employment discrimination is prohibited in much the same ways as is housing discrimination, refer to Chapter 9 on antidiscrimination laws.

Setting the Manager's Duties

The manager's duties will depend largely on the number of units to be managed, your own needs, and the manager's abilities. Delegate more responsibilities if you live far away from the property or don't want to be involved in day-to-day details such as showing vacant units, collecting rents, and keeping the premises clean. The Residential Rental Property Manager Memorandum (explained below) includes a list of duties you may want to delegate.

Licensing Requirements

Owners of rental property can perform all leasing activities for their property without needing a real estate broker's license. Similarly, if you hire a manager who lives on the property, that person need not be licensed. (B&P §§ 10131, 10131.01.) However, your tenant-manager can manage only the property the

manager lives on. If you want this person's services at your complex across town, the manager will need to take and pass the licensing exam administered by the California Department of Real Estate (or be supervised by a broker, as explained below).

The rules are somewhat tricky for managers who do not live on the property. For example, suppose you want to pay a resident manager to also manage your second property, or you want to hire your retired brother-in-law, who lives in his own home, to manage your apartment complex. Unless each obtains a real estate license, they cannot take the job unless they will be supervised by a licensed broker or real estate sales person. Even then, they will be able to assume only the following duties, and only at a single location:

- show rental units to prospective tenants
- provide preprinted rental applications and respond to applicants' inquiries about the application
- accept deposits, fees for credit checks and other administrative duties, security deposits, and rent
- provide information about rental rates and other terms and conditions of the rental, as set out in a schedule provided by the owner, and
- accept signed leases and rental agreements.

As you can see, a nonlicensed, nonresident manager is limited to performing rather routine tasks that don't call for initiative or decision making. For instance, this manager would not be qualified to negotiate a lease, deal with late rents or other violations of the rental agreement or lease, or appear in court on your behalf.

The rules boil down to this: Unless you manage your property yourself, or hire someone who will also live on each property, you'll have to deal with a licensed broker. You can hire one to manage the whole show or, if you want to use a nonlicensed manager at each property, you can look for a broker to supervise each nonlicensed manager. You may have a hard time finding a broker willing to take on supervisory duties—most brokers with property management experience will prefer to do the job themselves.

Avoiding Legal Problems

To avoid legal trouble down the road, follow the guidelines in this section when you hire a resident manager.

Most Tenant-Managers Are Employees, Not Independent Contractors

If you hire a tenant-manager, that person will usually be considered an employee by the IRS and other government agencies, even if *you* call the person an independent contractor. Employees are guaranteed a number of workplace rights that are not guaranteed to people who work as independent contractors. To be considered an independent contractor, a person must offer services to the public at large and work under an arrangement in which the worker controls both the outcome of the project and the means and method of accomplishing it. Most tenant-managers are legally considered to be employees because the property owner who hires them sets the hours and responsibilities and determines the particulars of the job.

Separate Employment From the Manager's Rental Agreement

When you decide to hire a tenant as a manager, you and the manager should sign two separate documents:

- a memorandum explaining the job and that the job can be terminated at any time for any reason by either party, and
- a month-to-month rental agreement that can be terminated by either party on 30 days' written notice (60 days' if the tenant occupies the premises for a year or more).

A single agreement covering employment and the tenancy is appropriate when you have a special manager's unit set up as both an office and residence. (See "Evicting a Manager," below.)

If you have separate employment and rental agreements with a tenant-manager, the manager will pay the full rent and receive a separate salary. And if you fire a tenant-manager, there will be no question that your ex-manager is still obligated to pay the full rent, as has been required all along. Because your obligations as an employer are the same whether you compensate the manager with reduced rent or a paycheck (you must still pay Social Security and

payroll taxes, for example), the paperwork is no more difficult than using the rent-reduction method.

EXAMPLE: Louise uses two agreements with her new tenant-manager Sydney: a month-to-month rental agreement under which Sydney pays $800 rent each month, and a management agreement under which Louise pays Sydney $200 each week and which can be terminated without reason at any time by either party.

On January 1, Sydney pays his $800 rent to Louise. On January 7, Louise pays Sydney his weekly $200 and gives him a written notice saying his services as a manager are no longer required, but that he may stay on as a tenant. Louise no longer pays Sydney his weekly $200, and Sydney knows that in February he'll have to pay the regular rent of $800.

Why Not Use an Oral Agreement?

Landlords and resident managers often agree orally on the manager's responsibilities and compensation, never signing a written agreement.

Even though oral agreements are usually legal and binding, they are not advisable. Memories fade, and the parties may have different recollections of what they agreed to. If a dispute arises between you and the manager, the exact terms of an oral agreement are difficult or impossible to prove if you end up arguing about them in court. It is a far better business practice to put your understanding in writing.

Giving a resident manager reduced rent in exchange for management services, on the other hand, isn't a good idea. If the manager doesn't properly perform his duties and you terminate the employment, you may run into problems when you insist that the ex-manager go back to paying the full rent.

If the ex-manager refuses to pay the full rent, your only alternative is to initiate an eviction lawsuit. The lawsuit is almost sure to be complicated by the fact that the amount of rent due depends on whether the manager's employment was properly terminated and whether he owes any extra rent as a result of not performing his duties.

EXAMPLE: Boris and Thomas sign an agreement under which Thomas collects rents and handles routine repairs in exchange for $200 off the monthly rent of $1,000. When Thomas turns out to be an incompetent repairperson, Boris fires him as of the end of the month, and the next month demands the full $1,000 rent (not the $900 Thomas has been paying). Thomas refuses to pay more than $900, claiming he was fired unjustly. Although Boris is willing to keep Thomas as a regular tenant, he wants him to pay the rent. When Thomas won't pay it all, Boris serves him with a three-day notice demanding the $200. Thomas still refuses to pay, so Boris files an eviction lawsuit.

Boris could have avoided all this by having a separate employment agreement with Thomas covering management responsibilities (collecting rent and handling routine repairs), compensation ($200 per month), and termination policy (termination of management duties at any time with or without cause).

Below is an example of a sound written agreement that spells out the manager's responsibilities, hourly wage or salary, hours, and payment schedule.

FORM

You'll find a downloadable copy of the Residential Rental Property Manager Memorandum on the Nolo website. See Appendix B for the link to the forms in this book.

To protect yourself from liability for your manager's illegal activities in carrying out his responsibilities, also prepare a more detailed set of instructions clarifying duties and basic legal guidelines. See the sample Instructions to Manager, below.

Meet Your Obligations as an Employer

Whether you compensate a tenant-manager with reduced rent or a regular salary, you have specific legal obligations as an employer. You are also responsible for a certain amount of paperwork and record keeping. If you don't pay Social Security and meet your other legal obligations as an employer, you may face substantial financial penalties.

Residential Rental Property Manager Memorandum

1. Parties

This Agreement is between Jacqueline La Mancusa,
Landlord of residential real property at 1704 Donner Ave., Bakersfield, California
, and
Bradley Marsh,
Manager of the property. Manager will be renting unit _____ of the property under a separate written rental agreement that is in no way contingent upon or related to this Agreement.

2. Beginning Date

Manager will begin work on April 10, 20xx.

3. Responsibilities

Manager's duties are set forth below:

Renting Units

- ☐ answer phone inquiries about vacancies
- ☒ show vacant units
- ☒ accept rental applications
- ☐ select tenants
- ☒ accept initial rents and deposits
- ☐ other (specify) _____
- ☐ _____

Vacant Apartments

- ☒ inspect unit when tenant moves in
- ☒ inspect unit when tenant moves out
- ☐ clean unit after tenant moves out, including:
  - ☐ floors, carpets, and rugs
  - ☐ walls, baseboards, ceilings, lights, and built-in shelves
  - ☐ kitchen cabinets, countertops, sinks, stove, oven, and refrigerator
  - ☐ bathtubs, showers, toilets, and plumbing fixtures
  - ☐ doors, windows, window coverings, and miniblinds
  - ☐ other (specify) _____
  - ☐ _____

Rent Collection

- [X] collect rents when due
- [X] sign rent receipts
- [X] maintain rent collection records
- [X] collect late rents and charges
- [X] inform Landlord of late rents
- [X] prepare late rent notices
- [X] serve late rent notices on tenants
- [X] serve rent increase and tenancy termination notices
- [X] deposit rent collections in bank
- [ ] other (specify) _____
- [ ] _____

Maintenance

- [ ] vacuum and clean hallways and entryways
- [X] replace lightbulbs in common areas
- [ ] drain water heaters
- [X] clean stairs, decks, patios, facade, and sidewalks
- [X] clean garage oils on pavement
- [X] mow lawns
- [X] rake leaves
- [X] trim bushes
- [ ] clean up garbage and debris on grounds
- [ ] other (specify) _____
- [ ] _____

Repairs

- [X] accept tenant complaints and repair requests
- [X] inform Landlord of maintenance and repair needs
- [X] maintain written log of tenant complaints
- [X] handle routine maintenance and repairs, including:
  - [X] plumbing stoppages
  - [X] garbage disposal stoppages/repairs
  - [X] faucet leaks/washer replacement
  - [X] toilet tank repairs
  - [X] toilet seat replacement
  - [X] stove burner repair/replacement

☒ stove hinges/knobs replacement
☒ dishwasher repair
☒ light switch and outlet repair/replacement
☒ heater thermostat repair
☐ window repair/replacement
☐ painting (interior)
☐ painting (exterior)
☐ replacement of keys
☐ other (specify)
☐ _____

Other Responsibilities

_____

_____

_____

4. Hours and Schedule

Manager will be available to tenants during the following days and times: Monday through Friday; 3 p.m. - 6 p.m. _____. If the hours required to carry out any duties may reasonably be expected to exceed 12 hours in any week, Manager shall notify Landlord and obtain Landlord's consent before working such extra hours, except in the event of an emergency. Extra hours worked due to an emergency must be reported to Landlord within 24 hours.

5. Payment Terms

a. Manager will be paid:
☐ $ _____ per hour
☐ $ _____ per week
☒ $ 600 per month
☐ Other: _____

b. Manager will be paid on the specified intervals and dates:
☐ Once a week on every _____
☐ Twice a month on _____
☒ Once a month on the first of the month
☐ Other: _____

6. Ending the Manager's Employment

Landlord may terminate Manager's employment at any time, for any reason that is not unlawful, with or without notice. Manager may quit at any time, for any reason, with or without notice.

7. Additional Agreements and Amendments

a. Landlord and Manager additionally agree that: _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____.

b. All agreements between Landlord and Manager relating to the work specified in this Agreement are incorporated in this Agreement. Any modification to the Agreement must be in writing and signed by both parties.

8. Place of Execution

Signed at Fresno (City), California (State)

Jacqueline La Mancusa — Landlord — April 3, 20xx — Date

Bradley Marsh — Manager — April 3, 20xx — Date

Especially if you're figuring out taxes for your employee (rather than having the work done by an accountant or tax preparer), you must keep good records. IRS Publication 334 (*Tax Guide for Small Businesses*) provides details about the records you must keep. Contact the IRS at 800-TAX-FORM to obtain a free copy of the publication. Or go online to www.irs.gov/Forms-&-Pubs and search for Form 334.

Help With Paperwork

If you hate paperwork, your accountant can probably handle it for you. Or, payroll services can handle virtually all the details of employing a manager—for example, withholding Social Security and unemployment taxes—for a relatively small fee. To get cost quotes, check online (or in the yellow pages) under Payroll Service or Bookkeeping Service.

Income taxes. The IRS considers the manager's compensation—whether in the form of payments or reduced rent—as taxable income to the manager. For that reason, your manager must fill out a federal W-4 form (*Employee Withholding Allowance Certificate*) when hired. You must deduct state and federal taxes from each paycheck, turn over withheld funds each quarter to the IRS and the California Franchise Tax Board, and give the manager a W-2 form (*Wage and Tax Statement*) at the end of the year.

For details on reporting and deduction requirements, contact the IRS (800-TAX-FORM), or browse their website at www.irs.gov. You can reach the California Franchise Tax Board at 800-852-5711, or look for information on their website at www.ftb.ca.gov.

Employer Identification Number. As an employer, you need a federal identification number that distinguishes you from other employers. If you are a sole proprietor, you can use your Social Security number. Otherwise, you can get an Employer Identification Number by completing Form SS-4 (*Application for Employer Identification Number*). Form SS-4 is available for free by calling the IRS at 800-TAX-FORM, or you can download the form from the IRS website at www.irs.gov/Forms-&-Pubs (type SS-4 into the search box). You can get an EIN online immediately at www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Apply-for-an-Employer-Identification-Number-(EIN)-Online.

Social Security and Medicare Taxes ("FICA"). Every employer must pay to the IRS a "payroll tax," currently equal to 7.65% of the employee's gross paycheck amount (before deductions) compensation. You must also deduct an additional 7.65% from the employee's wages and turn it over (with the payroll tax) to the IRS quarterly. These FICA (Federal Insurance Contributions Act) taxes go toward the employee's future Social Security and Medicare benefits.

If you compensate your manager with reduced rent, in most cases you must still pay the FICA payroll tax. For example, an apartment owner who compensates a manager with a rent-free $500 per month apartment must pay 7.65% of $500, or $38.25, in payroll taxes each month. The manager is responsible for paying another 7.65% ($38.25) to the IRS.

You do not have to pay FICA taxes on the value of the reduced rent if the following conditions are met:

- the manager's unit is on your rental premises
- you provide the unit for your convenience or to comply with state law, as will be the case if your property has 16 or more units
- your manager actually works as a manager, and
- your manager has accepted the unit as a condition of employment—in other words, you've said that the manager must live in the unit in order to be your resident manager.

For more information, see IRS Publication 15-B, *Employer's Tax Guide to Fringe Benefits*.

Contact the IRS at 800-TAX-FORM or their website noted above for deduction and reporting requirements and forms; payroll taxes have been in flux, so be sure to check with the IRS for the current rate.

Minimum wage and overtime. No matter how you pay your manager—by the hour or with a regular salary—you should monitor the number of hours worked to make sure you're complying with state and federal minimum wage laws. Overtime is calculated by the day, not by the week. If your manager works more than eight hours in any one day, that extra time is overtime, which you must compensate at one-and-one-half the rate of pay (on the other hand, if the manager works a few hours on a nonwork day, those hours are compensated at the regular rate of pay). You must

pay your manager only for the actual hours worked, even if you require the manager to be "on call" on the property. (*Isner v. Falkenberg*, 160 Cal. App. 4th 1393 (2008).)

If the total number of hours a manager works, multiplied by the minimum hourly wage, exceeds the rent reduction or other fixed rate of pay, you are in violation of minimum wage laws. For example, a manager who works four 20-hour weeks during the month must receive at least $8 per hour as of January 1, 2008. A landlord who pays less—even if it's in the form of a rent reduction—will run afoul of the minimum wage laws. California minimum wage laws also require employers to pay time-and-a-half if an employee works more than eight hours a day.

CAUTION

Check to see if your city has its own minimum wage or "living wage." San Francisco, for example, provides for a higher minimum than the state figure. Some local minimum wages are restricted to certain types of businesses, or to employers with more than a threshold number of employees. If your business fits within the law, you must comply and use your local minimum wage when figuring out whether the number of hours your manager works (times the local minimum wage amount) exceeds the rent reduction.

Rent reductions. If you compensate your manager by a rent reduction, you can count only up to two-thirds of the "fair market rental value" of the apartment for the purpose of complying with minimum wage laws, and in no event more than $381.20 for a single employee or $563.90 for a couple. (Labor Code § 1182.8 and Industrial Welfare Commission Minimum Wage Order at Calif. Code of Regulations § 11000.) For example, if the rent is normally $500, and you charge the tenant-manager only $100 per month, only $333 of the $400 rent reduction may be counted for minimum wage purposes. This is another reason why compensation by rent reduction is not a good idea.

To make sure you comply with minimum wage laws, the agreement with your manager should limit the total number of hours worked each month, or provide for additional payment if the manager works more hours than anticipated.

For information on minimum wage laws, contact a local office of the State Department of Industrial Relations, Department of the State Labor Commissioner. You'll find this information and more at the Department's website at www.dir.ca.gov.

Disability and workers' compensation insurance. As an employer, you must provide workers' compensation insurance and disability insurance, either through the state or a private party. This coverage provides replacement income and pays medical expenses for employees who are injured or become ill as a result of their job. It's a no-fault system—an injured employee is entitled to receive benefits whether or not you provided a safe workplace, and whether or not the manager's own carelessness contributed to the injury. (You are, of course, required by federal and state laws to provide a reasonably safe workplace.) You, too, receive some protection, because the manager, in most cases, cannot sue you for damages over the injury.

If you don't provide workers' comp and disability and a manager is injured on the job—for example, by falling down the stairs while performing maintenance, or even by a violent tenant—you could face serious legal problems. You could be sued by the State Department of Industrial Relations and possibly by the injured manager. If you lose such a lawsuit, the court judgment will not be covered by any other kind of insurance you might have.

Contact the local office of the State Employment Development for information about disability insurance, or visit their website at www.edd.ca.gov, where you'll find lots of information. Call your insurance agent regarding workers' compensation insurance.

Unemployment taxes. A manager who is laid off, quits for good reason, or is fired for anything less than gross incompetence or dishonesty is entitled to unemployment benefits. These benefits are financed by state payroll taxes paid by employers. The California Employment Development Department (EDD) may impose tax and penalty assessments (without first filing a lawsuit) against employers who don't pay required payroll taxes. Contact the local office of the EDD for the appropriate instructions and forms.

Annual W-2 form. You must provide employees with a W-2 form (*Wage and Tax Statement*) for the previous year's earnings by January 31. The W-2 form lists the employee's gross wages and provides a breakdown of any taxes that you withheld.

Sample Instructions to Manager

November 6, 20xx

Dear New Manager:

Welcome to your new position as resident manager. In performing your duties under our management agreement, please keep the following in mind:

1. Discrimination in rental housing on the basis of race, religion, sex, sexual preference, marital or familial status, age, national or ethnic origin, source of income, and any other unreasonable or arbitrary basis is illegal—whether you are accepting rental applications for vacant apartments or dealing with current residents. Your duties, in the event of a vacancy, are to advertise and accept rental applications in a nondiscriminatory manner. This includes allowing all individuals to fill out applications and offering the unit on the same terms to all applicants. After you have collected all applications, please notify me at the phone number listed below. I will arrange to sort through the applications and make the final decision as to who occupies units.
2. Do not issue any rent increase or termination notices without my prior approval, unless a tenant's rent is more than five days past due and he or she is not withholding rent because of dissatisfaction with the apartment—for example, the tenant has made no complaints in the previous six months. In that case, you may, without prior approval from me, serve the tenant a Three-Day Notice to Pay Rent or Quit, using the blank forms I have given you. However, if you have any reason to think that the tenant may assert that the failure to pay rent is based on any defects in the rental unit, please contact me immediately. Do this even if you are convinced that the tenant's complaints are unfounded.
3. Treat all tenants who complain about defects, even trivial defects or ones you believe to be nonexistent, with respect. Enter all tenant complaints into the log book I have supplied to you. Respond to tenant complaints about the building or apartment units immediately in emergencies, and within 24 hours in nonemergencies. If you cannot correct or arrange to correct any problem or defect yourself, please telephone me immediately.
4. Except in serious life- or property-threatening emergencies, never enter (or allow anyone else to enter) a tenant's apartment without consent or, in his or her absence, unless you have given the proper notice. Proper notice is presumed to be 24 hours' notice, preferably in writing (48 hours' notice is required prior to conducting the initial move-out inspection requested by the tenant). You may enter in the tenant's absence during ordinary business hours to do repairs or maintenance work, provided you have given the tenant a 24-hour notice in writing and delivered personally, but posted on the door if necessary, and the tenant hasn't objected. Please call me if you have any problems gaining access to a tenant's apartment for maintenance or repairs.
5. When a tenant moves in, and again when he or she moves out, inspect the unit. Within a few days (at most) of the tenant giving or receiving a 30-day (or 60-day) notice of termination of tenancy, fill out and provide the tenant with a copy of the Move-Out Letter, which explains the procedure for the return of security deposits. Conduct a move-out inspection with the tenant during the last two weeks of the tenancy, if the tenant requests it (try to arrange for one even if no request is made). Use the Landlord/Tenant Checklist to record damage and excessive wear and tear. After the tenant has moved, inspect again using the Landlord/Tenant Checklist to note unremedied (or new) damage or uncleanliness. Take a series of Polaroid or digital camera pictures at both inspections.

6. If you think a tenant has moved out and abandoned the apartment, do not enter it. Telephone me first.
7. Once a tenant has vacated an apartment and given you the key, itemize all cleaning costs and costs necessary to repair damages in excess of ordinary wear and tear. Give me a copy of this itemization, along with a notation of the amount of any back rent, the before and after Landlord/Tenant Checklist forms, and the departing tenant's forwarding address. Please make sure I see this material within a week after the tenant moves out, preferably sooner. I will mail the itemization and any remaining security deposit balance to the tenant within the required three-week period.
8. If you have any other problems or questions, please do not hesitate to call me. Leave a message on my answering machine if I am not at home.

Sincerely,

Terry Herendeen

Owner

111 Maiden Lane, Fresno, CA

Address

559-555-1234

Phone

I have received a copy of this memorandum and have read and understood it.

Barbara Louis

Manager

Nov. 7, 20xx

Date

New Hire Reporting Form. Within a short time after you hire someone—20 days or less—you must file a New Hire Reporting Form with a designated state agency. The information on the form becomes part of the National Directory of New Hires, used primarily to locate parents who have not complied with child support orders. Government agencies also use the data to prevent improper payment of workers' compensation and unemployment benefits or public assistance benefits. The form is available at the EDD's website, www.edd.ca.gov.

Immigration Law

The Immigration and Nationality Act (INA), Title 8 of the U.S. Code, is a federal law that restricts the flow of foreign workers into American workplaces. The INA covers almost all employees hired since November 6, 1986.

Under the INA, it is illegal for an employer to:

- hire a worker whom the employer knows has not been granted permission by the U.S. Citizenship and Immigration Services (or USCIS, formerly the INS) to be employed in the United States (through a green card, visa, or Employment Authorization Document)
- hire any worker who has not completed Form I-9, the *Employment Eligibility Verification* form, or
- continue to employ an unauthorized worker—often called an illegal or undocumented worker—hired after November 6, 1986.

If your manager will also be your tenant, you must handle the issue of his right to work carefully. Under state law (CC § 1940.3), a landlord may not ask actual or prospective tenants about their immigration status. To stay within state and federal law, have a tenant whom you've just decided to hire fill out and return the IRS Form I-9.

For more information, including forms, contact the U.S. Citizenship and Immigration Services at 800-375-5283 or go to the USCIS website at www.uscis.gov.

Management Companies

Property management companies generally take care of renting units, collecting rent, taking tenant complaints, arranging repairs and maintenance, and evicting troublesome tenants. Property management companies are useful for owners of large apartment complexes and absentee owners too far away from the property to be directly involved in everyday details.

A management company acts as an independent contractor, not an employee. Typically, you sign a contract spelling out the management company's duties and fees. Most companies charge a fixed percentage—typically 5% to 10%—of the total rent collected. This gives the company a good incentive to keep the building filled with rent-paying tenants. (Think twice about companies that charge a fixed percentage of the rental value of your property, regardless of whether you have a lot of vacancies or turnover.)

Questions to Ask When You Hire a Management Company

- Who are its clients: owners of single-family houses, small apartments, or large apartment complexes? Look for a company with experience handling property like yours. Also ask for client references, so you can see if they are satisfied with the management company.
- What services will the company provide?
- What are the costs?
- Will the management company take tenant calls 24 hours a day, seven days a week?
- Is the company located fairly close to your property?
- Are employees trained in landlord/tenant law? Can they consult an attorney qualified in landlord/tenant matters?
- If your property is under rent control, are company personnel familiar with the rent control law?
- Can you terminate the management agreement without cause on reasonable notice?

Hiring a management company has a number of advantages. Compared to a tenant-manager, management company personnel generally develop a more professional, less emotional relationship with tenants, and are also usually better informed about

the law. Another advantage is that you eliminate much of the paperwork associated with being an employer. Because you contract with a property management firm as an independent contractor, and it hires the people who actually do the work, you don't have to worry about Social Security, unemployment, or workers' compensation.

The primary disadvantage of hiring a management company is the expense. For example, 10% of the $1,000 rent collected each month from tenants in a 20-unit complex amounts to $2,000 a month, or $24,000 per year.

If you hire a management company to manage your property, you still must have an onsite manager if your building has more than 16 units. If your rental property has only a few units, or you own a number of small buildings spread over a good-sized geographical area, the management company probably won't hire resident managers, but will simply respond to tenant requests and complaints from its central office.

Management companies have their own contracts, which you should read thoroughly and understand before signing. Be sure you understand how the company is paid and its specific responsibilities.

An Owner's Liability for a Manager's Acts

A landlord is legally responsible for the acts of a manager or management company, who is considered the landlord's "agent." For example, you could be sued and found liable if your manager:

- refuses to rent to a qualified tenant who is a member of a minority group or has children, or otherwise violates antidiscrimination laws (see Chapter 9)
- makes illegal deductions from the security deposit of a tenant who has moved out, or does not return the departing tenant's deposit within the three weeks allowed by law (see Chapters 5 and 20)
- ignores a dangerous condition, such as substandard wiring that results in an electrical fire causing injury or damage to a tenant, or a security problem that results in a criminal assault on a tenant (see Chapter 12)
- steals from or assaults a tenant (see Chapter 12), or
- invades a tenant's privacy by flagrant and damaging gossip, trespass, or harassment (see Chapter 13).

In short, a landlord who knows the law but has a manager (or management company) who doesn't, could wind up in a lawsuit brought by prospective or former tenants. Some insurance policies do not cover any loss or defense costs when caused by a manager's intentional misconduct, such as purposeful discrimination or retaliation against a tenant.

Here's how to minimize your liability for your manager's mistakes or illegal acts:

- Thoroughly check the background of all prospective managers. (See Chapter 12 for advice.)
- Limit the authority you delegate to your manager. If you specify the manager's responsibilities in writing, you reduce (but do not eliminate) your liability for manager misconduct that exceeds the authority you delegated. For example, a landlord who instructs a manager in writing only to accept rental applications, with the landlord actually selecting the tenant, is less likely to be held liable for a manager who, without authority, rents an apartment in a discriminatory fashion.
- Make sure your manager is familiar with the basics of landlord/tenant law. If you delegate more duties to your manager, such as authority to select tenants or serve three-day, 30-day, 60-day, or 90-day notices, provide some legal guidelines. You might also give your manager this book to read and refer to. Written guidelines not only help the manager avoid legal trouble, but also demonstrate that you acted in good faith, which could be very useful should a tenant sue you based on your manager's misconduct. Your guidelines should dovetail with the manager's responsibilities laid out in the Residential Rental Property Manager Memorandum.

Above is a sample set of instructions for a manager with fairly broad authority. Obviously, if your manager is given more limited authority, your instructions should also be more limited.

Antidiscrimination training. You may wish to have your manager attend antidiscrimination training

sessions given by local fair housing groups or landlord associations. This will help the manager avoid illegal discrimination and shows that you are making efforts to comply with antidiscrimination laws.

- Make sure your liability insurance covers illegal acts of your employees. No matter how thorough your precautions, you may still be liable for your manager's illegal acts—even if your manager commits an illegal act in direct violation of your instructions.
- Keep an eye on your manager and listen to your tenants' concerns and complaints. If you suspect problems—for example, poor maintenance of the building or sexual harassment—do your own investigating. Try to resolve problems and get rid of a bad manager before problems accelerate and you end up with an expensive tenants' lawsuit.

The High Cost of a Bad Manager: Sexual Harassment in Housing

If tenants complain about illegal acts by a manager, pay attention. The owners of a Fairfield, California, apartment complex learned this lesson the hard way—by paying more than a million dollars to settle a tenants' lawsuit.

The tenants, mostly single mothers, were tormented by an apartment manager who spied on them, opened their mail, and sexually harassed them. They were afraid to complain, for fear of eviction. When the tenants did complain to the building's owners, the owners refused to take any action—and the manager stepped up his harassment in retaliation.

Finally, tenants banded together and sued, and the details of the manager's outrageous and illegal conduct were exposed. The owners settled the case before trial for $1.6 million.

Notifying Tenants of the Manager

You are legally required to give tenants the manager's name, address, and phone number, since the manager is someone who is authorized to accept rent from tenants and legal documents for you. (CC §§ 1961–1962.7.) If rent is accepted in person, you must also state the days and hours when the manager will accept it. This information must be in writing, whether the tenant has a written lease or rental agreement or an oral rental agreement. It is included in our lease and rental agreements in Clause 23.

If you hire a manager after the lease is signed, you'll need to notify your tenants that the manager is authorized to receive legal papers from tenants, such as termination of tenancy notices or court documents in an eviction lawsuit. Two sample disclosure notices are shown below.

Notice: Address of Manager of Premises

Muhammad Azziz, 1234 Market Street, Apartment 1, San Jose, CA, phone 408-555-6789, is authorized to accept rent and manage the residential premises at 1234 Market Street, San Jose, CA. Rent is accepted at this address Monday through Friday, 9 a.m. to 5 p.m. If you have any complaints about the condition of your unit or common areas, please notify Mr. Azziz immediately. He is authorized to act for and on behalf of the owner of the premises for the purpose of receiving all notices and demands from you, including legal papers (process).

Notice: Address of Owner of Premises

Rebecca Epstein, 12345 Embarcadero Road, Palo Alto, CA, phone 650-555-0123, is the owner of the premises at 1234 Market St., San Jose, CA. If you have any complaints about the condition of the unit or common areas, please notify Ms. Epstein immediately.

If you don't provide your address and phone number (or someone else's who's authorized to receive legal documents on your behalf), your manager will be the only person deemed to be your agent for the purpose of service of legal notices—whether you like it or not. Also, the tenant will be legally able to serve legal notices by certified mail (no return receipt required) rather than by personally delivering them to the manager. This means that a current or former tenant can serve lawsuit papers on you simply by mailing them, by certified mail, to your manager.

In addition, if you don't give tenants the name, address, and phone number of the person who is authorized to accept rent and legal documents for you, you will be unable to evict any tenant based on nonpayment of any rents that accrued while you were not in compliance with this notice requirement. (CC § 1962(c).)

EXAMPLE: Three of your tenants have written rental agreements that don't give your name, phone number, and address or name anyone to receive legal notices on your behalf. Three other tenants have oral agreements with your manager, Mike, who refused to disclose your name and address, which is not posted on the premises.

The tenants sue you over housing code violations, including defective heaters and a leaking roof that Mike never told you about. They serve the lawsuit papers (summons and complaint) on Mike, who is your agent for service of process because you didn't comply with the disclosure law. Mike throws the papers away without telling you about them, and neither you nor he appears in court. All the tenants win by default because you were properly served—through your agent—and didn't appear in court.

Firing a Manager

Unless you have made a commitment (oral or written contract) to employ a manager for a specific period of time, you have the right to terminate the employment at any time. But you cannot do it for an illegal reason, such as:

- race, age, ethnic, gender, or other illegal discrimination, or
- retaliation against the manager for calling your illegal acts to the attention of authorities.

EXAMPLE: You order your manager to dump 20 gallons of fuel oil at the back of your property. Instead, the manager complains to a local environmental regulatory agency, which fines you. If you now fire the manager, you will be vulnerable to a lawsuit for illegal termination.

To head off the possibility of a wrongful termination lawsuit, be prepared to show a good reason for the firing. It's almost essential to back up a firing with written records documenting your reasons. Reasons that may support a firing include:

- performing poorly on the job—for example, not depositing rent checks promptly, or continually failing to respond to tenant complaints
- refusing to follow instructions—for example, allowing tenants to pay rent late, despite your instructions to the contrary
- possessing a weapon at work
- being dishonest or stealing money or property from you or your tenants
- endangering the health or safety of tenants
- engaging in criminal activity, such as drug dealing
- arguing or fighting with tenants
- behaving violently at work, or
- unlawfully discriminating or harassing prospective or current tenants.

Ideally, a firing shouldn't come suddenly or as a surprise. Give your manager ongoing feedback about job performance and impose progressive discipline, such as an oral or written warning, before termination. Do a six-month performance review (and more often, if necessary), and keep copies. Solicit comments from tenants a few times a year and if comments are negative, keep copies.

RESOURCE

For more information on how to handle problem employees—including how to avoid hiring them in the first place—see Nolo's *Dealing With Problem Employees,* by Amy DelPo and Lisa Guerin (Nolo).

Evicting a Manager

If you fire a manager, you may also want that person to move out of your property, particularly if the manager occupies a special manager's unit or the firing has generated (or resulted from) ill will. How easy it will be to get the fired manager out depends primarily on whether you have separate management and rental agreements.

Separate Management and Rental Agreements

If you and the tenant-manager signed separate management and rental agreements (the manager doesn't have a lease), firing the manager will not affect the tenancy. The ex-manager will have to keep paying rent but will no longer work as manager.

To evict the former manager, you will have to give a normal 30-day or 60-day written termination notice, subject to any just-cause eviction requirements in rent control cities. (See Chapter 18.) All rent control cities do allow eviction of fired managers, though some cities impose restrictions on it. If the tenant has a separate fixed-term lease, you cannot terminate the tenancy until the lease expires.

Single Management/Rental Agreement

What happens to the tenancy when you fire a manager depends on the kind of agreement you and the manager had.

If the Manager Occupied a Special Manager's Unit

If you fire a manager who occupies a specially constructed manager's unit (such as one with a reception area or built-in desk) that must be used by the manager, your ability to evict the ex-manager depends on:

- the terms of the management/rental agreement, and
- local rent control provisions.

If the agreement says nothing about the tenancy continuing if the manager quits or is fired, termination of the employment also terminates the tenancy. That means you can evict the ex-manager without a separate tenancy-termination notice. In that case, no written notice is required to terminate the tenancy, unless one is required under the agreement. (See CCP § 1161(1).)

The just-cause eviction provisions of any applicable rent control law, however, may still require a separate notice or otherwise restrict your ability to evict a fired manager.

If the Manager Didn't Occupy a Manager's Unit

If the manager was simply compensated by a rent reduction, and there is no separate employment agreement, there may be confusion as to whether the rent can be "increased" after the manager is fired. (This is one reason we recommend against this kind of arrangement.)

If an ex-manager refuses to pay the full rent, you will have to serve a Three-Day Notice to Pay Rent or Quit, demanding the unpaid rent. (See Chapter 16.) If that doesn't get results, you'll have to follow up with an eviction (unlawful detainer) lawsuit.

Eviction Lawsuits

If you want to evict a former manager, we recommend that the eviction lawsuit be handled by an attorney who specializes in landlord/tenant law.

Eviction lawsuits against former managers can be extremely complicated. This is especially true if the management agreement requires good cause for termination of employment or a certain period of notice. (Our form agreement requires neither.) Such lawsuits can also be complicated where a single combined management/rental agreement is used or if local rent control laws impose special requirements.

Handling Requests for References

If another landlord asks you for a reference for someone you employed but later fired as manager, just follow this bit of folk wisdom: If you can't say something good, don't say anything at all. In light of the potential for being named in a slander suit, it's best to simply decline to give any information about a former manager (or tenant) rather than say anything negative. Besides, if you politely say, "I would rather not discuss Mr. Jones," the caller will get the idea.

CHAPTER

7

Getting the Tenant Moved In

FORMS IN THIS CHAPTER

Chapter 7 includes instructions for and samples of the Landlord/Tenant Checklist and Key and Pass Receipt and Agreement. The Nolo website includes downloadable copies of these forms. See Appendix B for the link to the forms in this book. Chapter 7 also includes a sample move-in letter you can use as a template in preparing your own move-in letter for new tenants, clarifying day-to-day issues, such as how to report repair problems.

Legal disputes between landlords and tenants have gained a reputation for being almost as strained and emotional as divorce court battles. Many disputes are unnecessary and could be avoided if—right from the very beginning—both landlord and tenant understood their legal rights and responsibilities. A clearly written lease or rental agreement, signed by all adult occupants, is the key to starting a tenancy. (See Chapter 2.) But there's more to getting new tenants moved in. You should also:

- Inspect the property, fill out a Landlord/Tenant Checklist, and take pictures of the unit.
- Prepare a move-in letter highlighting important terms of the tenancy.
- Collect rent and security deposit checks.

Inspect and Photograph the Unit

It is absolutely essential for you and prospective tenants (together, if at all possible) to check the place over for damage and obvious wear and tear, by filling out a Landlord/Tenant Checklist form and taking photographs of the rental unit.

Filling Out the Landlord/ Tenant Checklist

A Landlord/Tenant Checklist, inventorying the condition of the rental property, is an excellent device to protect both you and your tenant when the tenant moves out and wants the security deposit returned. Without some record as to the condition of the unit, you and the tenant are all too likely to get into arguments about things like whether the kitchen linoleum was already stained or the bedroom mirror was already cracked at the time the tenant moved in.

The checklist will also be useful when you perform the initial move-out inspection, if requested by the tenant (which will give the tenant a chance to clean or repair, and avoid deductions). And, coupled with a system to regularly keep track of the rental property's condition, the checklist can also be useful if tenants withhold rent, claiming the unit needs substantial repairs. (See Chapter 11 for instructions and forms to periodically update the safety and maintenance of your rental properties.) A sample Landlord/Tenant Checklist is shown below.

FORM

You'll find a downloadable copy of the Landlord/Tenant Checklist on the Nolo website. See Appendix B for the link to the forms in this book.

When you look at the checklist we've prepared for you, you'll see that we have filled out the first column with rooms and elements in these rooms. If you happen to be renting a one-bedroom, one-bath unit, our preprinted form will work just fine. However, chances are that your rental has additional (or fewer) rooms; or you may want to note and follow the condition of one aspect of a rental (say, the loft or the hot tub) that is not on our form. No problem! If you use the electronic version available on the Nolo website, you can change the entries in the first column of the checklist, and you can add rows. For example, you may want to add a row for a third bathroom (and list the toilet, sink, and shower), another bedroom, a service porch, and so on; or you may want to add room elements, such as a trash compactor, fireplace, or dishwasher. Consult your word processing program for instructions on how to add a row to a table.

How to Fill Out the Checklist

You and the tenant should fill out the checklist together. If you can't do this together, complete the form and then give it to the tenant to review. The tenant should make any changes and return it to you.

The checklist is in two parts. The first side covers the general condition of each room. The second side covers the condition of any furnishings provided, such as a living room lamp or bathroom shower curtain.

If your rental property has rooms or furnishings not listed on the form, you can note this in "Other Areas," or cross out something that you don't have and write it in. If you are renting out a large house or apartment or providing many furnishings, you may want to attach a separate sheet.

If your rental unit does not have a particular item listed, such as a dishwasher or kitchen broiler pan, put "N/A" (not applicable) in the "Condition on Arrival" column.

Mark "OK" in the space next to items that are in satisfactory condition.

Make a note—as specific as possible—on items that are not working or are in bad condition. For example,

Landlord/Tenant Checklist

General Condition of Rental Unit and Premises

1234 Fell Street — Street Address
Apt. 5 — Unit Number
San Francisco — City

	Condition on Arrival	Condition on Initial Move-Out Inspection	Condition on Departure	Actual or Estimated Cost of Cleaning, Repair/Replacement
Living Room				
Floors & Floor Coverings	OK			
Drapes & Window Coverings	OK			
Walls & Ceilings	OK			
Light Fixtures	OK			
Windows, Screens, & Doors	back door scratched			
Front Door & Locks	OK			
Smoke Detector	OK			
Fireplace	N/A			
Other				
Kitchen				
Floors & Floor Coverings	Cigarette burn hole (1)			
Walls & Ceilings	OK			
Light Fixtures	OK			
Cabinets	OK			
Counters	discolored			
Stove/Oven	OK			
Refrigerator	OK			
Dishwasher	OK			
Garbage Disposal	N/A			
Sink & Plumbing	OK			
Smoke Detector	OK			
Other				

	Condition on Arrival	Condition on Initial Move-Out Inspection	Condition on Departure	Actual or Estimated Cost of Cleaning, Repair/Replacement
Dining Room				
Floors & Floor Coverings	OK			
Walls & Ceilings	OK			
Light Fixtures	crack in ceiling			
Windows, Screens, & Doors	OK			
Smoke Detector	OK			
Other				
Bathroom				
Floors & Floor Coverings	OK			
Walls & Ceilings	OK			
Windows, Screens, & Doors	OK			
Light Fixtures	OK			
Bathtub/Shower	tub chipped			
Sinks & Counters	OK			
Toilet	OK			
Other				
Other				
Bedroom				
Floors & Floor Coverings	OK			
Windows, Screens, & Doors	OK			
Walls & Ceilings	OK			
Light Fixtures	dented			
Smoke Detector	OK			
Other				
Other				
Other				

	Condition on Arrival	Condition on Initial Move-Out Inspection	Condition on Departure	Actual or Estimated Cost of Cleaning, Repair/Replacement
Other Areas				
Heating System	OK			
Air Conditioning	N/A			
Lawn/Garden	N/A			
Stairs & Hallway	N/A			
Patio,Terrace, Deck, etc.	N/A			
Basement	OK			
Parking Area	OK			
Other				
Other				
Other				
Other				
Other				

☒ Tenants acknowledge that all smoke detectors and fire extinguishers were tested in their presence and found to be in working order, and that the testing procedure was explained to them. Tenants agree to test all detectors at least once a month and to report any problems to Landlord/Manager in writing. Tenants agree to replace all smoke detector batteries as necessary.

Notes: _____

Furnished Property

	Condition on Arrival	Condition on Initial Move-Out Inspection	Condition on Departure	Actual or Estimated Cost of Cleaning, Repair/Replacement
Living Room				
Coffee Table	two scratches on top			
End Tables	N/A			
Lamps	OK			
Chairs	OK			
Sofa	OK			
Other				
Other				
Kitchen				
Broiler Pan	N/A			
Ice Trays	OK			
Other				
Other				
Dining Area				
Chairs	OK			
Stools	N/A			
Table	leg bent slightly			
Other				
Other				
Bathroom				
Mirrors	OK			
Shower Curtain	OK			
Hamper	N/A			
Other				

	Condition on Arrival	Condition on Initial Move-Out Inspection	Condition on Departure	Actual or Estimated Cost of Cleaning, Repair/Replacement
Bedroom				
Beds (single)				
Beds (double)				
Chairs				
Chests				
Dressing Tables				
Lamps				
Mirrors				
Night Tables				
Other				
Other				
Other Area				
Bookcases				
Desks				
Pictures				
Other				
Other				

Use this space to provide any additional explanation:

Landlord/Tenant Checklist completed on moving in on May 1, 20 xx.

Ira Eppler and Chloe Gustafson
Landlord/Manager Tenant

Tenant

Tenant

Landlord/Tenant Checklist completed at Initial Move-Out Inspection on _____, 20 _____.

_____ and _____
Landlord/Manager Tenant

Tenant

Tenant

Landlord/Tenant Checklist completed on moving out on _____, 20 _____.

_____ and _____
Landlord/Manager Tenant

Tenant

Tenant

don't just write "needs fixing" if a bathroom sink is clogged. It's just as easy to write "clogged drain," so that later the tenant can't claim to have told you about a leaky faucet that supposedly was there from the start.

The second column, "Condition at Initial Move-Out Inspection," is where you'll note any damage or needed cleaning when you go through the unit, at the tenant's request, prior to moving out. If you like, you can also record the expected deductions that you'll make if the tenant doesn't remedy the noted problems.

The last two columns—"Condition on Departure" and "Actual or Estimated Cost of Cleaning, Repair/Replacement"—are for use when the tenant moves out and you need to make deductions from the security deposit for items that need to be repaired, cleaned, or replaced. (See Chapter 20 for details on record keeping and security deposits.)

After you and the tenants agree on all of the particulars, you all should sign and date the form on both sides, as well as any attachments. Keep the original for yourself and attach a copy to the tenant's lease or rental agreement. (See Clause 11 of our form agreements.)

Be sure the tenant also checks the box on the bottom of the first page of the checklist stating that the smoke detector was tested in the tenant's presence and shown to be in working order (required for new occupancies by state law). This section on the checklist also requires the tenant to test the smoke detector monthly and to replace the battery when necessary. By doing this, you'll limit your liability if the smoke detector fails and results in fire damage or injury. (See Chapter 11 for details on the landlord's responsibility to provide smoke detectors and maintain the property, and Chapter 12 for a discussion of the landlord's liability for injuries to tenants.)

Be sure to keep the checklist up to date if you repair, replace, add, or remove items or furnishings after the tenant moves in. Both you and the tenant should initial and date any changes.

Photograph the Rental Unit

Taking photos or videos of the unit before the tenant moves in is another excellent way to avoid disputes over a tenant's responsibility for damage and dirt. When the tenant leaves, you'll be able to compare "before" and "after" pictures. This will help if a tenant sues you for not returning the full security deposit. Nothing is better in the defense of a tenant's security deposit lawsuit than a landlord's pictures showing that the unit was immaculate when the tenant moved in and a mess at move-out. Photos/videos can also help if you have to sue a former tenant for cleaning and repair costs above the deposit amount.

Whether you take a photo with your phone or use a separate camera, print out two sets of the photos as soon as possible. Give one set to your tenant. Each of you should date and sign both sets of photos. If you make a video, clearly state the date and time when the video was made.

You should repeat this process with "after" pictures, to be signed or initialed by the tenant as part of your established move-out procedure (described in Chapter 20).

Send New Tenants a Move-In Letter

A move-in letter should dovetail with the lease or rental agreement (see Chapter 2) but cover day-to-day issues, such as how and where to report maintenance problems (covered in detail in Chapter 11). It should also spell out the role of the manager, if any. A move-in letter can be changed from time to time as necessary. A sample is shown below. You should tailor this letter to your particular needs (for example, alter it if your property is subject to local rent control or you don't employ a resident manager).

Along with your move-in letter, you may want to document the keys and passes that you're giving the new tenant. Our form, Key and Pass Receipt and Agreement, lists the common keys and passes landlords distribute, and gives you a place to add others. The form also advises the tenant not to copy or share these items, that you'll charge a lockout fee if you have to help tenants who have lost their keys, and that you will charge a reasonable fee for replacing lost or damaged keys or passes. Be reasonable when setting lockout and replacement fees (don't think of these as profit-generating moments).

Sample Move-In Letter

April 29, 20xx

Dear Mr. O'Hara:

Welcome to Happy Hill Apartments. We hope you will enjoy living here.

It is our job to provide you with a clean, undamaged, pleasant place to live. We take our job seriously. This letter is to explain what you can expect from the Management and what we'll be looking for from you.

1. Rental Agreement: Your signed copy is attached. Please let us know if you have any questions. A few things we'd like to highlight here:
    - There is no grace period for the payment of rent (see Clause 6 for details, including late charges). Also, we don't accept postdated checks.
    - If you want someone to move in as a roommate, please contact us. If your rental unit is big enough, we will arrange for the new person to fill out a rental application and, if it's approved, for all of you to sign a new rental agreement.
    - (*for a month-to-month rental*): To terminate your month-to-month tenancy, you must give at least 30 days' written notice to Management. Management may also terminate the tenancy, or change its terms, on 30 days' written notice.
    - (*for a fixed-term lease*): You occupy the premises under a fixed-term lease. You are responsible for all rent payments through the lease term, even if you move out before the lease expires. During the lease term, your rent cannot be increased, nor can other terms of your tenancy be changed.
    - Your security deposit is only to be applied, by the owner, to costs of cleaning, damages, or unpaid rent after you move out. You may not apply any part of the deposit, during your tenancy, toward any part of your rent in the last month of your tenancy. (See Clause 8 of your agreement.)
2. Manager: Sophie Beauchamp (Apartment #15, phone 555-1234) is your resident manager. You should pay your rent to her at that address and promptly let her know of any maintenance or repair problems (see #4, below) and any other questions or problems. She's in her office every day from 8 a.m. to 10 a.m. and from 4 p.m. to 6 p.m. and can be reached by phone other times. Rent may be paid on such dates and time. Ms. Beauchamp is authorized by me to receive all notices, and as an agent for service of process.
3. Landlord/Tenant Checklist: By now, Sophie Beauchamp should have taken you on a walk-through of your apartment to check the condition of all walls, drapes, carpets, appliances, etc. These are all listed on the Landlord/Tenant Checklist, which you should have carefully gone over and signed. When you move out, we will ask you to check each item against its original condition as indicated on the Checklist.
4. Maintenance/Repair Problems: You have a right to expect repairs to be made promptly. To help us accomplish this, the Management will give you Maintenance/Repair Request forms to report to the manager any problems in your apartment or the building or grounds, such as a broken garbage disposal. Keep several forms handy. (Extra copies are available from the manager.)

Sample Move-In Letter (continued)

Except in an emergency, all requests for repairs should be made on this form during normal business hours. In case of emergency, or when it's not convenient to use this form, call the manager at 555-1234.

5. Semiannual Safety and Maintenance Update: It's our goal to keep your unit and the common areas in excellent condition. To help us do this, we'll ask you to fill out a form every six months, to report any potential safety hazards or maintenance problems that otherwise might be overlooked. Please take the time to fill this out and send it back with your rent check.

6. Annual Safety Inspection: Once a year, we will inspect the condition and furnishings of your rental unit and update the Landlord/Tenant Checklist.

7. Insurance: We highly recommend that you purchase insurance, because tenants face many of the same risks that homeowners do:

    - You could lose valuable property through theft or fire.
    - You could be sued if someone is injured on the premises you rent.
    - If you damage the building itself (say you start a fire in the kitchen and it spreads), you could be responsible for large repair bills.

    Contact your insurance agent for more information on renters' insurance.

8. Moving Out: It's a little early to bring up moving out, but please be aware we have a list of items that should be cleaned before we conduct a move-out inspection. If you decide to move out, please ask the manager for a copy of our Move-Out Letter, explaining what is required and describing our procedures.

9. Telephone Number Changes: Please notify us if your home or work phone number changes, so we can reach you promptly in case of an emergency.

Please let us know if you have any questions.

Sincerely,
Tony Giuliano
Tony Giuliano, Owner

Key and Pass Receipt and Agreement

This acknowledgment of receipt and agreement is made between Ira Eppler _____ Landlord, and Chloe Gustafson _____ and _____, Tenant(s). Tenant(s) rented the premises at 1234 Fell Street, Apt. 5, San Francisco, CA by signing a lease/rental agreement dated May 1, 20xx.

Landlord gives to Tenant(s), and Tenant(s) acknowledge receipt of, the following keys, passes, and other equipment that will enable Tenant(s) to use and enjoy the rented premises:

- ☑ Key to rental unit front door lock (handle)
- ☑ Key to rental unit front door (deadbolt lock)
- ☑ Key to apartment building front door
- ☑ Mailbox key
- ☐ Garage key/pass
- ☑ Laundry room key
- ☐ Pool gate key
- ☐ Master key for storage room
- ☐ Key for tenant's storage locker/closet
- ☐ Other keys/passes/equipment: _____

Lockout charge. If Landlord needs to give Tenant(s) access to the rental property because Tenant(s) has lost keys or passes, Tenant(s) will pay Landlord a lockout fee of $15 when Landlord responds Monday through Friday (nonholidays), between 9 a.m. and 5 p.m.; and $25 when Landlord responds at any other day or time.

Replacement fee. Tenant(s) acknowledge that if, during their tenancy, they lose or damage any item such that it must be replaced, Landlord may charge a reasonable fee for such replacement, including an amount that reflects the value of Landlord's time needed to make or buy the replacement.

Tenant(s) will not copy or share keys or passes. Tenant(s) agree not to copy or share any of the keys or passes provided by Landlord.

At the end of the tenancy, Tenant(s) will return all items noted here and agree that, with the exception of keys to the individual rental unit, Landlord may deduct from the security deposit a reasonable and actual amount necessary to replace any missing items.

Ira Eppler _____ May 1, 20xx
Landlord or Manager — Date

Chloe Gustafson _____ May 1, 20xx
Tenant — Date

_____ _____
Tenant — Date

_____ _____
Tenant — Date

FORM

You'll find a downloadable copy of the Key and Pass Receipt and Agreement on the Nolo website. See Appendix B for the link to the forms in this book.

In the move-in letter, be sure to include a paragraph (such as the second paragraph in the sample shown above) explaining where, when, and to whom rent should be paid, and whether that person is authorized to receive notices, including legal notices, on your behalf. This is additional compliance with CC § 1962, to protect your right to evict for nonpayment of rent. (See the discussion of Clauses 5 and 23 in Chapter 2 for more details on why you need to provide this information to tenants.)

First Month's Rent and Security Deposit Checks

You don't want to get stuck with a tenant who's going to bounce checks to you. And if the new tenant's first rent or deposit check bounces, you might have to undertake time-consuming and expensive legal proceedings to evict a tenant who's paid you nothing.

To avoid this, never sign a rental agreement, let a tenant move furniture into your property, or give the tenant a key until you have the first month's rent and security deposit. It's a good practice to cash a tenant's check at the bank before the move-in date. (While you have the tenant's first check, photocopy it for your records; the information on it can be helpful if you ever need to bring legal action.) Remember, you cannot insist on a cash payment of either the security deposit or the first month's rent (but you can ask for a money order, or cashier's check, and if a tenant wants to pay in cash, you may accept it).

Responsible tenants who plan ahead will pay the rent and sign the lease at least several days before the move-in date. You can give the tenant a copy of the lease and the keys when the check clears or you receive cash or certified funds.

Clause 5 of our Lease and Rental Agreement forms requires tenants to pay rent on the same day of each month, with rent to be prorated between a move-in date (if it's other than the first) and the end of that month. For example, with a monthly rent of $900 due on the first of the month, a tenant who moves in on June 21 should pay ten days' prorated rent of $300 at move-in, before the full $900 July rent is due.

As a general rule, if the prorated rent for that first partial month is less than half a month's rent, you should request a more substantial amount up front. The reason for this is simple: A few tenants might impress you in person and look good on their applications, but yet are unable to come up with all the rent when due. Such individuals often look for rentals that require only a few hundred dollars up front; they don't worry about how they'll pay the rent later, hoping to find roommates by the time the rent comes due. You stand to lose heavily if you allow a person like this to move in on $300 prorated rent for the last ten days of the month and hope he'll come up with the regular $900 monthly rent on the first of the following month. If he doesn't come up with the full rent, and it takes you up to a month to evict him, you're out a month's rent plus eviction costs, a sum larger than any security deposit—which should be used to compensate you for the damage and mess this tenant may leave behind.

Insisting on a substantial up-front payment helps ferret out such individuals. There are a few ways to do this:

- Require the prorated rent of less than half a month plus the next month's entire rent, plus the security deposit. (The deposit can be either two or three times the monthly rent amount, depending on whether the rental unit is furnished or unfurnished; see Chapter 5.) For example, your tenant who moves in on June 21 and pays $300 for the rent through June 30 should also be asked to pay in advance the $900 rent for July and the security deposit.
- Insist on an entire month's rent up front and then prorate the second month. For example, the tenant who moves in on June 21 would first pay the full $900 rent for July. Then, come July 1, the $300 rent for June 21 through June 30 is due.
- Simply require rent payments on the day of the month that the tenant moved in, so that a tenant who moves in on the 21st will always pay rent on the 21st.

We recommend the first way—accepting the prorated rent if it is more than half a month's rent or, if it is less than that, the prorated amount plus another month's rent. It's easier and keeps the rent due on the convenient and customary first of the month.

Organize Your Tenant Records and Files

If you haven't done so already, be sure to establish a good system to keep track of all relevant documents for each tenant, such as rental applications, signed leases and rental agreements, Landlord/Tenant Checklists, and anything else relevant to the specific tenancy. After a tenant moves in, add documents to the individual's file, such as your written requests for entry, rent increase notices, and any other important information.

While you're at it, be sure you have a good system for organizing income and expenses for Schedule E (assuming you file IRS Form 1040 to pay your taxes). For detailed information on completing Schedule E and valuable tax advice for landlords, see *Every Landlord's Tax Deduction Guide,* by Stephen Fishman (Nolo).

CHAPTER

8

Lawyers, Legal Research, Eviction Services, and Mediation

Generally, California landlords can deal with most routine legal questions and problems without a lawyer. Just the same, there are times when good advice from a specialist in landlord/tenant law will be helpful, if not essential—for example, in complicated evictions or lawsuits by tenants alleging that dangerous conditions or wrongful acts caused injury.

This chapter recommends a strategy to most efficiently and effectively use legal services:

- First, keep up to date on landlord/tenant law so that you can anticipate and avoid many legal problems. Check this book's companion page on the Nolo website at www.nolo.com for important updates on California landlord/tenant law. Appendix B includes a link to this companion page.
- Second, use mediation services to settle disputes and head off lawsuits.
- Third, consider unlawful detainer assistants as an alternative to lawyers in standard eviction cases.
- Fourth, know the best way to go about hiring a lawyer and negotiating fees.

RELATED TOPIC

To avoid legal problems in the first place, read these chapters and follow these guidelines:

- Screen tenant applicants carefully: Chapter 1
- Use a clear, unambiguous written rental agreement or lease: Chapter 2
- Make sure your manager knows landlord/tenant law: Chapter 6
- Clarify tenants' responsibilities and grievance/repair procedures with a move-in letter: Chapter 7
- Establish a system for reporting and handling repairs: Chapter 11.

Legal Research Tools

Using this book is a good way to educate yourself about the laws that affect your business—but one book is not enough by itself. At one time or another, you'll need to do some further research in the law library or online.

Local Ordinances

If you are a landlord in a city with a rent control ordinance, you need a copy of the ordinance, as well as all rules issued by the rent board covering rent increases and hearings. The Rent Control Chart in Appendix A lists website addresses for those cities that have posted their ordinances online.

Even if your rental property is not in a rent-controlled area, you should be aware of any local ordinances that affect your business—such as, your city's health and safety standards. You'll find local ordinances online on the site maintained by the Institute of Governmental Studies in Berkeley, at www.igs.berkeley.edu/node/11317.

State Laws

It's essential that you also have access to current versions of the California statutes that regulate the landlord/tenant relationship. They are collected in volumes called codes.

The California Civil Code (CC) contains most of California's substantive landlord/tenant law, primarily in Sections 1940 through 1991. It includes laws governing minimum building standards, payment of rent, change and termination of tenancy, privacy, security deposits, and abandoned property, to name a few.

The California Code of Civil Procedure (CCP) is a set of laws explaining how people enforce legal rights in civil lawsuits. Eviction lawsuit procedures are contained in Sections 1161 through 1179 of the Code of Civil Procedure. Also of interest are the small claims court procedures, covered in Sections 116.110 through 116.950.

To read the statutes themselves (and to check pending legislation), see the website maintained by the Legislative Council at www.leginfo.ca.gov. For advice on finding a law, statute, code section, or case, see the Laws and Legal Research section on the Nolo site, www.nolo.com/legal-research. You may also find it useful to go to the reference desk at your public library for help; many have good law collections. If your county maintains a law library that's open to the public (often in a courthouse, state-funded law school, or a state capital building), you can get help there, too, from law librarians.

Remember that you'll need to consult a new volume every year—the state legislature tinkers with landlord/tenant laws every season. Never rely on an old set of statutes.

State Regulations

Many rules that California landlords must comply with are in the California Code of Regulations. These rules are made by various state agencies charged by the legislature to give specificity to laws that the legislature has passed (and the governor has signed). For example, state law requires landlords to provide hot water, but the specifics of that obligation (how hot?) are in the Code of Regulations.

The Code of Regulations is in every law library, but it's far easier to look at it online. Go to http://ccr.oal.ca.gov and use the table of contents to find Title 25, Housing and Community Development. By looking through the various subheadings, you'll find rules that apply to housing and rental housing in particular. For example, the rule regarding hot water (it must be at least 110 degrees Fahrenheit) is in Section 32 in Division 1, Chapter 1, Subchapter 1, Article 5. Other rules, such as plumbing and mechanical codes, are also in the Code of Regulations.

Federal Statutes and Regulations

Congress has enacted laws, and federal agencies such as the U.S. Department of Housing and Urban Development (HUD) have adopted regulations that amplify those laws, covering discrimination, wage and hour laws affecting employment of managers, and landlord responsibilities to disclose environmental health hazards. We refer to relevant federal agencies throughout this book and suggest you contact them for publications that explain federal laws affecting landlords, or copies of the federal statutes and regulations themselves.

We include citations for many of the federal laws affecting landlords throughout this book. The U.S. Code is the starting place for most federal statutory research. It consists of 50 separate numbered titles. Each title covers a specific subject matter.

Most federal regulations are published in the Code of Federal Regulations (C.F.R.), organized by subject into 50 separate titles.

You can access the United States Code and the Code of Federal Regulations at the U.S. House of Representatives Internet Law Library, at http://uscode.house.gov.

See the Laws and Legal Research section on www.nolo.com for advice on finding and reading federal law.

Court Decisions

Sometimes it isn't enough to read a statute—you also need to read the decisions of appeals courts, which explain what the statute means. These decisions are written by higher courts that hear appeals of decisions in trial courts, and state why the appeals court agrees or disagrees with the ruling of the trial court. Sometimes these case decisions are extremely important. For example, Civil Code Sections 1941 through 1942 set minimum housing standards. The 1974 case of *Green v. Superior Court,* 40 Cal. 3d 616 (1974), interpreted those statutes to allow tenants in substandard housing to withhold rent—without paying to make repairs themselves—even though no law specifically provides for this type of rent withholding. (See Chapter 11 for a discussion of this issue.)

The best way to learn of the existence of written court decisions that interpret a particular law is to first look in an "annotated code." An annotated code is a set of volumes of a particular code, such as the Civil Code or Code of Civil Procedure, that contains not only all the laws (as do the regular codes), but also a brief summary of many of the court decisions interpreting each law. These annotated codes can be found in any county law library or law school library in the state. Some public libraries also have them. Unfortunately, you won't find annotated codes for free online—but it's probably just a matter of time until these helpful additions will be available.

These annotated codes have comprehensive indexes by topic, and are kept up to date each year with paperback supplements ("pocket parts") stuck in a pocket inside the back cover of each volume. To keep up to date on new laws and court decisions, look at these pocket parts each year (they're published in

January and February) for Civil Code Sections 1940–1991 and Code of Civil Procedure Sections 1161–1179.

If a case summarized in an annotated code looks important, you may want to read the actual court opinion. To find it, you'll need the title of the case, the year of the decision, and the "citation" following each brief summary of the court decision. The citation is a sort of shorthand identification for the set of books, volume, and page where the case can be found.

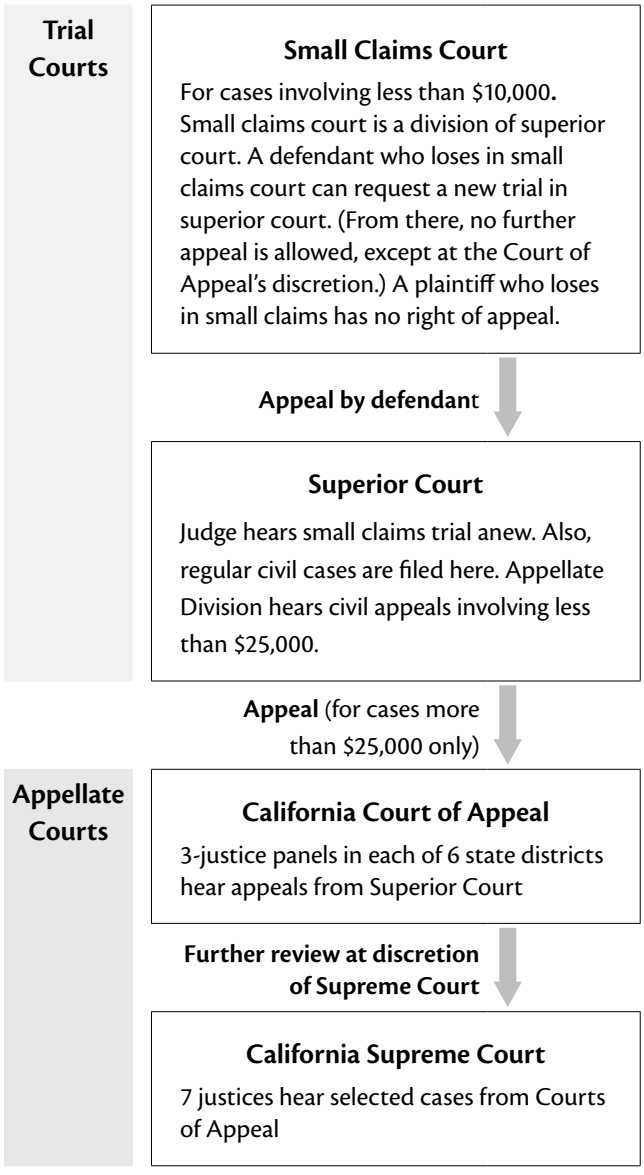
One set of volumes, the *Official Reports of the California Courts of Appeal*, shows decisions of the lower appellate courts, which include the Courts of Appeal (one for each of six districts in the state) and the Superior Court Appellate Department (one for each county). The Courts of Appeal hear appeals of cases brought in Superior Court (involving more than $25,000). Courts of Appeal decisions are abbreviated "Cal. App.," "Cal. App. 2d," "Cal. App. 3d," and "Cal. App. 4th," representing the first, second, third, and fourth series of volumes. Superior Court Appellate Departments hear appeals of cases brought in Superior Court involving $25,000 or less, and those decisions are listed in the "Supplement" of each volume of the official reports. These cases are therefore abbreviated "Cal. App. 2d Supp.," "Cal. App. 3d Supp.," and "Cal. App. 4th Supp."

A second set of volumes, the *Official Reports of the California Supreme Court,* lists decisions of the California Supreme Court, the state's highest court, which reviews selected cases of the Courts of Appeal. Supreme Court decisions are abbreviated "Cal.," "Cal. 2d," "Cal. 3d," or "Cal. 4th," representing the first, second, third, and fourth series of volumes.

California appellate and Supreme Court decisions are also published by the West Publishing Company in the California Reporter (abbreviated "Cal. Rptr." and "Cal. Rptr. 2d," respectively, for the first and second series) and Pacific Reporter (abbreviated "P." or "P.2d").

You can read California cases online, too. Appellate and Supreme Court opinions are available free at www.findlaw.com at "Cases and Codes." Click on California under State Resources. You'll eventually come to screens that allow you to enter search terms (such as the case name or citation), which will lead you to the opinion you're looking for.

California's Trial and Appellate Courts



Legal Research Help

We don't have space here to show you how to do your own legal research in anything approaching a comprehensive fashion. For free information on the subject, see the Laws and Legal Research section of www.nolo.com.

To go further, we recommend an excellent resource: *Legal Research: How to Find & Understand the Law*, by Stephen Elias and the Editors of Nolo (Nolo), which gives easy-to-use, step-by-step instructions on how to find legal information.

Sample Case Citations

case name	volume number	3rd series of Official Reports of the California Supreme Court	page number	volume number	the case also appears in Calif. Reporter, the unofficial reports	page number	volume number	the case is also listed in 2nd series of Pacific Reporter	page number	year of decision
Green v. Superior Court,	**10**	**Cal. 3d**	**616,**	**11**	**Cal. Rptr.**	**704,**	**517**	**P.2d**	**1168**	**(1974)**

case name	3rd series of Official Reports of the California Courts of Appeal, Volume 137, page 770	the case is also listed in Calif. Reporter, the unofficial reports, Volume 187, page 242	year of decision
Glaser v. Myers,	**137 Cal. App. 3d 770,**	**187 Cal. Rptr. 242**	**(1982)**

Mediating Disputes With Tenants

Mediation is a technique where a neutral third party helps people settle differences themselves, without going to court. Unlike a judge in court or an arbitrator in a formal hearing, a mediator does not impose a decision on the parties, but facilitates a compromise. Generally, mediation works well in situations where people want to settle their disputes so they can work together in the future. In a landlord/tenant context, mediation can be extremely helpful in areas such as disputes about noise, the necessity for repairs, a tenant's decision to withhold rent because defects have not been repaired, rent increases, privacy, and security deposits. Many large landlords find that an established mediation procedure is an invaluable way to head off lawsuits.

At the mediation session, each side gets to state his or her position, which often cools people off considerably and frequently results in a compromise. If the dispute is not resolved easily, however, the mediator may suggest ways to resolve the problem, or may even keep everyone talking long enough to realize that the real problem goes deeper than the one being mediated. For example, if a tenant has threatened rent withholding because of a defect in the premises, you may learn that the tenant's real grievance is that your manager is slow to make repairs. This may lead to the further discovery that the manager is angry at the tenant for letting his kids pull up his tulips.

At any rate, mediation often works, and if it doesn't, you haven't lost much. If mediation fails, you can still fight it out in court. In fact, if you or the tenant have already filed suit in small claims court, you may find that the judge will insist that you try mediation before presenting your case in court. Call your county's small claims court clerk to find out if this is the way your court works.

Mediation is most effective when there's an established procedure tenants and landlords can use. Here's how to set one up.

Step 1. Find a mediation group that handles landlord/tenant disputes. There are many mediation programs throughout the state, and almost all California cities receive federal funds to arrange for mediators to handle disputes between landlords and tenants. For more information, call city hall or the rent board in rent-controlled cities, and ask for the staff member who handles "landlord/tenant mediation matters" or "housing disputes." That person should refer you to the public office or private agency that attempts to informally resolve landlord/tenant disputes before they reach the court stage. Many mediation groups are city- or county-funded and do not charge for their services.

You can also contact one of the respected mediation organizations, such as the American Arbitration Association, or a neighborhood dispute resolution center, such as San Francisco's Community Boards program, and arrange for this group to mediate landlord/tenant disputes.

If you and the tenant are involved in a discrimination dispute that has escalated to the point where the tenant has filed a complaint with the state's Department of Fair Employment and Housing, you can take advantage of their free and very successful mediation service. For more information, see their website at www.dfehmp.ca.gov.

Step 2. Explain procedures for lodging complaints to every tenant. A move-in letter (see Chapter 7) would be a good place to do this. Make sure tenants know they can request mediation for disputes which escalate to the point where normal face-to-face compromise techniques prove to be of no avail, whether over privacy, rent withholding because of allegedly defective conditions, or whatever. Emphasize the fairness of the mediation process.

Step 3. If possible, split the cost (if any) of a mediation. (If this isn't acceptable to the tenant, and you pay the total mediation cost, make sure your tenant realizes that the mediator has no power to impose a decision.)

For more information on mediation, see *Mediate, Don't Litigate,* by Peter Lovenheim and Lisa Guerin (Nolo), available as a downloadable electronic book from www.nolo.com. This book explains the mediation process from start to finish, including how to prepare for mediation and draft a legally enforceable agreement.

Nonlawyer Eviction Services

Filing and following through with an eviction lawsuit involves filling out a number of legal forms. And once the forms are filed with the court, they must be served on the tenant—a task that isn't always easy. You can do it yourself, using *The California Landlord's Law Book: Evictions,* or you can hire a lawyer. There is also a third route: getting help with the paperwork, filing, and service from an eviction service run by nonlawyers, known as "unlawful detainer assistants," who must be registered with the county clerk. They exist in most metropolitan areas.

For a flat fee that is usually much lower than what lawyers charge, and often at a faster pace, eviction services take the basic information from you, prepare most of the initial paperwork, file the necessary papers in court, and have the tenant served with the Summons and Complaint.

Unlawful detainer assistants aren't lawyers. They can't give legal advice about the requirements of your specific case and can't represent you in court—only you or your lawyers can present your case in court. You must decide what steps to take in your case and the information to put in the needed forms. A nonlawyer eviction service can, however:

- provide written instructions and legal information you need to handle your own case
- provide the appropriate eviction forms and fill them out according to your instructions
- prepare your papers so they'll be accepted by the court, and
- arrange for filing the eviction forms in court and serving them on the tenant. (In the case of *People v. Landlords' Professional Services,* 215 Cal. App. 3d 1599 (1989), the court ruled that an eviction service whose nonlawyer employees gave oral legal advice was unlawfully practicing law. The court, however, said eviction services could legally give customers forms and detailed self-help legal manuals, fill out the forms as directed by the customers, and file and serve the papers.)

Most unlawful detainer assistants handle only routine cases. If the tenant contests the eviction suit—which happens less than one-fourth of the time—the

eviction service won't be able to help you in court. At this point, you must represent yourself in court or hire your own lawyer to take over. The unlawful detainer assistant may refer you to a lawyer whom you can hire.

To find an unlawful detainer assistant, check with a landlords' association or look in the phone book or online under "Unlawful Detainer Assistants" or "Paralegals."

Be sure the eviction service or typing service is reputable and experienced, as well as reasonably priced. (The cost should not exceed $100 for the service, plus another $400 for court filing fees and sheriff's fees.) Ask for references and check them. As a general matter, the longer a typing service has been in business, the better.

Unlawful detainer assistants must be registered and bonded as such. (B&P §§ 6400–6415.) If the service isn't registered, don't use it. The court forms that an eviction service prepares require you to state under penalty of perjury whether an "unlawful detainer assistant" helped you, and you must give the eviction service's name, address, and registration number.

Finding a Lawyer

Throughout this book, we point out specific instances when an attorney's advice or services may be useful, including complicated eviction, discrimination, and personal injury lawsuits.

Finding a good, reasonably priced lawyer is not always an easy task. If you just pick a name out of the telephone book or that you find online, you may find someone who charges too much, or one not qualified to deal with your particular problem. If you use the attorney who drew up your family will, you may end up with someone who knows nothing about landlord law. This sorry result is not necessarily inevitable—there are competent lawyers who charge fairly for their services.

As a general rule, experience is most important. You want a lawyer who specializes in landlord/tenant law. The best way to find a suitable attorney is through some trusted person who has had a satisfactory experience with one. Your best referral sources are other landlords in your area and your local landlords' association.

How you pay your lawyer depends on the type of legal services you need and the amount of legal work you have. The lawyer may charge an hourly rate to represent you in a contested eviction case, or a flat fee to represent you in court for a routine eviction for nonpayment of rent. In any case, always ask for a written fee agreement, explaining all fees (including work by legal assistants and court filing fees) and how costs will be billed and paid. A written agreement will help prevent disputes about legal fees and clarify the relationship you expect to have with the attorney and the services the lawyer will provide. Some agreements state how each of you can end the agreement and explain how you expect to work together, such as any decisions the lawyer can make alone and which require your approval.

How Not to Find a Lawyer

The worst referral sources are:

- Heavily advertised legal clinics, which are less likely to offer competitive rates for competent representation in this specialized area. While they may offer low flat rates for routine services such as drafting a will, it's less common to see legal clinics charge reasonable flat fees for other specific services. It is not unusual for legal services to advertise a very low basic price and then add to it considerably, based on the assertion that your particular problem costs more.
- Referral panels set up by local bar associations. While they sometimes do minimal screening before qualifying the expertise of lawyers in landlord/tenant law, usually the emphasis is on the word "minimal." You may get a good referral from these panels, but they sometimes refer people to inexperienced practitioners who don't have enough clients and who use the panel as a way of generating needed business.

RESOURCE

Find a lawyer at www.nolo.com/lawyers. To help consumers choose the right attorney, Nolo's Lawyer Directory allows each advertiser to provide a detailed profile, with

information about each lawyer's expertise (such as landlord-tenant law), education, and fees. Lawyers also indicate whether they are willing to review documents or coach clients who are doing their own legal work. You can also submit information about your legal issue to several local attorneys who handle landlord-tenant issues, and then pick the lawyer you'd like to work with. For advice on hiring and working with lawyers, including what to ask a prospective attorney, see www.nolo.com/lawyers/tips.html.

Once you get a good referral, call the law offices that have been recommended and state your problem. Find out the cost of an initial visit. You should be able to find an attorney willing to discuss your problems for around $100 for a half-hour consultation. If you feel the lawyer is sympathetic to your concerns and qualified to handle your problem, make an appointment to discuss your situation.

Beware of lawyers who advertise "free consultations." As your own business experience doubtless tells you, the world provides little or nothing of value for free. This is doubly true when it comes to buying legal help. Lawyers who will see you for nothing have every motive to think up some sort of legal action that requires their services. If you insist on paying fairly for an attorney's time, you are far more likely to be advised that no expensive legal action is needed.

Here are some things to look for in your first meeting:

- Will the lawyer answer all your questions about the lawyer's fees and experience in landlord/tenant matters and your specific legal problem? Stay away from lawyers who make you feel uncomfortable asking questions.
- Is the lawyer willing to assist you when you have specific questions, billing you on an hourly basis when you handle your own legal work—such as evictions? Is the lawyer willing to answer your questions over the phone and charge only for the brief amount of time the conversation lasted? Or will you have to make a more time-consuming (and profitable) office appointment? If the lawyer tries to dissuade you from representing yourself in any situation, or won't give any advice over the phone despite your invitation to bill you for it, find someone else. There are plenty of lawyers who will be very happy to bill you hourly to help you help yourself.
- If you want someone to represent you in an eviction lawsuit, does the lawyer charge a flat fee, or an hourly fee with a maximum? Most evictions, especially for nonpayment of rent, are routine and present little trouble, even when contested by the tenant. Many attorneys charge reasonable flat fixed rates, such as $500 to $750, to handle eviction lawsuits. If the lawyer's hourly rate exceeds $200, with no upper limit, you can do better elsewhere.
- If your property is in a rent-controlled city, does the lawyer practice in or near that city and know its rent control laws and practices?
- Does the lawyer represent tenants, too? Chances are that a lawyer who represents both landlords and tenants can advise you well on how to avoid many legal pitfalls of being a landlord.

Paying a Lawyer

If you do need a lawyer, find one who does not object to your doing as much legal work as you want and who will charge a reasonable hourly rate for occasional help and advice. While this isn't impossible, it may be difficult, because some lawyers may not want to accept piecemeal work.

Most lawyers charge around $200 an hour. How you pay your lawyer depends on how often you need legal services.

Large Landlord With Regular Legal Needs

If you own more than a dozen rental units and do not wish to handle all your own evictions from start to finish (even if uncontested), you will probably want to work out a continuing relationship with the lawyer, and you should have more than enough leverage to set up a relatively economical arrangement. There are several ways to go:

- Pay the attorney a modest monthly retainer to work with you and represent you in court in routine eviction cases as needed. (Other types of cases, such as where a tenant sues for damages, are so time-consuming that representation is not

included in such retainer agreements.) You can usually get a lot of service for a reasonable pre-established rate.
- Negotiate a fee schedule for various kinds of routine services, based on the lawyer handling all your work. Since you will probably provide a fair amount of business over the years, this should be substantially below the lawyer's normal hourly rate.
- Do the initial legal work in evictions and similar procedures yourself, but turn over to a lawyer cases that become hotly contested or complicated. If this is your plan, look for a lawyer who doesn't resent your doing some of your own legal work and who won't sock you with a high hourly rate for picking up a case you began.

Small Landlord With Occasional Legal Needs

If you are a very small landlord, you expect (and hope) that you will have little continuing need for a lawyer. The drawback to needing only occasional legal help is that a lawyer has little incentive to represent you for a reasonable fee when you get into occasional legal hot water. But it's possible to find a lawyer who specializes in landlord/tenant law who will charge you the same prices larger landlords get. And who knows, the lawyer may hope that you will expand your business and become a more profitable client in the future.

Note on attorney fees clause in lawsuits. If your lease or written rental agreement has an attorney fees provision (see Clause 22 of our forms), you are entitled to recover your attorney fees if you win a lawsuit concerning that lease or rental agreement, based on the terms of that agreement. There's no guarantee, however, that a judge will award attorney fees equal to your attorney's actual bill, or that you will ultimately be able to collect the money from the tenant or former tenant. Also, as discussed in Chapter 2, an attorney fees clause in your lease or rental agreement works both ways. Even if the clause doesn't say so, you're liable for the tenant's attorney fees if you lose. (CC § 1717.) (Your landlord's insurance policy will not cover such liability where the lawsuit is unrelated to items covered by the policy, such as eviction lawsuits by the landlord and security deposit refund suits by the tenant.)

TIP

Consider small claims court for security deposit and other money-related disputes. Chapter 20 explains how to prepare and present a case in small claims court.

Resolving Problems With Your Lawyer

If you see a problem emerging with your lawyer, nip it in the bud. Don't just sit back and fume; call or write your lawyer. Whatever it is that rankles, have an honest discussion about your feelings. Maybe you're upset because your lawyer hasn't kept you informed about what's going on in your lawsuit against your tenant for property damage, or maybe your lawyer has missed a promised deadline for reviewing your new system for handling maintenance and repair problems. Or maybe last month's bill was shockingly high, or you question the breakdown of how your lawyer's time was spent.

Here's one way to test whether a lawyer-client relationship is a good one—ask yourself if you feel able to talk freely with your lawyer about your degree of participation in any legal matter and your control over how the lawyer carries out a legal assignment. If you can't frankly discuss these sometimes sensitive matters with your lawyer, fire that lawyer and hire another one. If you don't, you'll surely waste money on unnecessary legal fees and risk having legal matters turn out badly.

Remember that you're always free to change lawyers. If you do, be sure to fire your old lawyer before you hire a new one. Otherwise, you could find yourself being billed by both lawyers at the same time. Also, be sure to get all important legal documents back from a lawyer you no longer employ. Tell your new lawyer what your old one has done to date, and pass on the file.

But firing a lawyer may not be enough. Here are some tips on resolving specific problems:
- If you have a dispute over fees, the local bar association may be able to mediate it for you.

- If a lawyer has violated legal ethics—for example, conflict of interest, overbilling, or not representing you zealously—the State Bar of California may discipline or even disbar the lawyer. Although lawyer oversight groups are typically biased in favor of the legal profession, they will often take action if your lawyer has done something seriously wrong.
- When a lawyer has made a major mistake—for example, missing the deadline for filing a case—you can sue for malpractice. Many lawyers carry malpractice insurance, and your dispute may be settled out of court.

Your Rights as a Client

As a client, you have the following rights:

- courteous treatment by your lawyer and staff members
- an itemized statement of services rendered and a full advance explanation of billing practices
- charges for agreed-upon fees and no more
- prompt responses to phone calls and letters
- confidential legal conferences, free from unwarranted interruptions
- up-to-date information on the status of your case
- diligent and competent legal representation, and
- clear answers to all questions.

CHAPTER

9

Discrimination

At one time, a landlord could refuse to rent to someone, or evict a month-to-month tenant on 30 days' notice, simply because he didn't like the tenant's skin color, religion, or national origin. All sorts of groups, including African-Americans, Asians, Jews, Hispanics, unmarried couples, gays, families with children, and the disabled, were routinely subjected to discrimination.

Fortunately, the days of legal invidious discrimination are long gone. Several federal, state, and local laws provide severe financial penalties for landlords who discriminate on the basis of race, religion, sex, age, and a number of other categories. And the categories named in the various statutes are not the only groups that are protected—the California Supreme Court has prohibited discrimination based on "personal characteristics" or "personal traits," meaning a person's geographical origin, personal beliefs, or physical attributes. (*Harris v. Capital Growth Investors XIV,* 52 Cal. 3d 1142, 278 Cal. Rptr. 614 (1991).)

This chapter reviews information you need to know to avoid illegally discriminating:

- legal reasons to turn down prospective tenants, such as a bad credit history or too many tenants for the size of the premises
- illegal types of discrimination and major laws and court cases, including recent developments in the field such as expanded protection for families with children
- tenants' legal remedies, in state and federal courts, for discrimination, and
- special rules applying to landlords who share their premises with tenants.

Legal Reasons for Refusing to Rent to a Tenant

The most important decision a landlord makes, save possibly for deciding whether to purchase rental property in the first place, is the choice of your tenants. Chapter 1 recommends a system for carefully screening potential tenants in order to select people who will pay rent on time, maintain your property, and not cause you any problems. Here we focus more closely on making sure that your screening process does not precipitate a costly charge of discrimination.

Remember that only certain kinds of discrimination in rental housing are illegal, such as selecting tenants on the basis of religion or race. You are legally free to choose among prospective tenants as long as your decisions are based on valid and objective business criteria, such as an applicant's ability to pay the rent and properly maintain the property. For example, you may legally refuse to rent to prospective tenants with bad credit histories, unsteady employment histories, or even low incomes that you reasonably regard as insufficient to pay the rent. Why? Because these criteria for tenant selection are reasonably related to your right to run your business in a competent, profitable manner (sometimes called your "legitimate or valid business interests"). And if a person who fits one or more obvious "bad tenant risk" profiles happens to be a member of a minority group, you are still on safe legal ground as long as:

- you are consistent in your screening and treat all tenants more or less equally—for example, you always require a credit report for prospective tenants
- you are not applying a generalization about people of a certain group to an individual, and
- you can document your legal reasons for not renting to a prospective tenant.

But pay attention to the fact that judges, tenants' lawyers, and government agencies that administer and enforce fair housing laws know full well that some landlords try to make up and document legal reasons to discriminate, when the real reason is that they just don't like people with a particular racial, ethnic, or religious background. So, if you refuse to rent to a person who happens to be African-American, has children, or speaks only Spanish, be sure you document your legitimate business reason specific to that individual (such as insufficient income or a history of eviction for nonpayment of rent). Be prepared to show that your tenant advertising, screening, and selection processes have been based on objective criteria and that a more qualified applicant has always gotten the rental unit.

This section discusses some of the common legal reasons you may choose or reject applicants based on your business interests. A valid occupancy limitation (such as overcrowding) can also be a legal basis for a refusal, but since this issue is fairly complicated, we have devoted a separate section to the subject.

CAUTION

To protect yourself in advance, always document your reasons for rejecting a tenant. A tenant whom you properly reject may nevertheless file a discrimination complaint with a fair housing agency. Recognizing this, you want to be able to prove that you had a valid business reason for refusing to rent to the particular person, such as negative references from a previous landlord or poor credit history. This means you need to routinely document your good reasons for rejecting all potential tenants before anyone files a discrimination claim. (We discuss how to document why you chose—or rejected—a particular tenant in Chapter 1.)

Objective Criteria—What Do They Look Like?

"Objective criteria" are tenancy requirements that are established before a prospective tenant even walks in the door, and are unaffected by the personal value judgments of the person asking the question. For example, a requirement that an applicant must never have been evicted for nonpayment of rent is "objective" because it is a matter of history and can be satisfied by a clear "yes" or "no." "Subjective criteria," on the other hand, have no preestablished correct answers, and the results of the questions will vary depending on the landlord who poses the question—for example, a requirement that the applicant present "a good appearance" has no predetermined "right" answer and will be answered differently by each landlord who asks the question. Subjective criteria are always suspicious in a housing context because their very looseness allows them to mask deliberate illegal discrimination.

So much for theory. Here are a few examples of allowable, objective criteria for choosing tenants:

- two positive references from previous landlords
- sufficient income to pay the rent, and
- a signed waiver allowing landlord to investigate applicant's credit history.

Credit Record and Income

You can legitimately refuse to rent to a prospective tenant who has a history of nonpayment of rent or whom you reasonably believe would be unable to pay rent in the future.

Here's some advice on how to avoid charges of discrimination when choosing tenants on the basis of income or credit history.

Do a credit check on every prospective tenant and base your selection on the results of that credit check. Accepting or rejecting tenants based on objective criteria tied to a credit report is the best way to protect yourself against an accusation that you're using a bad credit history as an excuse to illegally discriminate against certain prospective tenants. For example, if you establish rules saying you won't rent to someone with bad credit or who is evicted by a previous landlord for nonpayment of rent (information commonly found in credit reports), be sure you apply this policy to all applicants.

Avoid rigid point systems that rank prospective tenants on the basis of financial stability and other factors. Some landlords evaluate prospective tenants by giving each one a certain number of points at the outset, with deductions for bad credit and negative references and additional points for extremely good ones. Points are also awarded based on length of employment and income. The person with the highest score gets the nod. Point systems give the illusion of objectivity, but because the weight you give each factor is, after all, subjective, they can still leave you open to charges of discrimination.

Don't discriminate against married or unmarried couples by counting only one spouse's or partner's income (typically the man's). Always consider the income of both persons living together, married or unmarried, in order to avoid the accusation of marital status or sex discrimination.

Don't give too much weight to years spent at the same job, which can arguably discriminate against certain occupations. For example, software designers and programmers commonly move from one employer to another. If you insist that an applicant have a minimum number of years with the same employer, you may open yourself up to a charge that you are discriminating against applicants based on their "personal characteristics or traits," which is against the law.

Negative References From Previous Landlords

You can legally refuse to rent to someone based on what a previous landlord or manager has to say—for example, that the tenant was consistently late paying rent, broke the lease, or left the place a shambles.

Civil Lawsuits Involving a Tenant

Background reports typically indicate whether the applicant has been involved in civil lawsuits, such as an eviction or breach of contract suit. For many landlords, an eviction lawsuit is a red flag. Can you reject a tenant on this basis? It depends.

If a former landlord has filed and won an eviction lawsuit against an applicant, it may be reasonable to reject on that basis. And because even tenants who have *won* an eviction case are not a "protected class" under the law, you could also, if you wish, reject a tenant who prevailed (though it might be irrational to do so). But keep in mind that your ability to learn of a tenant's involvement in an eviction lawsuit is limited by law: As explained in Chapter 1, "Review Court Records," state law "masks," or seals the court records of eviction cases for the first 60 days after they're filed (with some exceptions). After that, the record is unmasked unless the tenant was the prevailing party *within those first 60 days*. (CCP § 1161.2.) The reasoning behind this preforeclosure era rule was simple: Most evictions proceed quickly (landlords want them over as soon as possible), and will be decided within 60 days; if the tenant wins, he should not be penalized by having his screening report reflect the lawsuit's filing.

But times have changed. Here's the problem with postforeclosure evictions of tenants: Unlike "normal" landlords, who want evictions done quickly, banks either deliberately or unintentionally handled postforeclosure evictions in ways that resulted in resolutions *after* 60 days had elapsed, thus preventing a victorious tenant from having the record permanently sealed. In many instances, foreclosing banks filed eviction lawsuits against tenants, but deliberately delayed taking the cases to trial (waiting more than 60 days after the filing), waiting out the clock to pressure tenants to give up their rights. These tenants lost the 60-day masking protection even if they won, because the 60-day period had passed.

Sometimes the delay was unintentional. When tenants contest a foreclosure-based eviction, the cases rarely go to trial within 60 days, because proving a valid sale requires personal attendance of faraway witnesses, including the process server who served the notice, and sometimes a realtor. Banks take a while to get this together and usually try to win by summary judgment (a pretrial proceeding), but this too typically takes over 60 days after the date of filing. Again, a resolution at a trial that occurs more than 60 days after the case was filed is not amenable to masking—even if the tenant wins.

The California legislature, concerned that many such tenants were being denied housing when eviction filings like these showed up on their screening reports, passed a law that specifies, as of January 1, 2011, that eviction lawsuits following a foreclosure can be reported to credit and screening agencies only if the new owner gets a judgment against all defendants, after a trial, within 60 days of filing. (CCP. §1161.2.)

If you see an eviction filing that's pre-2011 and learn that it involved a foreclosure, you probably shouldn't attach much significance to it. We think that if the prospective tenant's credit and rental history is otherwise good, those are the factors that should weigh heavily in your decision whether to rent to this applicant.

The background report may also indicate that the applicant is now, or has been, involved in another type of civil lawsuit—for example, a custody fight, a personal injury claim, or a dispute with an auto repair shop. If the legal matter has nothing to do with the applicant's rental history, ability to pay the rent, or satisfy your other tenancy requirements, you are on shaky ground if you base a rejection solely on that basis.

Criminal History

Understandably, many landlords wish to know about an applicant's prior criminal history. Can you reject an applicant because of a conviction for drunk driving, or murder, or drug use? What if there was an arrest but no conviction?

Convictions

If an applicant has been convicted for criminal offenses, you are probably, with one exception, entitled to reject on that basis. After all, a conviction indicates that the applicant was not, at least in that instance, a law-abiding individual, which is a legitimate criterion for prospective tenants. The exception, however, involves convictions for past drug use: As explained below, past drug addiction is considered a disability under the Fair Housing Amendments Act,

and you may not refuse to rent to someone on that basis—even if the addiction resulted in a conviction. (People with convictions for the sale or manufacture of drugs, or current drug users, are not, however, protected under the Fair Housing Act.)

Megan's Law

Not surprisingly, most landlords do not want to rent to tenants with convictions for violent sexual offenses or any sexual offenses against children. Checking a prospective tenant's background by ordering an investigative background report, as explained in Chapter 1, is one way to find out about a person's criminal history. Self-reporting is another: Rental applications, such as the one in this book, typically ask applicants whether they have ever been convicted of a crime and, if so, to provide the details.

"Megan's Law" may be able to further assist you in determining whether an applicant has a prior conviction for any sexual offense against a minor or a violent sexual offense against an adult. This law requires certain convicted sexual offenders to register with local law enforcement officials, who give the information on their whereabouts to a database maintained by the state. (Calif. Penal Code § 290.4.) Local law enforcement officials have the discretion to notify people who live near offenders who are "high risk" or "serious."

The Department of Justice posts the database on a website, www.meganslaw.ca.gov. (Penal Code § 290.46.) However, it is a crime to consult the website database for any reason other than to "protect a person at risk," and to subsequently deny housing to an applicant because of his placement on the list. Violating this law could result in triple actual damages, punitive damages, or a civil penalty of up to $25,000, as well as attorneys' fees.

Despite these strictures, many landlords routinely check the Megan's Law database. If you do, be aware that it has promised far more than it actually delivers. The law depends in large part on voluntary registration, and the not-surprising result is that California has lost track of nearly half of its sex offenders, according to data released by the state. ("Officials Admit Megan's Law Database Is Missing Thousands," *San Francisco Daily Journal,* January 8, 2003, p. 3.) Hopefully, the other methods we recommend that you use to learn about prospective tenants will, taken together, give you a complete and accurate picture.

Arrests

A more difficult problem is posed by the person who has an arrest record but no conviction. For starters, California law strictly forbids a consumer credit reporting agency (the agency doing the background check) from reporting an arrest unless there was a resulting conviction. (CC § 1785.13(a)(6).) Moreover, even convictions that are more than seven years old cannot be reported at all. These restrictions apply to all credit reporting agencies preparing reports for use in California, even if the agency itself is based in another state.

State law does not, however, limit the right of an individual, as opposed to a credit reporting agency, from asking the question or going to the courthouse (or court websites) and checking public records. If you do this and discover that an applicant has an arrest record, what should you do with this information?

Remember, many arrests result in the charges being dropped or reduced, and some defendants are acquitted at trial. A person who was mistakenly arrested or acquitted by a jury is not necessarily going to be a bad tenant. Think carefully before you base a rejection on an arrest record alone, especially if the arrest is old or involves a crime unrelated to good-tenant criteria. Be particularly careful if the applicant is also a member of a racial, ethnic, or other group that is protected by the fair housing laws. And keep in mind that if the rest of your background check (involving former landlords and employers) has been thorough, chances are that you will come up with solid information that you can use to reject an applicant without fear of a fair housing claim.

> **EXAMPLE:** When the bank on Main Street was robbed, the police broadcast a description of the robber as a young white male with brown hair, wearing jeans, and driving a tan Camaro. Andrew was stopped because he and his car fit this description, and he was arrested and eventually stood trial. He was acquitted by the jury when his attorney was able to show that the fingerprints left by the robber did not match Andrew's.
>
> When Andrew applied for an apartment a few years later, the landlord went to the local county courthouse and asked to examine the criminal records of the last several years. He read about Andrew's arrest, trial, and acquittal. Because

Andrew was acquitted and had solid references from prior landlords and employers, the landlord disregarded the fact of the arrest and offered him the apartment.

Immigration Status

Landlords may not legally inquire as to tenants' or applicants' immigration status. (CC § 1940.3.) This is true even if a local city or county ordinance seems to require it, as such ordinances are now invalidated by state law. As we said earlier in Chapter 1, the most you can do in this regard is ask a tenant whom you hire as a resident manager or other employee to fill out an IRS Form I-9, verifying legal ability to work in this country.

Incomplete or Inaccurate Rental Application

Your carefully designed application form will do its job only if the applicant provides you with all the necessary information. Obviously, if you can reject an applicant on the basis of negative references or bad credit history, you can reject them for failing to allow you to check their background, or if you catch them in a lie.

Inability to Meet Legal Terms of Lease or Rental Agreement

It goes without saying that you may legally refuse to rent to someone who can't come up with the security deposit or meet some other condition of the tenancy, such as the length of the lease.

Pets

You can legally refuse to rent to people with pets, and you can restrict the types of pets you accept. You can also, strictly speaking, let some tenants keep a pet and say no to others—because "pet owners," unlike members of a religion or race, are not as a group protected by antidiscrimination laws. However, from a practical point of view, an inconsistent pet policy is a bad idea because it can only result in angry, resentful tenants.

Keep in mind that you cannot refuse to rent to someone with an animal if that animal is a properly trained "service" dog for a physically or mentally disabled person. (For a discussion of renting to pet owners, see Clause 13 of our form lease and rental agreements in Chapter 2. Also, see Chapter 12, which covers landlord liability for injuries caused by tenants' pets.)

Sources of Discrimination Laws

Now that we have discussed the permissible reasons to reject an applicant or treat tenants differently, it is time to turn to the impermissible reasons that constitute fair housing violations. First, let's set the stage by explaining the sources of the antidiscrimination laws.

Landlords in California are subject to at least two, and sometimes three or four, tiers of law dealing with illegal discrimination. On the federal side, you are bound by the federal Fair Housing Act (and its 1988 Amendments) and the Civil Rights Act of 1964 (specifically, Title VII of that Act). In addition, all California landlords are subject to the Unruh Act and the Fair Employment and Housing Act, plus provisions in the Business and Professions Code that proscribe unfair competition. (Although you might not think of it this way, courts consider illegal discrimination to be an illegal business practice, too.) Finally, some landlords are subject to local ordinances (enacted by their county or their city) that, either directly or indirectly, forbid additional types of housing discrimination. The chart entitled "Illegal Discrimination," below, summarizes these laws and the discriminatory practices they forbid.

Why is it important to understand that landlords are subject to many laws regulating their relationship with tenants? The obvious answer is that being subject to the laws of several legislative bodies makes you vulnerable to challenges from each of the agencies charged with carrying out these laws. In other words, an act of discrimination may expose you to challenges from the federal government (via the federal Department of Housing and Urban Development, or HUD), the state government (via the California Department of Fair Employment and Housing, or DFEH), or your county or city government (via the office charged with enforcing housing regulations). Under the state's unfair competition laws, you may

even be sued by government officials or private citizens who were not themselves the target of the discriminatory incident. (B&P §§ 17200 and following.) These statutes have been used by the attorney general, district attorneys, nonprofit organizations, and even the Consumers' Union to file suit to stop discriminatory practices, even though neither they nor their members were directly affected by the discrimination.

Forbidden Types of Discrimination

Essentially, any discrimination that is not rationally related to a legitimate business reason is illegal under California law. Courts and administrative agencies can assess substantial financial penalties for unlawful discrimination and can order a landlord to rent to a person who was discriminated against.

Even an innocent owner whose agent or manager discriminates without the owner's knowledge can be sued and found liable. (To protect yourself, make sure your manager knows the law. See "Managers and Discrimination," below, and Chapter 6.) Even if you unintentionally violate the federal Fair Housing Act or the state Fair Employment and Housing Act, you can be found liable. In other words, if your behavior has a discriminatory impact on a protected class of persons, your personal intentions are irrelevant.

You might be under the impression that antidiscrimination laws apply only to your decision to accept or reject a prospective tenant. The laws' reach is much broader, however, and affects almost every aspect of your business. If a prospective tenant falls within one of the protected categories described in this section, antidiscrimination laws prohibit you from taking any of the following actions:

- advertising or making any statement that indicates a limitation or preference based on race, religion, or any other protected category
- falsely stating that a rental unit is unavailable
- setting more restrictive standards for selecting certain tenants
- refusing to negotiate for a rental agreement or lease
- providing inferior housing conditions, privileges, or services
- terminating a tenancy for a discriminatory reason
- providing or suggesting different housing arrangements (commonly known as "steering")
- refusing to allow a disabled person to make "reasonable modifications" to his living space, or
- refusing to make "reasonable accommodations" in rules or services for disabled persons.

EXAMPLE 1: An owner, Osgood, rents apartments in his six-unit apartment building without regard to racial or other unlawful criteria. His tenants include an African-American family and a single Latin American woman with children. Osgood sells his building to Leo, who immediately gives only these two tenants 30-day notices. Unless Leo can come up with a valid nondiscriminatory reason for evicting these minority tenants, they can successfully defend an eviction lawsuit Leo brings on the basis of unlawful discrimination. The tenants can also sue Leo for damages in state or federal court.

Information on Fair Housing Laws

For more information on the rules and regulations of the Fair Housing Act, contact HUD's California office at 450 Golden Gate Avenue, San Francisco, CA 94102. Phone: 415-489-6400; to order publications, call 916-478-7251 (TTY: 800-877-8339). Website: www.hud.gov. For information on state fair housing laws, contact the Department of Fair Employment and Housing at 2218 Kausen Drive, Suite 100, Elk Grove, CA 95758. Phone 800-884-1684, 916-478-7251; www.dfeh.ca.gov. You'll also find good online information at www.housing.org, maintained by Project Sentinel, a Northern California nonprofit organization with consumer education projects, a free mediation service for landlords and tenants, and authority to investigate reports of housing discrimination.

For information on local housing discrimination laws, contact the headquarters of your local government, such as your city hall or county courthouse.

EXAMPLE 2: Now, let's assume that Leo, having lost both the eviction lawsuits and the tenants' suits for damages against him, still tries to discriminate by adopting a less blatant strategy—adopting an inconsistent policy of responding

to late rent payments. When Leo's white tenants without children are late with the rent, he doesn't give them a Three-Day Notice to Pay Rent or Quit until after a five-day grace period, while nonwhite tenants receive their three-day notices the day after the rent is due. In addition, Leo is very slow when nonwhite tenants request repairs. These more subtle means of discrimination are also illegal, and Leo's tenants have grounds to sue him for damages on account of emotional distress, plus punitive damages of up to three times that amount and attorney fees. Leo's tenants also have grounds to defend any eviction lawsuit Leo brings against them.

How Fair Housing Groups Uncover Discrimination

Landlords who turn away prospective tenants on the basis of race, ethnic background, or other group characteristics obviously never come out and admit what they're doing. Commonly, a landlord falsely tells a person who's a member of a racial minority that no rentals are available, or that the prospective tenant's income and credit history aren't good enough. From a legal point of view, this can be a dangerous—and potentially expensive—tactic. Here's why: Both HUD and fair housing groups that are active in many areas are adept at uncovering this discriminatory practice by having "testers" apply to landlords for vacant housing. Typically, a tester who is African-American or Hispanic will fill out a rental application, listing certain occupational, income, and credit information. Then, a white tester will apply for the same housing, listing information very similar—or sometimes not as good—as that given by the minority applicant.

A landlord who offers to rent to a white tester, and rejects—without valid reason—a minority applicant who has the same (or better) qualifications, is very likely to be found to be guilty of discrimination. Such incidents have resulted in many hefty lawsuit settlements. Fortunately, it's possible to avoid the possibility of legal liability based on discrimination by adopting tenant screening policies that don't discriminate and applying them evenhandedly.

In the sections that follow, we'll look at each of the categories of illegal discrimination and explore their obvious and not-so-obvious meaning. These are the "hot buttons" that can get you into trouble with a fair housing agency.

Race or Religion

Fortunately, the amount of overt racial and religious discrimination has lessened over the last several decades. This is not to say, however, that discrimination doesn't exist, especially in subtle forms. And unfortunately, housing agencies and the courts may see "discrimination" where your intent was completely well intentioned. Below, we'll look at some of the common examples of both intentional (but subtle) discrimination and of unintended discrimination.

Intentional, Subtle Discrimination

It goes without saying that you should not overtly treat tenants differently because of their race or religion—for example, renting only to members of a certain religion or race is obviously illegal. Deliberate discrimination should not be cavalierly dismissed, however, as something practiced by insensitive oafs. Unexpected situations can test your willingness to comply with antidiscrimination laws and can reveal subtle forms of intentional discrimination that are just as illegal as blatant discrimination. Consider the following scenario.

EXAMPLE: Several tenants in Creekside Apartments reserved the common room for a religious occasion. Creekside management learned that the tenants were members of a supremacist religion that believes in the inferiority of all nonwhites and non-Christians. Creekside was appalled at the thought of these ideas being discussed on its premises, and denied the group the use of the common room. The tenants who were members of this group filed a discrimination complaint with HUD on the basis of freedom of religion. HUD supported the religious group and forced Creekside to make the common room available. Creekside wisely sent all tenants a memo stating that making the common room available reflects management's intent to comply with fair housing laws and not their endorsement of the principles urged by any group that uses the room.

As the above example illustrates, religions that are outside the mainstream are protected under the discrimination laws.

CAUTION

Don't make decisions on the basis of how applicants sound over the phone. Academic studies show that people can often identify a person's ethnic background based on short phone conversations. Researchers tested this theory on unsuspecting landlords, some of whom rejected large numbers of African-American applicants compared to equally qualified white callers. Fair housing advocacy groups, described in "How Fair Housing Groups Uncover Discrimination," above, can be expected to use this tactic as a way to build a case against landlords whom they suspect of regular, illegal discrimination.

Unintended Discrimination

Unintended discriminatory messages may be conveyed when advertisements feature statements such as "next to the Catholic church" or "Sunday quiet times enforced." (Both ads may be understood as suggesting that only Catholics or Christians are welcome as tenants.) The same considerations apply to your dealings with your tenants after they have moved in. Conscientious landlords should carefully review tenant rules, signs, newsletters, and all communications to make sure that they cannot be construed in any way to benefit, support, or discriminate against any racial or religious group. The examples and advice we give below may seem "politically correct" in the extreme, but take our word for it, they are based on actual fair housing complaints, and deserve to be taken seriously.

- The apartment complex newsletter invites everyone to a "Christmas party" held by the management. Non-Christian tenants might feel that this event is not intended for them and therefore that they have been discriminated against. A better approach: Call it a "Holiday Party" and invite everyone.
- Management extends the use of the common room to tenants for "birthday parties, anniversaries and Christmas and Easter parties." A better idea: Invite your tenants to use the common room for special celebrations, rather than list specific holidays.
- In an effort to accommodate your Spanish-speaking tenants, you translate your move-in letter and house rules into Spanish. Regarding the use of alcohol in the common areas, the Spanish version begins, "Unlike Mexico, where drinking may be condoned in public places, alcoholic beverages may not be consumed in common areas…." Because this phrase applies a racial generalization, it may well become the basis for a fair housing complaint.
- The metropolitan area where you own residential rental property contains large numbers of both Spanish-speaking and Cantonese-speaking people. Advertising in only Spanish, or translating your lease into only Cantonese, will likely constitute a fair housing violation because it suggests that members of the other group are not welcome.

Ethnic Background and National Origin

Like discrimination based on race or religion, discrimination based on national origin is illegal, whether it's practiced openly and deliberately or unintentionally. Though a landlord may not openly state that he doesn't like certain ethnic or national groups and therefore will not rent to them, this is not the end of the story. A landlord who is motivated by a valid business concern, but who chooses tenants in a way that singles out people of a particular nationality, may be found to have acted in a discriminatory way. Let's see how a misguided attempt to choose financially stable, long-term tenants can amount to discrimination against a nationality.

You may legally reject a tenant who has a shadowy financial background and has broken prior leases by suddenly leaving the property. It is common knowledge that many illegal aliens do not have verifiable financial histories, and they can be picked up and deported at any moment. In order to save the cost of a reference check, can you simply ask a Latino for his or her immigration papers or proof of citizenship? The answer is "No," because California now prohibits all such questions. If you are worried about an applicant's stability, focus on rental history and employment patterns.

Illegal Discrimination

State law, and in some cases federal law, absolutely forbids discrimination on the following grounds, regardless of a landlord's claim of a legitimate business need.

Type of discrimination	Civil Rights Act of 1964 [1]	Fair Housing Act and Fair Housing Amendments Act [2]	Unruh Act (CA) [3]	Fair Employment and Housing Act (CA) [4]	Court Decisions (see footnotes)	Local Ordinances
Race	✓	✓	✓	✓		✓
Ethnic background		✓	✓	✓		
National origin		✓	✓	✓		
Religion		✓	✓	✓		✓
Sex		✓	✓	✓		✓
Gender identity				✓		
Marital status			✓	✓	[5]	✓
Age and families with children		✓	✓		[6]	✓
Disability		✓	✓	✓	[7]	✓
Sexual orientation			✓	✓	[8]	✓
Receipt of public assistance				✓	[9]	
Personal characteristic or trait			✓		[10]	

[1] 42 U.S.C. § 1982.

[2] 42 U.S.C. §§ 3601–3619, 3631.

[3] CC §§ 51–53, 54.1–54.8.

[4] Government Code §§ 12926, 12955–12988. For specific prohibition of discrimination on the grounds of marital status, see *Atkisson v. Kern County Housing Authority*, 58 Cal. App. 3d 89 (1976); and *Hess v. Fair Employment and Housing Commission*, 138 Cal. App. 3d 232 (1982).

[5] *Smith v. Fair Employment and Housing Commission*, 12 Cal. 4th 1143, 51 Cal. Rptr. 2d 700 (1996); and *Hess v. Fair Employment and Housing Commission*, 138 Cal. App. 3d 232 (1982).

[6] *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721 (1982), construes the Unruh Act to prohibit discrimination against families on the sole basis that they have children.

[7] *Giebeler v. M & B Associates*, 343 F.3d 1143 (2003). If a prospective tenant is disabled and therefore unable to work, but has a financially qualified cosigner who will agree in writing to pay the rent, refusal to accept the tenant, based on an inflexible policy against cosigners, could constitute illegal discrimination based on disability.

[8] *Beaty v. Truck Insurance Exchange*, 6 Cal. App. 4th 1455 (1992).

[9] 59 Ops. Cal. Atty. Gen. 223. However, a landlord may legally refuse to rent to a tenant who fails to meet minimum-income criteria, so long as the same test is applied equally to all applicants regardless of their source of income. *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142 (1991). But as to disabled prospective tenants who don't meet this criteria, see (7), above.

[10] *Harris v. Capitol Growth Investors XIV*, 52 Cal. 3d 1142 (1991).

Disability

The federal Fair Housing Act and the state's Unruh and Fair Employment and Housing Acts prohibit discrimination against people who:

- have a physical or mental disability (including, but not limited to, hearing, mobility and visual impairments, chronic alcoholism or mental illness, AIDS, AIDS-Related Complex, HIV-positive status, and mental retardation) that substantially limits one or more major life activities
- have a history or record of such a disability, or
- are regarded by others as though they have such a disability.

You may be shocked to see what is—and what is not—considered a disability. Although it may seem strange, an alcoholic is considered disabled. Does this mean that you must rent to a drunk? What about past, and current, drug addiction? Let's look at each of these issues.

Alcoholism

You may encounter an applicant, let's call him Ted, who passes all your criteria for selecting tenants but whose personal history includes a disquieting note: Employers and past landlords let you know they suspect that Ted has a serious drinking problem that is getting worse. However, as far as you can tell, Ted has not lost a job or a place to live due to his drinking problem. Can you refuse to rent to Ted for fear that he will drink away the rent, exhibit loud or inappropriate behavior, or damage your property? No, you cannot, unless you can point to specific acts of misbehavior or financial shakiness that would sink any applicant, regardless of the underlying cause. Your fear alone that this might happen (however well founded) will not legally support your refusal to rent to Ted. In a nutshell, you may not refuse to rent to an alcoholic simply because of his status as an alcoholic—you must be able to point to specific facts other than his status as an alcoholic that render him unfit as a tenant.

> **EXAMPLE:** Patsy applied for an apartment one morning and spoke with Carol, the manager. Patsy said she would have to return that afternoon to complete the application form because she was due at an Alcoholics Anonymous meeting. Carol decided on the spot that she did not want Patsy for a tenant, and she told Patsy that the unit "had just been rented," which was a lie. (Patsy saw a newspaper ad for the unit the next week.) Patsy filed a complaint with HUD, alleging that she was an alcoholic who had been discriminated against. Because Carol could not point to any reason for turning Patsy away other than her assumption that Patsy, as an alcoholic, would be a bad tenant, the judge awarded Patsy several thousand dollars in damages.

The fact that alcoholism is classified as a disability does not mean that you must rent (or continue to rent) to every alcoholic. The law only prohibits you from turning away (or evicting) an alcoholic solely because he fits into this classification. If you do a thorough background check and discover that the applicant has shown an inability to pay the rent or a tendency to damage property, you may refuse to rent on those bases, just as you would refuse to rent to a nonalcoholic who had the same history. Similarly, if an alcoholic damages your property or interferes with your other tenants' ability to quietly enjoy their property, this tenant is a candidate for eviction, just as would be any tenant who exhibited this behavior. Consider the following scenario, which is what Carol should have done.

> **EXAMPLE:** Same facts as above, except that Carol went ahead and took an application from Patsy later that day and checked her references. Patsy's former landlord told Carol that Patsy had refused to pay for damage from a fire she had negligently caused; Patsy's employment history showed a pattern of short-lived jobs and decreasing wages. Carol noted this information on Patsy's application form and, as she would have done for any applicant with a similar background, Carol rejected Patsy. Patsy filed a complaint with HUD, again claiming discrimination on the basis of her alcoholism. When the HUD investigator asked to see Patsy's application and questioned Carol about her application criteria for all applicants, he concluded that the rejection had been based on legally sound business reasons and was not, therefore, a fair housing violation.

CAUTION

When dealing with suspected alcoholism, mental problems, or drug use, recognize that rejecting on these bases alone is illegal. Do a thorough investigation: If you discover that the applicant has negative references or a poor credit or employment history, use these factors as the basis for your rejection.

Drug Use

Under the Fair Housing Act, a person who has a past drug addiction is classed as someone who has a record of a disability and, as such, is protected under the fair housing law. You may not refuse to rent to someone solely because he is an ex-addict, even if that person has felony convictions for drug use. Put another way, your fear that the person will resume his illegal drug use is not sufficient grounds to reject the applicant. If you do a thorough background check, however, and discover a rental or employment history that would defeat any applicant, you may reject the person as long as it is clear that the rejection is based on these legal reasons.

On the other hand, people who currently use illegal drugs are breaking the law, and you may certainly refuse to rent to them—particularly if you have good reason to suspect that the applicant or tenant is dealing drugs. (See Chapter 12 for a discussion of legal problems you face by allowing current drug users to live in your property.) Also, if the applicant has felony convictions for dealing or manufacturing illegal drugs, as distinct from convictions for possession of drugs for personal use, you may use that history as a basis of refusal.

Mental or Emotional Impairments

Like alcoholics or past drug users, applicants and tenants who have (or appear to have) mental or emotional impairments must be evaluated based on their financial stability and histories as tenants, not on their mental health status. Unless you can point to specific instances of past behavior that would make a prospective tenant dangerous to others, or unless you have other valid business criteria for rejecting the person, a refusal to rent could result in a fair housing complaint.

Questions and Actions That May Be Considered to Discriminate Against the Disabled

You may not ask a prospective tenant if she has a disability or illness, or ask to see medical records. If it is obvious that someone is disabled—for example, the person is in a wheelchair or wears a hearing aid—it is illegal to inquire about the severity of the disability.

Unfortunately, even the most innocuous, well-meaning question or remark can get you into trouble, especially if you decide not to rent to the person. What you might consider polite conversation may be taken as a probing question designed to discourage an applicant.

> **EXAMPLE:** Sam, a Vietnam veteran, was the owner of Belleview Apartments. Jim, who appeared to be the same age as Sam and who used a wheelchair, applied for an apartment. Thinking that Jim might have been injured in the Vietnam War, Sam questioned Jim about the circumstances of his disability, intending only to pass the time and put Jim at ease. During their conversation, Sam learned that Jim had not been in Vietnam. When Jim was not offered the apartment—he did not meet the financial criteria that Sam applied to all applicants—he filed a complaint with HUD, alleging discrimination based on his disability. Sam was unable to convince the HUD investigator that his questions were not intended to be discriminatory and, on the advice of his attorney, Sam settled the case for several thousand dollars.

A manager's or landlord's well-intentioned actions, as well as his words, can become the basis of a fair housing complaint. For example, it is illegal to "steer" applicants to units that you, however innocently, think would be most appropriate. For example, if you have two units for rent—one on the ground floor and one three stories up—do not fail to show both units to the applicant who is movement impaired, however reasonable you think it would be for the person to consider only the ground floor unit.

The Rights of Disabled Tenants

You must also concern yourself with the Fair Housing Act after you have rented a home to a disabled person. The Fair Housing Act requires that you:

- *accommodate* the needs of a disabled tenant, at your expense (42 U.S.C. § 3604(f)(B) (1988)), and
- allow disabled tenants to make reasonable *modifications* of their living unit at their expense if that is what is needed for the person to comfortably and safely live in the unit. (42 U.S.C. § 3604(f)(3)(A) (1988).)

We'll look briefly at each of these requirements.

Accommodation. Landlords and managers are expected to adjust their rules, procedures, or services in order to give a person with a disability an equal opportunity to use and enjoy a dwelling unit or a common space. Accommodations include such things as:

- providing a close-in, spacious parking space for a wheelchair-bound tenant
- allowing a guide dog or other "service animal" in a residence that otherwise disallows pets
- allowing a special rent payment plan for a tenant whose finances are managed by someone else or by a government agency
- arranging to read all communications from management to a blind tenant, and
- providing a tub and clothesline for a mentally ill tenant whose anxiety about machines makes her unable to use the washer and dryer.

Does your duty to accommodate disabled tenants mean that you must bend every rule and change every procedure at the tenant's request? Generally speaking, the answer is "No": Landlords are expected to accommodate "reasonable" requests, but they need not undertake changes that would seriously impair their ability to run their business.

Modification. Where your duty to accommodate ends, your obligation to allow the tenant to modify may begin. A disabled person has the right to modify private living space to the extent necessary to make the space safe and comfortable, as long as the modifications will not make the unit unacceptable to the next tenant or the disabled tenant agrees to undo the modification when the tenancy is over, subject to reasonable wear and tear. Examples of modifications undertaken by a disabled tenant include:

- lowering counter tops for a wheelchair-bound tenant
- installing special faucets or door handles for persons with limited hand use
- modifying kitchen appliances to accommodate a blind tenant, and
- installing a ramp to allow access to a wheelchair.

How to Respond to Unreasonable Requests for Accommodations or Modifications

The law requires you to agree to "reasonable" requests for accommodations or modifications. You don't have to go along with unreasonable ones, but you can't simply say "No" and shut the door. You must engage in what HUD calls an "interactive process" with the disabled person. In essence, this means you have to get together and try to reach an acceptable compromise. For example, suppose you require tenants to pay rent in person at the manager's office. A disabled tenant asks that the manager collect the rent at her apartment. Since this would leave the office unstaffed, you suggest instead that the tenant mail the rent check. This is a reasonable compromise.

You are not obliged to allow disabled tenants to modify their unit at will, without your prior approval. You are entitled to ask for a reasonable description of the proposed modifications, proof that they will be done in a workmanlike manner, and evidence that the tenant is obtaining any necessary building permits. Moreover, if a tenant proposes to modify the unit in such a manner that will require restoration when the tenant leaves (such as the repositioning of lowered kitchen counters), you may require that the tenant pay into an interest-bearing escrow account the amount estimated for the restoration. (The interest belongs to the tenant.)

Verification of Disabled Status

When a tenant or applicant asks for a modification or accommodation, it may be obvious that the person falls within the legal definition of a disabled person, and that the request addresses that disability. In those cases—think of a blind applicant who asks to keep a seeing eye dog—it would be pointless for you to demand proof that the person is disabled and needs the accommodation. (Indeed, doing so might result in a harassment lawsuit.) However, many times the

claimed disability, and the appropriateness of the request, are not so clear. You're entitled to ask for verification, but you must do so carefully.

For years, landlords asked for a doctor's letter. Now, according to a HUD and Department of Justice guidance memo, you must be willing to listen to less formal sources. (*Reasonable Accommodations Under the Fair Housing Act*, Joint Statement of the Department of Housing and Urban Development and the Department of Justice, May 17, 2004.) Sources of reliable information include:

- **The individual himself.** A person can prove that he is disabled (and that a modification or accommodation addresses that disability) by giving you a "credible statement." Unfortunately, the guidance memo does not define this term.
- **Documents.** A person who is under 65 years of age and receives Supplemental Security Income or Social Security Disability Insurance benefits is legally disabled. Someone could establish disability by showing you relevant identification cards. Likewise, license plates showing the universal accessibility logo, or a driver's license reflecting the existence of a disability, are sufficient proof.
- **Doctors or other medical professionals, peer support groups, nonmedical service agencies.** Information from these sources might come through letters, phone calls, or personal visits.
- **Reliable third parties.** This wide-open source of information could include friends, associates, and roommates, though some fair housing experts interpret this phrase as meaning any "third party professional who is familiar with the disability." We don't know whether this definition will become the standard used by courts.

The Americans with Disabilities Act (ADA)

The federal Americans with Disabilities Act, commonly known as the "ADA," provides widespread protection to disabled people in the realm of employment and public and commercial accommodations. (42 U.S.C. §§ 12101 and following.) Landlords who employ workers are subject to its requirements, but the impact of the ADA doesn't stop here. The ADA applies to two additional areas, even for landlords who are not employers:

- **Common areas and areas open to the public.** Areas of common use, such as the lobby and passageways, including the rental office, must comply with the ADA, whereas rental units are subject to the federal Fair Housing Act, the Unruh Act, and the state Fair Employment and Housing Act.
- **Telecommuters or persons with home business offices.** The ADA exempts facilities covered by the federal Fair Housing Act, but the exemption may not apply when the residence is also used as a commercial site. Under federal law, even something as simple as a business call from a home office to another state could constitute an act of "commerce," thus bringing the home office within the purview of the ADA. The requirements of the ADA apply only to new construction, or when alterations are made in the existing building. (Landlords are not required to "retrofit" existing structures.) Of major importance to the landlord is the interpretation by the U.S. Department of Justice that the accessibility requirements extend not only to the commercial site itself (the home office), but to entryways, doorways, hallways, and restrooms if these aspects of the building are used by the telecommuter's or home worker's business invitees.

The implications of the ADA's requirements are significant. Unlike the federal Fair Housing Act, there is nothing in the ADA that requires the landlord to allow modification of the structure at the tenant's expense. The ADA simply mandates that the structure be in compliance; it is up to the landlord and the tenant/home office worker to work things out between themselves. Keep these considerations in mind if a tenant proposes to set up a home office, especially one that will host business invitees or the public at large.

New Buildings and the Disabled

The Fair Housing Amendments Act (42 U.S.C. §§ 3604(f)(3)(C) and 3604(f)(7)) imposes requirements on new buildings of four or more units that were first occupied after March 1991. All ground floor units and every unit in an elevator building must be designed or constructed so that:

- the main building is accessible and on an accessible route
- the public and common areas are "readily accessible to and usable by" the disabled, including parking areas (a good rule of thumb is to reserve 2% of the spaces)
- entryway doorways have 36" of free space *plus* shoulder and elbow room; and interior doorways are at least 32" wide
- interior living spaces have wheelchair-accessible routes throughout, with changes in floor height of no more than ¼"
- light switches, outlets, thermostats, and other environmental controls are within the legal "reach range" (15" to 48" from the ground)
- bathroom walls are sufficiently reinforced to allow the safe installation of "grab bars," and
- kitchens and bathrooms are large enough to allow a wheelchair to maneuver within the room (40" turning radius minimum) and have sinks and appliances positioned to allow side or front use.

For more information, search "fair housing accessibility guidelines" at www.hud.gov.

Familial Status

Discrimination on the basis of familial status includes not only affirmatively refusing to rent to families with children or to pregnant women, but also trying to accomplish the same goal by setting overly restrictive space requirements (limiting the maximum number of people permitted to occupy a rental unit), thereby preventing families with children from occupying smaller units.

Below we discuss how to establish reasonable occupancy standards. The fact that you can legally adopt occupancy standards, however, doesn't mean you can use "overcrowding" as a euphemism for refusing to rent to tenants with children, if you would rent to the same number of adults. A few landlords have adopted criteria that for all practical purposes forbid children under the guise of preventing overcrowding—for example, allowing only one person per bedroom, with a couple counting as one person. Under these criteria, a landlord would rent a two-bedroom unit to a husband and wife and their one child, but would not rent the same unit to a mother with two children. This practice, which has the effect of keeping all (or most) children out of a landlord's property, would surely be found illegal in court and would result in monetary penalties.

It is also illegal to allow children only on ground floors, or to designate certain apartments as separate adult units and family units.

It is essential to maintain a consistent occupancy policy. If you allow three adults to live in a two-bedroom apartment, you had better let a couple with a child (or a single mother with two children) live in the same type of unit, or you leave yourself open to charges that you are illegally discriminating.

> **EXAMPLE:** Jackson owned and managed two one-bedroom units in a duplex, one of which he rented out to three flight attendants who were rarely there at the same time. When the other unit became vacant, Jackson advertised it as a one-bedroom, two-person apartment. Harry and Sue Jones and their teenage daughter were turned away because they exceeded Jackson's occupancy limit of two people. The Jones family filed a complaint with HUD, whose investigator questioned Jackson regarding the inconsistency of his occupancy policy. Jackson was convinced that he was in the wrong, and agreed to rent to the Jones family and to compensate them for the humiliation they had suffered as a result of being refused.

You cannot legally refuse to rent on account of a woman's pregnancy (whether she is single, married, or with an unmarried cohabitant). Doing so is illegal discrimination based on sex. (Government Code § 12926(p).) When the birth of a child would result in exceeding your uniformly applied and reasonable occupancy standards, you should proceed with caution and contact an attorney knowledgeable in this area.

Finally, do not inquire as to the age and sex of any children who will be sharing the same bedroom. This is their parents' business, not yours. (The General Counsel for HUD wrote in a July 1995 memo that consideration by a landlord of the age and sex of tenant children was a violation of the Fair Housing Act with respect to sex discrimination.)

Marital Status

Under California law, landlords may not discriminate on the basis of marital status. This means that you cannot refuse to rent to single renters because you'd rather have married people in your building; nor may you refuse to rent to married tenants because you want a "singles only" environment.

But what about renting to people who appear to be a couple but who aren't married? Can a landlord who believes that cohabitation is morally wrong refuse to rent to unmarried couples? The answer is a firm "No." (*Smith v. Fair Employment & Housing Commission,* 12 Cal. 4th 1143, 51 Cal. Rptr. 2d 700 (1996).)

Age

The federal Fair Housing Act does not expressly use the word "age," but nevertheless discrimination on the basis of age is definitely included within the ban against discrimination on the basis of familial status. The Unruh Act, on the other hand, explicitly forbids discrimination on the basis of age. While the issue of age discrimination usually arises in the context of families with children, it is also present in the practice of some landlords to rent to only "youthful" applicants, or to set quotas of young versus elderly tenants in order to preserve a certain "mix" of residents. Sometimes called "reverse discrimination," choices made on the basis of advanced age are as illegal as those based on youth. Housing reserved exclusively for senior citizens, which must meet strict requirements, is exempted. CC § 51.3 defines senior citizen housing as that reserved for persons 62 years of age or older, or a complex of 150 or more units (35 in nonmetropolitan areas) for persons older than 55 years. The federal law definition is almost identical. (42 U.S.C. § 3607.)

A charge of age discrimination could arise in situations where the landlord's intentions are well meaning but the consequences are illegal. For example, we are often reminded that ours is an aging society, and that with the increase in the number of older adults comes the need for appropriate housing. Some older tenants may not, however, be able to live completely independently—for example, they may rely on the regular assistance of a nearby adult child or friend. Can you, as the landlord, refuse to rent to an older person solely because you fear that frailty or a dimming memory will pose a threat to the health or safety of the rest of your tenants?

The answer to this question is "No." You may feel that your worry about elderly tenants is well founded, but unless you can point to an actual incident or to facts that will substantiate your concern, you cannot reject an elderly applicant on the basis of your fears alone. For example, you could turn away an older applicant if you learned from a prior landlord or employer that the person regularly forgot to lock the doors, failed to pay the rent on time, or demonstrated an inability to undertake basic housekeeping chores. In other words, if the applicant has demonstrated an inability to live alone as a renter, your regular and thorough background check should supply you with those facts, which are legally defensible reasons to refuse to rent. If you reject an applicant solely on your "hunch" that the person will never be able to make it alone, you are setting yourself up for a fair housing complaint. As for your stylistic preference for youthful tenants, this is age discrimination in its purest form, and it will never survive a fair housing complaint.

> **EXAMPLE 1:** Nora's 80-year-old mother, Ethel, decided that it was time to find a smaller place and move closer to her daughter. Ethel sold her home and applied for a one-bedroom apartment at Coral Shores. Ethel had impeccable references from neighbors and employers and an outstanding credit history. Nonetheless, Mike, the manager of Coral Shores, was concerned about Ethel's age. Fearful that Ethel might forget to turn off the stove, lose her key, or do any number of other dangerous things, Mike decided on the spot not to rent to her. Ethel filed a fair housing complaint, which she won on the basis of age discrimination.

Learning from his experience with Ethel, Mike, the manager at Coral Shores, became more conscientious

in screening tenants. The following example shows how he avoided another lawsuit on age discrimination.

> **EXAMPLE 2:** William was an elderly gentleman who decided to sell the family home and rent an apartment after his wife passed away. He applied for an apartment at Coral Shores. Since William had no "prior rental history," Mike, the manager, drove to William's old neighborhood and spoke with several of his former neighbors. Mike also called William's personal references. From these sources, Mike learned that William had been unable to take care of himself the last few years, having been completely dependent on his wife. Mike also learned that, since his wife's death, William had made several desperate calls to neighbors and family when he had been unable to extinguish a negligently started kitchen fire, find his keys, and maintain basic levels of cleanliness in his house. Mike noted these findings on William's application and declined to rent to him on the basis of these specific facts.

You may also find yourself in the situation of having rented to someone who has lived alone competently for years but who, with advancing age, appears to be gradually losing the ability to safely live alone. Determining the point when the tenant should no longer live alone is a judgment call that will vary with every situation, and we cannot provide a checklist of "failings" that will suffice for everyone. There is, however, one universal ground rule that will, by now, sound pretty familiar: You cannot evict merely on the basis of the person's elderly status, nor can you base your actions solely on your fears of what that person might do. You must be able to point to real, serious violations of the criteria that apply to all tenants before you can take action against an elderly violator.

CAUTION

Elderly tenants may also qualify as disabled tenants, who are entitled to accommodation under the law. An elderly tenant who, because of age, cannot meet one of your policies may be entitled to special treatment because the tenant also qualifies as someone disabled. (See the discussion of discrimination on the basis of disability, below.) In other words, you may not be able to use an elderly tenant's inability to abide by one of the terms of the tenancy as the basis of an eviction—instead, you may be expected to adjust your policy in order to accommodate the disability. For example, an elderly tenant who is chronically late with the rent because of sporadic disorientation might be entitled to a grace period or a friendly reminder from the landlord or manager when the rent is due; whereas a nondisabled tenant who is chronically late with the rent may be a proper candidate for a three-day notice.

Renting to Minors

You may wonder whether the prohibition against age discrimination applies to minors (people under age 18). If the minor applicant is "legally emancipated"—which means that the young person must be legally married, have a court order of emancipation, or be in the military—the minor has the same status as an adult. This means you will need to treat the applicant like any other adult. In short, if the applicant satisfies the rental criteria that you apply to everyone, a refusal to rent to this minor could form the basis of a fair housing complaint. On the other hand, if the applicant is not emancipated, it's probably not legal for the person to be on their own in the first place; and in any event, chances are that the applicant's credit history or financial status will not meet your requirements. The person could be rejected on that basis.

Sex

Sex discrimination sometimes takes the form of refusing to rent to single women with a certain income, but renting to men with similar incomes, though this is rare. It can also take the form of refusing to rent to a pregnant woman, whether she is single or with a cohabitant or spouse. (Government Code § 12926(p); for more on this, see the discussion on Familial Status discrimination above.) Sex discrimination also sometimes takes the form of sexual harassment—refusing to rent to a person who resists a landlord's or manager's sexual advances, or making life difficult for a tenant who has resisted such advances.

What is sexual harassment in a rental housing context? Courts have defined it as:

- a pattern of persistent, unwanted attention of a sexual nature, including the making of sexual remarks and physical advances, or a single instance of highly egregious behavior. A manager's repeated requests for social contact or constant remarks concerning a tenant's appearance or behavior could constitute sexual harassment, as could a single extraordinarily offensive remark, or
- a quid pro quo, in which a tenant's rights are conditioned upon the acceptance of the owner's or manager's attentions. For example, the manager who refuses to fix the plumbing until the tenant agrees to a date is guilty of sexual harassment. This type of harassment may be established on the basis of only one incident.

EXAMPLE: Oscar, the resident manager of Northside Apartments, was attracted to Martha, his tenant, and asked her repeatedly for a date. Martha always turned Oscar down and asked that he leave her alone. Oscar didn't back off, and began hanging around the pool whenever Martha used it. Oscar watched Martha intently and made suggestive remarks about her to the other tenants. Martha stopped using the pool and filed a sexual harassment complaint with HUD, claiming that Oscar's unwanted attentions made it impossible for her to use and enjoy the pool. Oscar refused to consider a settlement when the HUD investigator spoke to him and Martha about his actions. As a result, HUD pursued the case in court, where a federal judge awarded several thousand dollars in damages to Martha.

CAUTION

Sexual harassment awards under the Civil Rights Act have no limits. Owners and managers who engage in sexual harassment risk being found liable under Title VII of the 1964 Civil Rights Act, which also prohibits sexual discrimination. There are no limits to the amount of punitive damages that can be awarded in Title VII actions. Punitive damages are generally not covered by insurance, and it is far from clear whether even actual damages in a discrimination case (that is, nonpunitive damages, such as pain and suffering) will be covered, either. See below for a discussion of insurance coverage in discrimination cases.

What's It All About?

California law prohibits discrimination on the basis of sex, sexual orientation, and gender identity. Are you confused by these terms? You're not alone. Here's what they mean:

- **Sex.** Landlords cannot refuse to rent to someone (or set different policies) on the basis of that person's sex. For example, you can't decide that you'll not have women living in the ground floor units, nor can you turn down male applicants because you think that men will cause more wear and tear than women.
- **Sexual orientation.** You can't discriminate against people who are gay, lesbian, or bisexual, or whom you think are gay, lesbian, or bisexual.
- **Gender identity.** You cannot discriminate against people who have changed their gender, which means that they have transitioned from the gender they were assigned at birth to the opposite gender. Transgendered individuals transition to their new persona by dressing and acting according to their chosen gender, and often by taking hormones or having surgery.

Most savvy landlords will focus on an applicant's ability to pay the rent, credit history, and rental history. If you do the same, the applicant's manner and private life won't concern you.

Sexual Orientation

It is illegal to discriminate on the basis of someone's sexual orientation in California. "Sexual orientation" includes heterosexuality, homosexuality, and bisexuality. (Government Code §§ 12920 and following.)

Gender Identity

It is against state law to discriminate on the basis of a person's gender or gender identity. (Government Code § 12926.) This means that you may not refuse to rent to someone who has changed, or is in the process of changing, his or her gender, through hormone treatment, surgery, or both. In practical terms, if an applicant's dress and mannerisms don't match your

expectation for that individual's stated gender identity, you cannot legally refuse to rent on that basis.

Smoking

Discrimination against smokers is not specifically prohibited by any civil rights law, and no California court has ruled that such discrimination is prohibited. Because "smokers," as a class, are not a specifically protected group, would it be legal for a landlord to turn away a smoker, or charge higher rent, or designate certain apartments as "nonsmoking" only? (Remember, each of these acts would be illegal if systematically practiced against members of a particular race, religion, ethnicity, or other protected group.) Or, to look at it from another perspective, would discrimination against smokers constitute discrimination on the basis of a person's "personal characteristics" or "personal trait" (discussed in more detail below), which is illegal under the Unruh Act?

There is no clear answer to this question, and we can only suggest how a court might approach the issue. Let's start by remembering the point made many times when discussing legal reasons to discriminate: If a valid business reason underlies your housing decision, and if you apply the criterion across the board to every applicant and tenant, the mere fact that a particular individual happens to belong to a protected class will not turn your decision into an act of illegal discrimination. When we apply this principle to the question of smokers, a number of ideas come to mind in defense of a "No Smokers" policy:

- **Smoke = expense.** Smoke damages carpets, drapes, and paint. If this type of damage is considered "normal wear and tear," which you pay for, you will end up with greater repair and replacement costs by renting to a smoker. You could "build in" the cost of smoke-damaged premises by tacking it onto a security deposit, at least up to the point of the maximum amount of the deposit as limited by state law. (See Chapter 5.) You could also make a strong argument that smokers create added maintenance and repair costs, which constitutes a valid business reason to charge a higher rent, limit the number of smokers' units, or prohibit smoking in common areas or altogether.

Medical Marijuana Smoking

We do not believe California or federal law requires landlords to allow marijuana possession, use, or cultivation on the premises, even where the tenant has medical approval to use it. In 1996, California voters enacted Proposition 215, known as the "Compassionate Use Act," which simply removed state (but not federal) criminal penalties for the use, possession, and cultivation of small amounts of marijuana for doctor-approved medical purposes. This law, however, did not make marijuana legal for such individuals under federal law. For that reason, the federal Americans with Disabilities Act (ADA) does not require this kind of accommodation.

Second, the California Supreme Court has ruled that in the employment context, the California Fair Employment and Housing Act—which also applies to rental housing—does not forbid employment discrimination on this basis. We therefore think that landlords are not under any legal duty to accommodate use, possession, or cultivation of even small amounts of marijuana by a tenant who has a doctor's approval to do so.

In other words, it's up to you if you want to allow medical-marijuana smoking in your rental, but you don't have to. Think carefully before allowing the cultivation of even small amounts of marijuana on your property. Keep in mind that in a multiunit building, non-marijuana-using tenants in the same building may complain about the unwanted smoke—and unwanted marijuana "highs."

- **Smoke = liability.** The health dangers from secondhand smoke are understood and acknowledged. (California's Air Resources Board has added second-hand smoke to its list of toxic air contaminants.) Indeed, California has a statewide law forbidding smoking in most workplaces and in restaurants (local restrictions may be even stricter). (Labor Code § 6404.5.) It would seem illogical to require a restaurant to prohibit smoking, but not allow a landlord to make the same rule. And if a pile of stinking garbage constitutes a nuisance, over which the landlord can be successfully sued, why not the

pervasive, unpleasant, and unhealthy stench from stale smoke in the apartment lobby or laundry room?

Remember, no court case has specifically upheld the landlord's right to limit his premises to nonsmokers, or to otherwise apply different rental terms and conditions to smokers. Whether such a practice would pass the "legitimate business interest" test, or whether it would run afoul of the prohibition against discrimination on the basis of one's "personal characteristic," is yet to be known.

Public Assistance

You may not refuse to rent to applicants simply because they are receiving public assistance. You may, however, refuse to rent to persons whose incomes fall below a certain level, as long as you apply that standard across the board. For example, if you require all prospective tenants to have a $2,000 monthly income before you will consider renting to them, the fact that this excludes welfare recipients who receive only $900 a month does not constitute illegal discrimination under the Unruh Act. (In *Harris v. Capital Growth Investors XIV,* 52 Cal. 3d 1142 (1991), the California Supreme Court ruled that a landlord who insisted a tenant's monthly income equal three times the rent did not unlawfully discriminate in violation of the Unruh Act.) In addition, you cannot *exclude* any welfare or other assistance payments an applicant may receive when computing the applicant's total income, for purposes of your income-to-rent ratio. Using the example above, if an applicant receives a subsidy of $900 and has other income that, added to the subsidy, meets or exceeds your income requirements, you cannot disregard the subsidy.

Finally, you would be guilty of unlawful discrimination if you normally rented to tenants regardless of income, but set an income requirement for public assistance recipients; or if you refused to rent to a person who qualified under your guidelines solely because that applicant received welfare.

Note on Low-Income Tenants

Many tenants with low incomes may qualify for federally subsidized housing assistance, the most common being the Section 8 program of the federal Department of Housing and Urban Development (HUD). ("Section 8" refers to Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437(f).) That program subsidizes tenants' rents by paying part of the rent directly to the landlord. The local housing authority, landlord, and tenant enter into a one-year agreement, which includes a written lease supplied by the county housing authority. The tenant pays up to 30% of his monthly income to the landlord, and the housing authority pays the landlord the difference between the tenant's contribution and what it determines is the market rent each month.

Section 8 offers several advantages to the landlord:

- The larger part of the rent is paid on time every month by the housing authority.
- If the tenant doesn't pay the rent and you have to evict him, the housing authority guarantees the tenant's unpaid portion, and also guarantees payment for damages to the property by the tenant, up to a certain limit.

Section 8's disadvantages are that:

- The housing authority's determination of what is market rent is often low.
- The landlord is locked into a tenancy agreement for one year, and can't terminate the tenancy except for nonpayment of rent or other serious breach of the lease. Even then, 90 days' notice is required. (CC § 1954.535; *Wasatch Property Management v. DeGrate*, 35 Cal. 4th 1111 (2005).) (Evictions based on grounds other than nonpayment of rent are difficult.)

You have the right to decide not to participate in the Section 8 program without violating any antidiscrimination laws. Call the housing authority in the county where your property is located if you wish to participate in the Section 8 program. They will refer eligible applicants to you and will prepare the necessary documents (including the lease) if you decide to rent to an eligible applicant.

Personal Characteristics or Traits

After reading the above list outlining the types of discrimination forbidden by California and federal law, you might be tempted to assume that it is legal to discriminate for any reason not mentioned by name in a state, federal, or local law. For example, because none of the civil rights laws specifically prohibits discrimination against men with beards or long hair, you might conclude that such discrimination is permissible. This is not true.

Even though California's Unruh Civil Rights Act contains only the words "sex, race, color, religion, ancestry, or national origin" to describe types of discrimination that are prohibited, illegal discrimination is not limited to these categories. The California Supreme Court has ruled that discrimination on the basis of an individual's "personal characteristic or trait" is also illegal. This means that you may not discriminate on the basis of a current or prospective tenant's geographical origin, physical attributes, or personal beliefs. (*Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142 (1991).)

What does this tell landlords who hate lawyers and decide never to rent to one, or who don't approve of long-haired men? In a word, it ought to tell them that discrimination on these grounds, since it is based on the person's appearance or occupation (which are personal characteristics or traits), is against the law. We come once again to the landlord's guiding light for housing decisions: Only valid business reasons, applied uniformly to all tenants, will make it past a fair housing complaint.

> **EXAMPLE:** Sara owns a small apartment complex in a university town. She has had a recurring problem renting to students, many of whom have abandoned their leases, flaunted her policies regarding unauthorized cotenants, and caused inordinate wear and tear. Since many of the student tenants come from out of state, suing them successfully in small claims court has been difficult. Deciding that renting to students is a poor business practice, Sara adopts a "no out-of-state students" policy.

Sara's policy is an invitation to a fair housing complaint. Prospective student tenants could argue that her approach constitutes discrimination on the basis of a personal characteristic (being a student) and geographic origin (coming from out of state), both of which are against the law under the Supreme Court's interpretation of the Unruh Act. But what about Sara's experience with student tenants? Is there a legal way to protect her business?

The answer to Sara's problems lies in tightening up her procedures with respect to all applicants. For example, if she requires everyone to provide several references from prior landlords, she should be able to weed out the applicants who are likely to break the lease and leave. In order to be fair to those students who have no rental history, Sara might accept employer references or require the students' parents to cosign the lease. The lease should make it clear that the presence of unauthorized, long-term guests is grounds for eviction; it is up to Sara to be vigilant and make sure that this rule is not ignored.

Waterbeds

State law forbids an owner of property built after January 1973 from refusing to rent to tenants simply because they have waterbeds. (CC § 1940.5.) However, the landlord may insist on strict standards in leases and rental agreements (discussed under Clause 20 in Chapter 2).

Occupancy Limits

The fact that discrimination against families with children is illegal does not mean you have to rent a one-bedroom apartment to a family of five. You can legally establish reasonable space-to-people ratios, but you cannot use overcrowding as a pretext for refusing to rent to tenants with children, if you would rent to the same number of adults.

A few landlords have adopted criteria that for all practical purposes forbid children under the guise of preventing overcrowding—for example, allowing only one person per bedroom, with a couple counting as one person. Under these criteria, a landlord would rent a two-bedroom unit to a husband and wife and their one child, but would not rent the same unit to a mother with two children. This practice has the effect of keeping all (or most) children out of a landlord's property and for this reason is likely illegal. At the least, it's strong evidence of an intent to discriminate.

One court has ruled against a landlord who did not permit more than four persons to occupy three-bedroom apartments. (*Zakaria v. Lincoln Property Co.*, 185 Cal. App. 3d 500, 229 Cal. Rptr. 669 (1986).) In *Smith v. Ring Brothers Management Corp.*, 183 Cal. App. 3d 649, 228 Cal. Rptr. 525 (1986), another court held that a rule precluding a two-child family from occupying a two-bedroom apartment violated a local ordinance similar to state law.

The state Fair Employment and Housing Commission has ruled that a Los Angeles apartment owner who limited occupancy to one person per bedroom—when state health and safety laws would have allowed as many as ten people in a two-bedroom apartment there—had clearly intended to exclude children. The tenants who had been denied an apartment and complained to the state were awarded $2,500 each.

The Fair Employment and Housing Commission is the enforcement arm of the California Department of Fair Employment and Housing (DFEH). The DFEH (one of the places a tenant can complain about discrimination) will investigate a complaint for possible filing with the Commission based on a "two-plus-one" rule: If a landlord's policy is more restrictive than two persons per bedroom plus one additional occupant, it is suspect. Thus, a landlord is asking for trouble by insisting on no more than two people in a one-bedroom unit, four in a two-bedroom unit, six in a three-bedroom unit, and so on. However, a landlord who draws the line by refusing to rent to more than three people to a one-bedroom, five to a two-bedroom, and seven to a three-bedroom unit will be on safe ground.

Occupancy Limits and the Uniform Housing Code

The Uniform Housing Code (the UHC) is part of California's state housing law, and is intended to prevent the unhealthy and dangerous results of overcrowding. (H&S § 17922(a)(1).) The UHC addresses the question of occupancy in terms of the size of the rental's bedrooms. A room that the landlord has "designed or intended" to be used as a bedroom (CC § 1941.2(a)(5)) must be at least 70 square feet for one person, plus an additional 50 square feet for each additional occupant:

- One person: 70 square feet
- Two people: 120 square feet, and
- Three people: 170 square feet (UHC § 503).

Cities are free to adopt their own occupancy specifications, and some (notably San Francisco) have allowed for more occupants per bedroom.

You may be wondering what happens when a rental bedroom is too small, in terms of square feet, to permit application of the "two-per-bedroom-plus-one" rule. For example, in a city that has not adopted its own occupancy standards (and is thus subject to the UHC rules), can the landlord prohibit three people from occupying a one-bedroom apartment if the bedroom is less than 170 square feet?

We are not aware of any California cases that have settled this question—but we can offer some guidelines based on a federal appellate court's conclusions and our own common sense. As long as the square-foot guidelines that you are following were developed and are applied in order to prevent overcrowding, and not as a means to weed out families, it's likely that a court would consider them reasonable. And if a landlord applies square-foot guidelines equally to all tenants (not to just families, for example), we don't see why he couldn't vary the two-per-bedroom-plus-one rule in appropriate situations. This was the conclusion reached by a federal appellate court in Ohio (*Fair Housing Advocates Ass'n, Inc. v. City of Richmond Heights, Ohio*, 209 F.3d 626 (6th Cir. 2000)).

This said, we urge you to apply a good dose of common sense. Unless you are prepared for a time-consuming and potentially expensive challenge by disappointed tenants (who may find willing advocates in a fair housing advocacy group), think long and hard before you refuse to rent a smallish one-bedroom unit to a couple with one child, or a two-bedroom unit to a family with three children, even if each bedroom falls slightly below the 170 square foot minimum for three people . It's unlikely that you'll be challenged by the health and safety authorities if three children occupy one somewhat too small room; it's more likely that you'll face a fair housing complaint if you refuse to rent to this family. In instances of severe overcrowding, of course, you'll need to follow the law, but again, be sure that you don't "draw the line" in a manner that consistently excludes families but not groups of adults.

Are there any situations in which you can safely go below the "two per bedroom plus one" rule? In a word, rarely. You will have to be able to convincingly argue that physical limitations of your infrastructure (such as a limited plumbing system or an extraordinarily small dwelling) justify an occupancy standard that is lower than the state rule. Very few landlords have done so successfully. (*Pfaff v. U.S. Dept. of Housing and Urban Development*, 88 F.3d 739 (9th Cir. 1996).)

It is equally important to maintain a consistent occupancy policy. If you allow three adults to live in a two-bedroom apartment, you had better let a couple with a child live in the same type of unit, or you leave yourself open to charges that you are illegally discriminating.

Children born to tenants. In a non-rent-controlled city, you can evict tenants with month-to-month rental agreements by giving a 30-day notice (60 days for tenants having lived there a year or more), provided you do not have an illegal discriminatory motive. Be careful, though, if your reason for evicting is that a tenant has given birth or adopted. You should not evict for this reason unless the new arrival results in illegal overcrowding based on the two-plus-one rule. You also should realize that any tenants, particularly ones who are expecting a child, are likely to be upset if you ask them to move. They may scrutinize your rental policies and practices toward families with children, and may initiate a complaint with the Department of Fair Employment and Housing or even file a lawsuit.

You may be within your rights to insist on a reasonable rent increase after a child is born, provided:

- Your tenant has only a month-to-month rental agreement rather than a lease fixing rent for a specific period.
- Your property is not subject to rent control. (Some cities, including San Francisco, rule out childbirth as a rationale for a rent increase.)
- The rent increase is reasonable and truly based on the number of occupants in the property.

Legal Penalties for Discrimination

A landlord who unlawfully discriminates against a tenant or prospective tenant may end up in state or federal court or before a state or federal housing agency facing allegations of discrimination.

Showing you how to defend a housing discrimination lawsuit is beyond the scope of this book. With the exception of a suit brought in small claims court, you should see an attorney if a tenant sues you or files an administrative complaint against you for discrimination. Contact your insurance company if a lawsuit or claim is filed against you. You may be entitled to a defense (and perhaps coverage for a settlement or verdict as well) under your comprehensive general liability policy.

A tenant may complain about illegal discrimination by filing a lawsuit in state or federal court, or by filing an administrative complaint with the U.S. Department of Housing and Urban Development (HUD) or the California Department of Fair Employment and Housing (DFEH). Commonly, the federal courts require that the tenant first file a complaint with HUD. Discrimination on grounds not prohibited by federal law, such as marital status or sexual orientation, can generally be taken only to the state court or to California's Department of Fair Employment and Housing. Similarly, HUD usually, but not always, requires that the tenant first file a complaint with the state agency.

State and federal courts and housing agencies that find that discrimination has taken place have the power to:

- Order a landlord to rent a particular piece of property to the person who was discriminated against.
- Order the landlord to pay the tenant for "actual" or "compensatory" damages, including any higher rent the tenant had to pay as a result of being turned down, and damages for humiliation, emotional distress, or embarrassment. The state Fair Employment and Housing Commission cannot award actual damages based on humiliation, emotional distress, and so on; only state or federal courts can award these types of damages. (*Walnut Creek Manor v. Fair Employment and Housing Commission*, 54 Cal. 3d 245, 284 Cal. Rptr. 718 (1991).) Still, the Commission can award damages based on higher rent the tenant had to pay, and punitive damages of up to $1,000 for each illegal act. This rule does not bind federal agencies.

- Make the landlord pay punitive damages (extra money as damages for especially outrageous discrimination) and the tenant's attorney fees.

Under the federal Fair Housing Act, which covers discrimination based on sex, race, religion, disability, family status, and national or ethnic origin, punitive damages may be as high as $16,000 for a first violation and $65,000 for a third violation within seven years. For racial discrimination, however, higher punitive damages are allowed under the Civil Rights Act of 1964. (*Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973); *Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970).) The state's Fair Employment and Housing Commission's power to award punitive damages is limited to $1,000 per violation.

Under California's Unruh Civil Rights Act, triple actual damages may be awarded in a lawsuit for a violation of discrimination laws, and at least $4,000 must be awarded when tenants go to court and win. Small claims courts can award damages of up to their maximum jurisdictional amounts of $10,000. For more information on small claims courts, see *Everybody's Guide to Small Claims Court in California,* by Ralph Warner (Nolo).

RESOURCE

If you wish to know more about complaint procedures, contact HUD or the DFEH. See "Information on Fair Housing Laws," above.

Owner-Occupied Premises and Occasional Rentals

Even small-scale landlords are subject to the fair housing laws. Regularly renting out a single apartment or house, or even half of an owner-occupied duplex, constitutes the operation of a business to which the Unruh Act applies. An owner-occupant of a duplex, triplex, or larger complex is governed by civil rights laws in the renting of the other unit(s) in the building, even though the owner lives in one of the other units, because the owner-occupant is renting out property for use as a separate household, where kitchen or bathroom facilities aren't shared with the tenant. (See *Swann v. Burkett,* 209 Cal. App. 2d 685 (1962), and 58 Ops. Cal. Atty. Gen. 608 (1975).) The state Fair Employment and Housing Act applies as well. The federal Fair Housing Acts apply only to owner-occupied properties of four or more units. (In practical terms, however, this exemption for smaller owner-occupied properties is somewhat irrelevant, since the applicable state laws are more protective than their federal counterparts).

But what about owners who rent to single boarders, or who are one-time or occasional landlords? If you're in one of these categories, some fair housing requirements may not apply, provided you meet certain requirements, as explained in the two sections below.

Rentals to Single Boarders in Single-Family Homes

We have all seen advertisements like this, in newspapers and newsletters and on supermarket bulletin boards: "Widow seeks single, older Christian lady to share her home as a boarder …." Based on what you know about illegal housing discrimination, you might wonder how these advertisements escape prosecution. Isn't the ad above a perfect example of marital, age, religious, and sexual discrimination?

The answer is "Yes." But the reality of the situation is that few spurned boarders, and certainly fewer government agencies, are interested in suing one-person landlords and forcing them to accept a housemate not of their choosing. And state housing law (Government Code §§ 12955(c) & (d) and 12927(c)) does, in any event, make housing preferences perfectly legal as long as there is:

- only one boarder, and
- no discriminatory advertising.

The ban against discriminatory advertising means that the owner must not make any discriminatory "notices, statements or advertisements." As you might expect, this requirement has proved to be quite unworkable. How can the widow communicate her preferences for her boarder without making any "notices, statements or advertisements"?

Perhaps in response to this absurdity, the legislature amended the state Fair Employment and Housing Law to provide that advertisements for a boarder of a certain sex will not be considered a discriminatory act. (Government Code § 12927(2)(B).) Federal law has a similar exception. In other words, the widow

mentioned above would be on solid ground if she mentions only her desire for a female roommate; but her stated preferences for an elderly, single Christian would still, theoretically, be a violation of the fair housing laws.

Occasional Rentals

State fair housing laws also apply to owners who rent out their homes on a one-time or even occasional basis. What if you rent out your home while on a temporary job assignment in another state, or while your family takes an extended summer vacation? What if you're a teacher who rents out your home during every sabbatical—an occasional but regular rental situation?

Unfortunately, the answers to these questions are not very clear. On the one hand, the Unruh Act applies only to "business establishments," which would seem to exclude the sporadic or one-time rental, but possibly not the infrequent-but-regular rental. Before a landlord quickly decides that he is not subject to Unruh, however, it would be prudent to remember that the California Supreme Court has been mandated to apply Unruh "in the broadest sense reasonably possible." (*Burks v. Poppy Construction Company*, 57 Cal. 2d 463, 20 Cal. Rptr. 609 (1962).) Moreover, the Fair Employment and Housing Act applies generally to "owners," and is not restricted to business establishments.

What should careful landlords conclude regarding their fair housing duties? We recommend that you comply with all of the fair housing laws, in your advertisements, statements, and practices.

Managers and Discrimination

If you hire a manager, particularly one who selects tenants, make certain that person fully understands laws against housing discrimination. (See Chapter 6 on landlord liability for a manager's conduct and strategies for avoiding problems in this area.)

You should always let your tenants know that you, as well as your manager, intend to abide by the law, and that you want to know about and will address any fair housing problems that may arise. While this will not shield you from liability if you are sued due to your manager's conduct, it might (if you are lucky) result in the tenant's initial complaint being made to you, not a fair housing agency. If you hear about a manager's discriminatory act and can resolve a complaint before it gets into "official channels," you will have saved yourself a lot of time, trouble, and money.

One way to alert your tenants and prospective tenants to your commitment to the fair housing laws is to include in all ads, applications, and other material given to prospective tenants a section containing your antidiscrimination stance. Prepare a written policy statement as to the law and your intention to abide by it. Post this statement in the manager's office or somewhere on the premises, and give a copy to all prospective tenants.

Sample Statement on Equal Opportunity in Housing

From: Shady Dell Apartments

To: All Tenants and Applicants

It is the policy of the owner and manager of Shady Dell Apartments to rent our units without regard to a tenant's race, ethnic background, sex, age, religion, marital or family status, physical disability, or sexual orientation. As part of our commitment to provide equal opportunity in housing, we comply with all federal, state, and local laws prohibiting discrimination. If you have any questions or complaints regarding our rental policy, call the owner at (phone number).

If, despite your best efforts, you suspect that your manager—whether on purpose or inadvertently—is using unlawful discriminatory practices to select or deal with tenants, you should immediately resume control of tenant selection and property management yourself. Alternatively, this may be the time to shield yourself from potential liability and engage the services of an independent property management company, who theoretically will conduct themselves within the law.

Insurance Coverage for Discrimination Claims

Despite your best efforts to avoid discriminating in the selection and treatment of your tenants, you may find yourself the subject of a fair housing claim. Will your insurance policy cover the cost of defending the

claim and, if you lose, the cost of the settlement or judgment? The answers to these questions depend entirely on two highly variable factors: the wording of your insurance policy and the court decisions, if there are any, about the meaning of the words. In short, there are no answers that will apply to everyone, but we can alert you to the issues that arise in every situation. At the very least, knowing how insurance companies are likely to approve or deny defense and judgment costs should help you evaluate your own policy.

In this section we'll review the kinds of insurance coverage that most owners are likely to carry. Next, we'll discuss the key insurance terms ("bodily injury," "occurrence," and "personal injury") that are called into question when coverage for discrimination is involved. It is beyond the scope of this book to conclusively analyze every possible policy, but at the very least it will be clear to every landlord that since insurance coverage for discrimination claims is far from assured, your need to prevent fair housing violations in your business must be taken extremely seriously.

RELATED TOPIC

Chapter 12 discusses broad types of liability insurance, coverage for managers and other employees, and coverage for injuries suffered as a result of defective conditions on the property.

Typical Liability Insurance Policy

Most owners of residential rental property carry a comprehensive liability insurance policy, which typically includes business liability coverage. With this type of coverage, the insurance company agrees to pay on your behalf all sums that you are legally obligated to pay as damages "for bodily injury, property damage or personal injury caused by an occurrence to which this insurance applies." The policy will generally define the three key terms "bodily injury," "occurrence," and "personal injury." The meaning of these terms in the context of a discrimination claim will determine whether the insurance company will cover any particular defense and the claim. Let's look at them more closely.

The Insurance Company's Duty to Defend: Broader Than the Duty to Cover

When you purchase liability insurance, you have bought two things: the promise of the insurance company to defend you if you are sued for an act that arguably falls within the coverage of the policy, and their promise to settle or pay the damage award if you lose. But sometimes (as is the case in fair housing claims), it is unclear whether, assuming you lose the case, your policy covers the conduct that gave rise to the claim. When this happens, your insurance company will usually defend you, but they may reserve the right to argue about whether they are obligated to pay the damages if the case is lost.

Definition of "Bodily Injury"

Discrimination complaints rarely include a claim that the victim suffered a physical injury at the hands of the landlord or manager. It is far more likely that the tenant or applicant will sue for the emotional distress caused by the humiliation of the discriminatory act. Is a claim for emotional distress covered under the policy's definition of "bodily injury"?

"Bodily injury" is typically defined as injury, disease, or sickness. In a case alleging a violation of the federal fair housing laws brought in federal court in California, the owner and the insurance company argued about whether the policy could cover the injury that the plaintiff (the tenant) was claiming. The owner was able to convince the court that the policy would apply to the tenant's claim of emotional distress because the tenant had physical manifestations (dry throat and stomach cramps) that accompanied the mental distress. (*State Farm Fire & Cas. Co. v. Westchester Investment Co.*, 721 F.Supp. 1165 (C.D. Cal. 1989).) In short, the court concluded that, if proved, the emotional distress was an "injury" because there were more than mental symptoms. Keep in mind, however, that this ruling applies only to federal fair housing cases. California state courts, which typically hear state claims (those brought under the state Fair Employment and Housing Act, Unruh, and others), are not bound by this federal court ruling.

Definition of "Occurrence"

Your insurance company will defend and pay out on a claim if it is caused by an occurrence to which the policy applies. An "occurrence" is typically defined as an accident, the results of which are neither expected nor intended from the standpoint of the insured (the property owner). So, even if you make it past the emotional-distress-isn't-bodily-injury hurdle, your insurance company may successfully deny coverage if it can convince a judge that an act of discrimination is not an "occurrence" under the policy.

An insurance company can easily argue that an act of discrimination—like turning away a minority applicant—cannot be considered an "occurrence," since it is by definition intentional, not accidental. In California, courts have ruled that an intentional act is not an "accident" that would bring the action within the policy. (*Commercial Union Insurance Company v. Superior Court of Humboldt County*, 196 Cal. App. 3d 1205, 242 Cal. Rptr. 454 (1987); see also *Royal Globe Insurance Company v. Whitaker*, 181 Cal. App. 3d 532, 226 Cal. Rptr. 435 (1986).)

In one case, however, where it was the manager's act of discrimination that formed the basis of the complaint, the owner was able to successfully argue that the alleged negligent supervision of the manager constituted the "accident" necessary to bring the conduct within the scope of the policy. (*State Farm Fire & Cas. Co. v. Westchester Investment Co.*, 721 F.Supp. 1165 (C.D. Cal. 1989).) This theory wouldn't work if the owner herself were the one who allegedly committed the fair housing violation.

Definition of "Personal Injury"

Now that we've explained how an insurance company might deny coverage because the discrimination complaint claims nonphysical, intentional injury, we have some possibly better news. Insurance policies also typically provide coverage for "personal injury," or an injury that arises out of the conduct of your business. Personal injuries typically include false arrest, libel, slander, and violation of privacy rights; they also include "wrongful entry or eviction or other invasions of the right of private occupancy." As you can see from this definition, personal injuries include things that are neither bodily injuries nor accidental. And the definition includes some offenses, like libel, that seem somewhat similar to discrimination. Why, then, wouldn't a discrimination claim be covered under a policy's definition of "personal injury"?

The answer lies in the legal meaning of the phrase "wrongful entry or eviction or other invasions of the right of private occupancy," which is part of the definition of "personal injury." Does an act of discrimination fit within this phrase? Very few courts have addressed this question, but of those that have, the answers are quite mixed. For example, coverage has been denied on the grounds that "discrimination" is a specific wrong and, had the insurance company intended to cover discrimination, it would have specifically mentioned it (as it did with the terms libel, eviction, and the others). Coverage for discrimination claims by applicants who have been turned away has, however, been allowed by one federal court in California in a case alleging a violation of the federal Fair Housing Act. (*State Farm Fire & Cas. Co. v. Westchester Investment Co.*, 721 F.Supp. 1165 (C.D. Cal. 1989).)

In sum, there are at least three ways that insurance companies can deny coverage, if not also the defense, of a fair housing claim and award: They can claim that the discriminatory act resulted in emotional distress, which is not a type of bodily injury; they can argue that an act of discrimination was intentional, and thus not an accidental occurrence to which the policy applies; and they can argue that discrimination is not one of the personal injuries that are covered by the policy. We suggest that you give the matter some thought when choosing a broker and negotiating your policy; but by far the best use of your energy is to make sure that your business practices do not expose you to these claims in the first place.

Discrimination and Public Policy

An insurance company will occasionally argue that it should not have to cover a landlord's intentional acts of discrimination because discrimination is an evil act that someone should not be able to insure against. While this argument has some persuasive aspects—discrimination is, indeed, contrary to public policy—it falls apart when you acknowledge that all sorts of other intentional bad acts (like libel and slander) are perfectly insurable. Courts have not been persuaded by the "public policy" argument.

CHAPTER 10

Cotenants, Subtenants, and Guests

Conscientious landlords go to a lot of trouble to screen prospective tenants. All those sensible precautions, however, may do you no good if unapproved tenants move in, in addition to or in place of the people you chose. You may have trouble getting the new tenants to pay rent or pay for damage to the unit. And, if worse comes to worst, you may have a tough time evicting them.

Fortunately, you can usually avoid these problems, and others, by spelling out cotenants' and subtenants' rights and responsibilities in your lease or rental agreement.

Common Definitions

Cotenants. Two or more tenants who rent the same property under the same lease or rental agreement, both being jointly liable for the rent and other terms of the agreement. Roommates and couples who move in at the same time are generally cotenants.

Subtenant. Someone who rents all or part of the premises from a tenant (not the landlord). The tenant continues to exercise some control over the rental property, either by occupying part of the unit or intending to retake possession at a later date.

Sublease. A written or oral agreement by which a tenant rents to a subtenant.

Roommates. Two or more unrelated people living under the same roof and sharing rent and expenses. A roommate may be a cotenant or a subtenant.

Assignment. The transfer by a tenant of all the rights of tenancy to another, who is the "assignee."

RELATED TOPIC

Our form agreements (Chapter 2) spell out these respective rights and responsibilities by:

- limiting the number of people who can live in the rental property (Clause 3)
- allowing only the persons whose names appear on the lease or rental agreement, along with their minor children, to live in the property (Clauses 1 through 3)
- requiring the landlord's written consent in advance for any sublet, assignment of the lease or rental agreement, or for any additional people to move in (Clause 10), and
- allowing tenants' guests to stay no more than ten days in a six-month period (Clause 3).

Renting to More Than One Tenant

When two or more people rent property together, and all sign the same rental agreement or lease (or enter into the same oral rental agreement when they move in at the same time), they are cotenants. Each cotenant shares the same rights and responsibilities under the lease or rental agreement. Neither cotenant may terminate the other's tenancy.

Cotenants' Responsibilities

In addition to having the same rights and responsibilities, each cotenant is independently obligated to abide by the terms of the agreement. All cotenants are legally responsible to the landlord.

Paying Rent

Each cotenant, regardless of agreements they make among themselves, is liable for the entire amount of the rent.

> **EXAMPLE:** James and Helen sign a month-to-month rental agreement for a $1,500 apartment. They agree between themselves to each pay half of the rent. After three months, James moves out without notifying Helen or the owner, Laura. As one of two cotenants, Helen is still legally obligated to pay all the rent (although she might be able to recover James's share by suing him in small claims court).
>
> Laura has three options if Helen can't pay the rent:
>
> - Laura can give Helen a Three-Day Notice to Pay Rent or Quit, and follow through with an unlawful detainer (eviction) lawsuit if Helen fails to pay the rent or move within the three days.
> - If Helen offers to pay part of the rent, Laura can legally accept it, but Helen is still responsible for the entire rent. (It's common for roommate cotenants to offer only "their portion" of the rent, when in

fact they're all jointly liable for it all; see Chapter 3 for a detailed discussion of accepting partial rent payments.)

- If Helen wants to stay and find a new cotenant, Laura can't unreasonably withhold her approval. She should, however, have the new cotenant sign a rental agreement.

Violations of the Lease or Rental Agreement

In addition to paying rent, each tenant is responsible for any cotenant's action that violates any term of the lease or rental agreement—for example, if one cotenant seriously damages the property, or moves in an extra roommate or a pit bull, contrary to the lease or rental agreement, all cotenants are responsible. The landlord may terminate the entire tenancy with the appropriate three-day notice, even if some of the cotenants objected to the rule-breaking or weren't consulted by the prime offender.

If you have to evict a tenant for a breach other than for nonpayment of rent (in which case you would evict all the tenants), you must decide whether to evict only the offending cotenant or all of them. Your decision will depend on the circumstances. You obviously don't want to evict an innocent cotenant who has no control over the troublemaker who just brought in a pit bull—assuming the innocent one can still shoulder the rent after the roommate is gone. On the other hand, you may wish to evict all cotenants if they each share some of the blame for the problem.

Disagreements Among Cotenants

Usually, cotenants orally agree among themselves to split the rent and to occupy certain parts of the property, such as separate bedrooms. Not infrequently, this sort of arrangement goes awry. If the situation gets bad enough, the tenants may start arguing about who should leave, whether one cotenant can keep the other out of the apartment, or who is responsible for what part of the rent.

The best advice we can give landlords who face serious disagreements between cotenants is not to get involved, as a mediator or otherwise. If one or more cotenants approach you about a dispute, explain that they must resolve any disagreements among themselves. Remind them that they are each legally obligated to pay the entire rent, and that you are not affected by any agreement they have made among themselves.

If one tenant asks you to change the locks to keep another cotenant out, tell the tenant that you cannot legally do that. If the tenant fears violence from a cotenant, refer the tenant to the local superior court, where the tenant can seek a restraining order. A landlord may not lock out one tenant unless a court has issued an order that the tenant stay out.

There is one kind of disagreement between co-occupants that can affect you, however, to which you might want to respond. If one occupant terminates a lease and leaves because a co-occupant has committed domestic violence, stalking, or sexual assault on her or him, as is allowed under CC § 1946.7, you could seek to evict the other occupant staying behind, using a three-day notice, on the basis that he (or she) has committed a legal nuisance. (See Chapter 19 for more on domestic violence situations.)

Subtenants and Sublets

A subtenant is a person who rents all or part of the property from a tenant and does not sign the rental agreement or lease with the landlord. A subtenant is someone who either:

- rents (sublets) an entire dwelling from a tenant who moves out temporarily—for the summer, for example, or
- rents one or more rooms from the tenant, who continues to live in the unit.

If a tenant moves out permanently and transfers all his rights under the lease or rental agreement to someone else, that new tenant is not a subtenant; this person is an "assignee."

Subtenants' Responsibilities

The tenant functions as the subtenant's landlord. The subtenant is responsible to the tenant for whatever rent they've agreed on between themselves. The tenant, in turn, is the one responsible to the landlord for the rent. Even a tenant who has temporarily moved out and sublet the property is liable to the landlord—this is true even if the landlord, for convenience, accepts

rent from the subtenant. Doing so does not make the subtenant the landlord's tenant.

A subtenant has an agreement only with the tenant. This is true even if the subtenant is approved by the landlord. Because the subtenant does not have a separate agreement with the landlord, the subtenant does not have the same legal rights and responsibilities as a tenant.

The subtenant's right to stay depends on the tenant's right to stay. So if you can legally evict the tenant, then you can evict the subtenant. For example, if the lease or rental agreement prohibited the tenant from subleasing without the landlord's consent, and the tenant brought in a subtenant anyway, the tenant would be in breach of the lease. The landlord could evict the tenant for this breach, and since the subtenant's right to stay depends on the tenant's right to stay, the landlord could evict the subtenant, also.

If a Tenant Wants to Sublet

Our lease and rental agreements require the tenant to obtain the landlord's written consent in advance in order to sublet or bring in additional people to live in the unit. (See Chapter 2, Clause 10.) This will let you control who lives in your property. (If you want to collect damages against a tenant with a lease or rental agreement who leaves early, you cannot unreasonably withhold your consent to sublet. See Chapter 19 for a discussion of this concept of the landlord's obligation to mitigate damages.)

Suppose you wish to accommodate a tenant who wants to sublet for six months while out of the area, and you approve the proposed subtenant. You may want to insist on signing a written agreement with the new person for the six-month period that the original tenant plans to be away. That makes the new person a regular tenant who is liable to you for the rent, not a subtenant who is liable to someone else (the tenant).

You should also get the original tenant to sign a document, such as the sample Termination of Tenancy Agreement shown below, stating that the original tenant agrees to terminate his tenancy. This will terminate the tenancy so that you can rent the property to the new tenant. Then, when the first tenant returns and the second leaves, you can again rent to the first, using a new agreement.

Termination of Tenancy Agreement

I, _____*name of tenant*_____,

agree that my tenancy at _____*address*_____,

entered into on _____*date of original agreement*_____, 20xx,

will terminate _____*effective date of termination*_____, 20xx.

_____

Signature of tenant

Tenant

_____

Date

If the original tenant is uneasy about you renting to the subtenant directly, and asks you how he will get the unit back if the new tenant is reluctant to leave at the end of six months, as long as your lease or rental agreement prohibits subletting, your answer should be a polite version of, "That's your problem." Think of it this way: By asking you the question, your tenant admits that he doesn't completely trust the new tenant, even though he selected that person. You don't want to be in the middle of this type of situation. It's better that the original tenant bear the brunt of any problem—if there is one—than you.

If, on the other hand, you want to hold the original tenant's place and allow him to come back after the six months, you may decide to consent to the sublet. Although the subtenant won't be liable to you for the rent, you can still evict the subtenant if the rent isn't paid. If the rent continues to be paid but the subtenant won't leave after the six months, it's up to the tenant to evict the subtenant.

CAUTION

House sitters are subtenants. Even if your tenant doesn't collect rent from a house sitter, that person is legally still a subtenant. Treat a house sitter the way you'd treat any proposed subtenant: Remind the tenant that your written consent is required and, if you have any qualms about the ability of the tenant to keep paying the rent, insist that the house sitter become a regular tenant, as explained above.

When a Tenant Brings in a Roommate

Suppose love (or loneliness) strikes your tenant and he wants to move in a roommate? Assuming your lease or rental agreement restricts the number of people who can occupy the unit (as ours does in Clause 3), the tenant must get your written permission for additional tenants.

San Francisco's Master Tenants

A San Francisco ordinance has created the legal category of "master tenant" in shared housing situations. A master tenant (or tenants) is the person who signs the lease or rental agreement with and is responsible to the landlord. This master tenant then has the legal authority to rent to others, unless, of course, the lease or rental agreement (as ours do) prohibits subletting without the landlord's prior written consent.

Normally, landlords are well advised to make late-arriving subtenants full-fledged cotenants, to remove a layer of management and make every tenant equally answerable to the landlord. But under San Francisco's rent control ordinance, landlords are prohibited from raising the rent to market levels as long as an original tenant—the master tenant—still remains. If the landlord adds the new occupant as a cotenant, and the original master tenant leaves before the new cotenant, the landlord will not be able to raise the rent to market levels. For this reason, it's to the landlord's advantage to leave any new occupant in the position of being a subtenant, because only then will the landlord preserve his right to raise the rent to market rates if the original, master tenant leaves before any later-arriving subtenant.

Giving Permission for a New Roommate

Obviously, your decision to allow a new cotenant should be based on whether you believe the new person will be a decent tenant. If your tenant proposes to move in a new person who has a good credit record and isn't otherwise objectionable, and there is enough space in the unit, you may want to allow the new roommate. (See Chapter 9 for overcrowding standards that you may lawfully impose.) If the new occupant is a spouse or registered domestic partner and there's no problem with overcrowding, be careful before you say no. Refusal to allow your tenant to live with a spouse or registered domestic partner could be considered illegal discrimination based on marital status.

Raising the Rent

When an additional tenant comes in, it is perfectly reasonable for you to raise the rent (or the security deposit), if it is allowed under local rent control laws. To accomplish this, have both the original and new occupants sign a new lease or rental agreement at the higher rent, as cotenants. Failing that, if it's a month-to-month rental agreement, you could increase the rent by a 30-day notice (60 days' for a rent increase over 10%), provided you don't care about the new occupant being a subtenant who is not liable to you directly. Obviously, more people living in a residence means more wear and tear and higher maintenance costs in the long run. Also, a rent increase when an additional tenant moves in should cause little hardship to the current occupants, who will now have someone else to pay part of the rent. The new rent should be in line with rents for comparable units occupied by the same number of persons.

If the existing tenant has a fixed-term lease, you will have to change the lease to raise the rent. As long as the lease allows a set number of tenants and requires your permission before the tenant moves in new people, you can legally withhold your permission until the lease is changed to provide a reasonable rent increase. If the property is subject to rent control, however, you may need to petition the local rent control board for permission to increase the rent based on an increased number of occupants. (For more on rent control, see Chapter 4.)

Prepare a New Rental Agreement or Lease

If you allow a new person to move in, make sure the newcomer becomes a full cotenant. You'll need to prepare a new lease or rental agreement for signature by all tenants. Do this before the new person moves in, to avoid the possibility of a legally confused situation.

EXAMPLE: Chung, the landlord, rents to Suzy. Olaf moves in later without signing a rental agreement or lease. Because Olaf has not entered into a

contract with Chung, he starts with no legal rights or obligations to Chung. His obligations to Suzy, as her subtenant, depend on their agreement regarding the rent and Olaf's right to live in the apartment. Suzy is completely liable for the rent and for all damage to the premises, whether caused by Olaf or herself, because she, not Olaf, entered into a contract with Chung. Olaf would only be liable for damage he negligently caused, if Chung could prove that Olaf was the one who caused the damage.

Guests and New Occupants You Haven't Approved

Our rental agreement and lease allow guests to stay overnight up to ten days in any six-month period, without your written permission. (See Chapter 2, Clause 3 of the proposed agreement.) The value of this clause is that a tenant who tries to move someone in for a longer period has violated the lease or rental agreement, which gives you grounds for termination (discussed below).

If a tenant simply moves a roommate in on the sly—despite the fact that your lease or rental agreement prohibits it—or it appears that a "guest" has moved in clothing and furniture and has begun to receive mail at your property, take decisive action right away. If you don't take action, the roommate will turn into a subtenant or a cotenant—one you haven't screened or approved of.

A subtenant, despite not having all the rights of a tenant, is entitled to the same legal protection, to which a tenant is entitled. Such an individual must be:

- served a separate Three-Day Notice to Pay Rent or Quit
- named in an eviction lawsuit, and
- served with legal papers.

An unauthorized resident creates a lot more hassle for you in the event of an eviction, and a tremendous hassle if you never learn the resident's name. (For details on the eviction process, see Chapter 18 and *The California Landlord's Law Book: Evictions*.)

You may want to make the roommate or guest a cotenant by preparing a new lease or rental agreement. You may also increase the rent or the security deposit unless that's prohibited by any applicable rent control ordinance. If you do not want to rent to the guest or roommate and if that person remains on the premises, or if that person refuses to sign a lease or rental agreement (asking to be a "permanent guest"), make it clear that you will evict all occupants based on breach of the occupancy terms of the lease.

If your tenant has a month-to-month tenancy in an area where there is no rent control, and the tenant is not renting under a federal housing program, you can always give the tenant a 30-day notice to leave, without giving any reason. (We discuss terminations of tenancy in Chapter 18.)

RENT CONTROL

If your property is in a rent-controlled area or other city requiring just cause for eviction, see Chapters 4 and 18. Generally, moving in an illegal tenant should qualify as just cause to get rid of the tenant under most rent control ordinances, because it is a significant violation of the terms of the tenancy. However, you can't evict a tenant until you first give notice of the problem (in this case, the additional person) and a chance to cure it (get the new person to leave).

CAUTION

Don't discriminate against guests. You cannot legally object to a tenant's frequent overnight guests based on your religious or moral views. (See Chapter 9.) It is illegal to discriminate against unmarried couples, including gay or lesbian couples, in California.

If a Tenant Leaves and Assigns the Lease to Someone

A lease or rental agreement gives a tenant certain rights—the most important, obviously, is to live in the premises. If the tenant permanently gives or sells all these rights to someone else, it's called an "assignment," because the tenant has legally assigned all rights to someone else. For example, a tenant who signs a year lease may leave after six months and assign the rest of the term to a new tenant.

The lease and rental agreements at the back of this book (Clause 10) forbid assignments without the owner's consent.

Assignments aren't quite as bad as sublets, however, as far as a landlord is concerned. The new occupant (assignee) is directly responsible to the landlord for everything the original tenant was liable for—even without an agreement between the assignee and the landlord. (CC § 822.) The previous occupant (assignor) remains liable to the landlord also, unless the landlord agrees otherwise in writing.

Nevertheless, even if your lease or rental agreement allows a tenant to assign his rights, it's better to have the new tenant sign a new lease or written rental agreement. That will make your legal relationship with the new tenant clear.

If you unreasonably withhold your consent for a tenant to assign her rights—for example, six months left under a year-long lease—you may lose your right to recover the rest of the rent due under the lease. A landlord is obligated to limit the original tenant's responsibility for the remaining rent by renting to a suitable new tenant as soon as possible. (This is discussed in detail in Chapter 19.) If you turn down an acceptable prospect found by the tenant, you won't have a strong case if you want to sue the original tenant for not paying the rent for the rest of the lease term.

CHAPTER

11

The Landlord's Duty to Repair and Maintain the Property

FORMS IN THIS CHAPTER

Chapter 11 includes instructions for and samples of the following forms:

- Resident's Maintenance/Repair Request
- Time Estimate for Repair
- Semiannual Safety and Maintenance Update, and
- Agreement Regarding Tenant Alterations to Rental Unit.

The Nolo website includes downloadable copies of these forms. See Appendix B for the link to the forms in this book. Chapter 11 also includes a sample letter suggesting a compromise with a tenant on rent withholding, and a letter you can send a tenant who threatens to withhold rent. You can use these sample letters as templates in preparing these types of letters, if necessary.

The tenant's responsibility to pay rent depends on the landlord's fulfilling his legal duty to maintain the property and keep it in good repair. Obviously, then, keeping up rental property should be something every landlord takes seriously.

This chapter describes the specific housing standards and laws landlords must follow, and outlines strategies for dealing with tenants who threaten to or do withhold rent because of the property's condition. It also provides practical advice on how to stay on top of your repair and maintenance needs, and minimize financial penalties and legal problems.

RELATED TOPIC

Issues regarding the landlord's duty to repair and maintain the property are also covered in other chapters. See:

- Lease and rental agreement provisions on landlords' and tenants' responsibilities for repair and maintenance: Chapter 2
- Delegating maintenance and repair responsibilities to a manager: Chapter 6
- Highlighting repair and maintenance procedures in a move-in letter and using a Landlord/Tenant Checklist to keep track of the premises before and after the tenant moves in: Chapter 7
- Landlord's liability for a tenant's injuries from defective and dangerous housing conditions: Chapter 12
- How to avoid illegal retaliatory evictions after tenants complain about housing conditions or withhold rent: Chapter 15
- Conducting a final inspection of the rental unit for cleaning and damage repair before the tenant moves out: Chapter 20
- Evicting a tenant who damages the property: Chapter 18.

State and Local Housing Standards

Several state and local laws set housing standards for residential rental property. These laws require landlords to put their rental apartments and houses in good condition before renting them, and keep them that way while people live there. Here is a list of the laws you need to know about.

California's State Housing Law. Also known as the State Building Standards Code, this law lists property owners' general obligations to keep residential property in livable condition. (H&S §§ 17900–17997.8, including regulations contained in Title 25 of the California Code of Regulations.) It refers, in turn, to very specific housing standards contained in the Uniform Housing Code enforced by local governments.

Industry codes. Several "industry codes" also set habitability standards. Most cities and counties have adopted and enforce the Uniform Housing Code (UHC), which contains very specific housing standards—for example, regarding the heating system. The UHC is available in most libraries and may be purchased from the International Code Council (ICC). The Los Angeles District Office is at 5360 Workman Mill Road, Whittier, CA 90601-2298, 888-ICC-SAFE. The ICC website is at www.iccsafe.org. A few cities, including Los Angeles, have enacted ordinances with additional requirements. (Besides the UHC, there are Uniform Building, Plumbing, and Mechanical Codes, and a National Electrical Code.) Check with the building inspector or health department of the city or county where you own rental property to see which local laws apply to your property.

Civil Code Sections 1941.1–.3. These state statutes list the minimum legal requirements for a rental dwelling to be "tenantable," or legal to rent to tenants. If your property doesn't meet these requirements—for example, if it has a leaking roof—a tenant may be excused by a judge from paying all or part of the rent. Many of the Section 1941.1–.3 requirements overlap those set forth in the State Housing Law and local ordinances. (For example, Civil Code § 1941.1 requires only that "hot water" be available, while the UHC requires that the water heater be able to heat the water to 110° Fahrenheit.)

Civil Code Section 1941.4 and Public Utilities Code Section 788. These statutes make residential landlords responsible for installing a telephone jack in each of their rental units and placing and maintaining inside phone wiring.

Health and Safety Code Section 13113.7. This state statute requires all units in multiunit buildings to have smoke detectors. The details are in the California Building Code (see below).

Health and Safety Code Sections 17926 & 17926.1. A landlord must install a carbon monoxide detector, approved and listed by the State Fire Marshal pursuant to Health and Safety Code Section 13263, in each dwelling unit having a fossil fuel burning heater or appliance, fireplace, or an attached garage, on or before July 1, 2011, for single-family dwellings; and on or before January 1, 2013, for all other dwellings. If a tenant becomes aware that the device is not working and notifies the landlord, the landlord must fix or replace it.

Health and Safety Code Section 13220. This state statute requires landlords to provide information on emergency procedures in case of fire to tenants in multistory rental properties. The statute applies to apartment buildings that are two or more stories high and contain three or more rental units that open into an interior hallway or lobby area. Landlords must post emergency information on signs using international symbols at every stairway area and in other specified places throughout the building.

How Many Smoke Detectors Must I Install?

The California Building Code gives you the details on where you must install smoke detectors. (Calif. Building Code § 310.9.)

Install at least one smoke detector in every bedroom and one outside in the hallway. Install one detector on each level of the home, if you have a second floor or basement. On floors without bedrooms, detectors should be installed in or near living areas, such as dens, living rooms, or family rooms. Do not install them in the kitchen or close to the shower because steam may trigger frequent false alarms.

You also need to think about where, exactly, to place the device. Generally, install detectors on the ceiling at least four inches out from the wall. If you must install them on the wall, place them at least four inches down from the ceiling but no lower than 12 inches from the ceiling. (Keep them high because smoke rises.) Place smoke detectors at the top of each stairwell and at the end of each long hallway. Do not place them any closer than within three feet of an air supply register that might recirculate smoke resulting in a delayed alarm. Be sure to keep the detector away from fireplaces and wood stoves to avoid false alarms.

Enforcement of Housing Standards

The State Housing Law and local housing codes are enforced by the building department of the city (the county, in unincorporated areas). Violations creating immediate health hazards, such as rats or broken toilets, are handled by the county health department. Fire hazards, such as trash in the hallways, are dealt with by the local fire department.

If you establish a system for tenants to regularly report on maintenance and repair needs, and if you respond quickly when complaints are made (we show how below), you may never have to deal with these local agencies.

Inspections by Local Agencies

A local building, health, or fire department usually gets involved when a tenant complains. The agency inspects the building and, if it finds problems, issues a deficiency notice that requires the owner to remedy all violations, including any the tenant didn't complain about. Owners of residential rental property in Los Angeles County who have received certain deficiency notices from local building or health department officials must register their substandard property with the county within ten days. A landlord who fails to comply can face civil and criminal penalties—including not being able to evict a tenant of the substandard property for nonpayment of rent. (H&S §§ 17997–17997.5.)

In some cases, a tenant's complaint about a single defect can snowball, with the result that several agencies require the landlord to make needed repairs. For example, say a tenant complains to the health department about a lack of heat. During its inspection, the health department observes an unsafe stove and an unventilated bathroom. The health department notifies the fire department about the stove and tells the building department about the bathroom, which results in inspections by both departments.

Some cities don't wait for tenants to complain. As discussed in Chapter 13, they routinely inspect rental property for compliance with local law.

State and local agencies don't enforce Civil Code § 1941.1, which requires a rental unit to be "tenantable."

It is enforced by the tenant through the withholding of rent and other remedies, as described below.

Failure to Comply With Repair Orders

If you fail to make any repairs demanded by local officials, the city or county may bring a lawsuit, or even criminal charges, against you. Violations of the State Housing Law are misdemeanors, punishable by a fine of up to $1,000 ($5,000 for a second offense within five years) or up to six months' imprisonment, or both. (H&S §§ 17995–17995.5.) For very serious violations due to "habitual neglect of customary maintenance" that endanger "the immediate health and safety of residents or the public" within a five-year period, the maximum penalty is a $5,000 fine and up to a year in jail. (In 2000, a San Jose landlord who repeatedly refused to attend to serious repair problems was sentenced to live in her own apartment house. For 60 days, she lived in a roach-infested two-bedroom with a broken oven, a stove with one working burner, faulty electrical wiring, a broken window, leaky pipes, and crumbling ceiling. It rented for $1,100 a month. (*San Francisco Chronicle*, October 3, 2000).)

You may be required to pay "relocation benefits" to tenants who must move in order for you to effect repairs. (H&S § 17980.7.) (The tenant's right to move out is discussed below.) If the court finds that the substandard conditions constitute a nuisance (a serious threat to safety or morals), it may order the building to be razed or removed. You may even be disallowed from claiming state income tax write-offs associated with the property, including interest, taxes, and depreciation on the building. (California Revenue and Taxation Code § 24436.5.)

In addition to penalties assessed by governmental agencies, the tenant may sue you if you don't make necessary repairs. Tenants can ask the judge to order the landlord to make repairs (and reduce rent until repairs are completed), or even to appoint a receiver who would be authorized to collect rents, manage the property, and supervise the necessary repairs. Even after the repairs are completed and the receiver discharged, the court can order you to report to it concerning the condition of the building for up to 18 months. (H&S § 17980.7.)

A tenant may also withhold rent if you fail to make necessary repairs. In fact, if you haven't made repairs within 35 days after being ordered to by a government agency, the tenant is automatically entitled to withhold rent.

Under the Rent Escrow Account Program (REAP), Los Angeles tenants may in some circumstances pay rent directly into a city-managed escrow account if the owner fails to make repairs ordered by the local building or health department within 60 days after receiving written notice to repair. Both the city and county of Sacramento have similar ordinances, but they are seldom used.

Delegating Repair and Maintenance Responsibilities to Tenants

Any lease or written rental agreement provision by which a tenant agrees to give up his rights to a habitable home is illegal and unenforceable. (*Green v. Superior Court,* 10 Cal. 3d 616 (1974).) Nor can a landlord escape the duty to keep rented property in good repair and properly maintained by trying to make it the tenant's responsibility.

But the tenant and landlord can agree that the tenant is solely responsible for repairs and maintenance in exchange for lower rent. (CC § 1942.1. Also see *Knight v. Hallsthammar,* 29 Cal. 3d 46 (1981).) (See Clause 17 of our form lease and rental agreements in Chapter 2.) Major maintenance and repair duties are rarely, however, appropriate candidates for delegation, since these jobs will generally involve a significant amount of money and will require expertise that the average tenant is not likely to possess. In any delegation situation, monitor the situation to make sure that your tenant-repairperson chooses proper materials and procedures.

See the text below for a discussion of a tenant's rights to withhold rent and sue when a landlord fails to keep the rental property in a habitable condition. For a related topic—setting repair and maintenance responsibilities for a resident manager—see Chapter 6.

CAUTION

If you discover a meth lab (or the remnants of one) in a tenant's unit, be extremely careful and thorough in your clean-up efforts. The chemicals used to make this illegal drug are extremely dangerous and harmful to health. See "Clean Meth Labs Carefully," in Chapter 18.

Housing Standards Under State Law

Rental housing standards established by Civil Code §§ 1941.1–.3, the State Housing Law and its implementing regulations, and the Uniform Housing Code (UHC) include:

- A structure that is weatherproof and waterproof; there must be no holes or cracks through which wind can blow, rain can leak in, or rodents can enter (CC § 1941.1).
- A plumbing system in good working order (free of rust and leaks), connected to both the local water supply and sewage system or septic tank. The landlord is not responsible for low pressure, contamination, or other failures in the local water supply—his obligation is only to connect a working plumbing system to the water supply (CC § 1941.1).
- A hot water system capable of producing water of at least 110 degrees Fahrenheit (CC § 1941.1 and UHC).
- A heating system that was legal when installed (CC § 1941.1), and which is maintained in good working order and capable of heating every room to at least 70 degrees Fahrenheit (UHC).
- An electrical system that was legal when installed, and which is in good working order and without loose or exposed wiring (CC § 1941.1). There must be at least two outlets, or one outlet and one light fixture, in every room but the bathroom (where only one light fixture is required). Common stairs and hallways must be lighted at all times (UHC).
- A lack of insect or rodent infestations, rubbish, or garbage in all areas (CC § 1941.1). With respect to the living areas, the landlord's obligation to the tenant is only to rent out units that are initially free of insects, rodents, and garbage. If the tenant's housekeeping attracts pests, that's not the landlord's responsibility. However, the landlord is obliged to keep all common areas clean and free of rodents, insects, and garbage at all times.
- Enough garbage and trash receptacles in clean condition and good repair to contain tenants' trash and garbage without overflowing before the refuse collectors remove it each week (CC § 1941.1).
- Floors, stairways, and railings kept in good repair (CC § 1941.1).
- The absence or containment of known lead paint hazards (deteriorated lead-based paint, lead-contaminated dust or soil, or lead-based paint disturbed without containment (CC § 1941.1; H&S § 17920.10). See Chapter 12 for more information on lead hazards.)
- Deadbolt locks on certain doors and windows, effective July 1, 1998 (CC § 1941.3). Your duty to provide locks is explained in more detail in Chapter 12.
- Ground fault circuit interrupters for swimming pools (effective July 1, 1998), and antisuction protections on wading pools, excepting single-family residence rentals (effective January 1, 1998 for new pools and January 1, 2000 for existing pools) (H&S §§ 116049.1 and 116064).

Each rental dwelling must, under both the UHC and the State Housing Law, have the following:

- A working toilet, wash basin, and bathtub or shower. The toilet and bathtub or shower must be in a room that is ventilated and allows for privacy.
- A kitchen with a sink, which cannot be made of an absorbent material such as wood.
- Natural lighting in every room through windows or skylights having an area of at least one-tenth of the room's floor area, with a minimum of 12 square feet (three square feet for bathroom windows). The windows in each room must be openable at least halfway for ventilation, unless a fan provides for ventilation.
- Safe fire or emergency exits leading to a street or hallway. Stairs, hallways, and exits must be litter free. Storage areas, garages, and basements must be free of combustible materials.
- Every apartment building having 16 or more units must have a resident manager (25 CCR § 42).

Civil Code § 1941.4 and Public Utilities Code § 788 make residential landlords responsible for installing a telephone jack in their rental units, and for placing and maintaining inside phone wiring.

Health and Safety Code § 13113.7 requires smoke detectors in all multiunit dwellings, from duplex on up.

Health and Safety Code §§ 17916 and 17926.1 require carbon monoxide detectors in all dwelling units, and Health and Safety Code § 13220 requires landlords to provide information on emergency procedures in all multistory buildings.

Maintenance of Appliances and Other Amenities

State and local housing laws deal with basic living conditions only—heat, water, and weatherproofing, for example. They do not deal with "amenities"—other facilities that are not essential but make living a little easier. Examples are stoves, refrigerators, drapes, washing machines, swimming pools, saunas, parking places, intercoms, and dishwashers. The law does not require the landlord to furnish these things, but a landlord who does might be required to maintain or repair them—not by state and local housing laws, but by the landlord's own promise to do so.

The promise might be express or implied. When the lease or rental agreement says that the landlord will repair or maintain certain items, such as appliances, the promise is express. When the landlord (or a manager or agent) says or does something that seems to indicate the landlord would be responsible for repairing or maintaining an item or facility, the promise is implied. Here are some typical examples of implied promises.

EXAMPLE 1: Tina sees Joel's ad for an apartment, which says "heated swimming pool." After Tina moves in, Joel stops heating the pool regularly because his utility costs have risen. Joel has violated his implied promise to keep the pool heated. (Joel should avoid ad language that commits him to such things.)

EXAMPLE 2: When Joel's rental agent shows Tom around the building, she goes out of her way to show off the laundry room, saying, "Here's the laundry room—it's for the use of all the tenants." Tom rents the apartment. Later the washing machine in the laundry room breaks down, but Joel won't fix it. Joel has violated his implied promise to maintain the laundry room appliances in working order.

EXAMPLE 3: Tina's apartment has a built-in dishwasher. When she rented the apartment, neither the lease nor the landlord said anything about who was to repair the dishwasher if it broke. The dishwasher has broken down a few times and whenever Tina asked Joel to fix it, he did. By doing so, he has established a "usage" or

The Los Angeles Rent Escrow Account Program (REAP)

If the repairs ordered by the local building or health department aren't completed on time, the Department of Housing Preservation and Production requests the owner to appear at an informal conference to explain the delay. If the Department of Housing isn't satisfied, a REAP advisory committee, consisting of representatives of the housing, building, and fire departments, can recommend that the City Council impose a rent escrow. A landlord can appeal this recommendation to a hearing officer. If the hearing officer also recommends imposition of the escrow, the matter then goes to the City Council for the ultimate decision.

If the City Council orders it, tenants may pay their rents into the city escrow program. As long as tenants do so, they cannot be evicted for nonpayment of rent. (Needless to say, a 30-day notice of termination of tenancy (or even of a rent increase) would seem retaliatory at this stage, and Los Angeles's rent control law requires a landlord to show just cause for eviction.) Also, a landlord whose building has been put under REAP is prohibited from passing on the costs of repairs in the form of higher rents, as is normally allowed under Los Angeles's rent control ordinance.

With city authorization, repairs can be paid for by the escrow program administrator out of the escrow. However, taxes and mortgage payments cannot be made out of the escrow. After all required repairs have been made, any money left over is returned to the landlord, minus an administrative fee.

Obviously, the best way to avoid REAP is to quickly respond to repair orders by local authorities. Failing that, be cooperative and conciliatory at the informal conference, stressing your willingness to make needed repairs. If any of the problems were caused by tenants, you should point that out. If your building is recommended for REAP and you believe some of the defects were caused by tenants, you should see an attorney about appealing for a formal hearing before a hearing officer.

"practice" that the landlord—not the tenant—is responsible for repairing the dishwasher.

If you violate an express or implied promise relating to the condition of the premises, the tenant may sue you for money damages, usually in small claims court. The tenant cannot repair the appliance and deduct the cost from the rent. Keep in mind that you can't label an essential piece of equipment an "amenity" and hope to avoid either your duty to supply it or the consequences (such as a tenant's rent withholding) if you fail to.

RENT CONTROL

Don't decrease services. A decrease in promised services, including a refusal to continue maintenance, may be considered an illegal rent increase.

The Tenant's Responsibilities

State law also requires tenants to use rented premises properly and keep them clean. Specifically, Civil Code §§ 1941.2–.3 require the tenant to:

- **Keep the premises as "clean and sanitary as the condition of the premises permits."** For example, a tenant whose kitchen had a rough, unfinished wooden floor that was hard to keep clean would not be able to keep the floor bright, shiny, and spotless.
- **Properly operate gas, electrical, and plumbing fixtures.** Examples of abuse include overloading an electrical outlet, flushing large foreign objects down the toilet, and allowing bathroom fixtures to become filthy.
- **Refrain from damaging or defacing the premises or allowing anyone else to do so.**
- **Use living and dining rooms, bedrooms, and kitchens for their proper respective purposes.** For example, the living or dining room should not regularly be used as a makeshift bedroom.
- **Report broken door or window locks in the dwelling unit.** Tenants are specifically charged with the duty to alert you of malfunctioning locks in their units. If a tenant has not notified you of a problem, and you in fact are unaware of the broken device, you will not be liable for a violation of the state law.

In addition, under Civil Code § 3479, every tenant is prohibited from disturbing the neighbors' peaceful enjoyment of their property. This is known as refraining from creating or allowing a "nuisance," which is discussed more fully in Chapter 12.

To protect yourself, make sure your lease or rental agreement spells out basic tenant obligations. (See Clause 11 of our form agreements in Chapter 2.)

A tenant's isolated or minor violation of these duties will not relieve a landlord from the duty to provide a habitable dwelling. (The landlord is still responsible for the condition of the premises and can be prosecuted for violating housing standards.) However, if a tenant is in "substantial violation" of any of these requirements, and this violation "substantially contributes" to the untenantable condition (or "substantially interferes" with the landlord's obligation to make the dwelling tenantable), the landlord is relieved from the duty to repair the condition. The tenant cannot withhold rent or sue the landlord if the tenant has contributed to the poor condition of the premises. (CC §§ 1929, 1941.2, and 1942(c).)

> **EXAMPLE:** Lance complains to his landlord, Gary, about a defective heater. When Gary's repairperson goes to fix the heater, he is confronted by an overwhelming smell of garbage and mildewed laundry. Lance cannot sue Gary for failing to fix the heater until and unless Lance cleans house, even though the foul smell didn't cause the heater to break. Lance's failure to keep the place clean and sanitary obviously interferes substantially with his landlord's attempt to fix the heater.

To protect a landlord against a tenant's careless damage to the property, our lease and rental agreements make the tenant financially responsible for repair of damage caused by the tenant's negligence or misuse. (See Clause 18, Chapter 2.) That means, where the tenant or his friends or family cause damage—for example, a broken window, a toilet clogged with children's toys, or a refrigerator that no longer works because the tenant defrosted it with a carving knife—it's the tenant's responsibility to make the repairs or to reimburse the landlord for doing so.

EXAMPLE: By his own sorrowful admission, Terry, angry over the loss of his job, puts his fist through a window. As a result, a cold wind blows in, cooling off Terry, if not his temper. Terry can't withhold rent to make his landlord fix the window, since Terry caused the problem in the first place. However, under state and local law, Terry's landlord is still responsible for fixing the window, after which he can and should bill Terry for the repair.

If a tenant refuses to repair or pay for the damage he caused, you can sue the tenant, normally in small claims court, for the cost of the repairs. If the tenancy is from month to month in a non-rent-controlled area, you may also want to consider a 30-day termination notice (or a 60-day notice if the tenant has lived there one year or longer). If the damage is very severe, such as numerous broken windows or holes in the wall, you can use a three-day notice and sue for eviction on the basis that the tenant has "committed waste" to the property. (See Chapter 18 and *The California Landlord's Law Book: Evictions*.)

You could also evict based on the tenant's breach of the lease or rental agreement provision forbidding damage to the premises (Clause 18), but you would have to give the tenant a chance to correct the problem. On the other hand, if you proceed under the theory that the tenant has committed waste, your three-day notice need not give this option—except in some rent-controlled cities. (CCP § 1161(4).) In any eviction case based on a three-day notice, you must also be able to establish that the damage was truly caused by the tenant's neglect, or you will lose the case and have to pay the tenant's court costs and attorney fees.

The Tenant's Right to Repair and Deduct

Under certain circumstances a tenant can, without your permission, have a defect repaired and withhold the cost of the repairs from the following month's rent. (CC § 1942.) (A tenant can also just move out of an untenantable premise—see below.) This is commonly called the "repair-and-deduct" remedy. It is subject to the following restrictions:

- The defect must be related to "tenantability." In other words, the problem must be serious and directly related to health or safety. Examples are broken heaters, stopped-up toilets, broken windows, and the absence or malfunctioning of legally required door and window locks.
- The defect or problem must not have been caused by the careless or intentional act of the tenant or a guest. Thus, a tenant cannot use this remedy to replace a window he broke himself.
- The amount the tenant withholds must be less than one month's rent.
- The tenant can use this remedy no more than twice in any 12-month period.
- Before having the repair done, the tenant must give the landlord or manager notice of the problem and a "reasonable" amount of time to fix it. The notice can be oral or written.

Of all these rules, the rule that the tenant give "reasonable" notice is the one most open to interpretation. According to Civil Code § 1942(b), reasonable notice is presumed to be 30 days. But it can be a lot less for an urgent problem, such as a defective heater in winter, a leaky roof during the rainy season, or a stopped-up toilet in a one-bath unit any time.

EXAMPLE 1: In July, Pam tells her landlord, Lorraine, that she was treated to some April showers in her living room three months earlier, due to a leaky roof. Unless it suddenly starts raining regularly in the middle of summer, this problem, though serious, isn't urgent. Pam must wait at least 30 days before she can take the repair into her own hands.

EXAMPLE 2: On a cold Monday in January, Frank tells his landlord, Regina, that the heater no longer works. By Wednesday night, Regina still hasn't fixed the heater. In the meantime, Frank and his family must sleep in a 45-degree apartment. So on Thursday, after only two days, Frank has the heater fixed, at a cost of $200. In February, Frank deducts this amount from his rent. Regina sues to evict Frank for nonpayment of rent. The judge decides that two days' notice was reasonable under the circumstances, and Regina loses. She must pay not only her own court costs and attorney fees, but Frank's as well.

EXAMPLE 3: Phil complains to his landlord, Linton, that the kitchen sink faucet drips slightly. Under their rental agreement, the tenant is not allowed to do any repairs on the rental unit. Although the duty to fix the faucet is Linton's, the problem does not pose a serious health or safety threat. Consequently, Phil cannot use the repair-and-deduct remedy.

If it comes to a fight, reasonable notice will be defined by a judge, not by the landlord. Going to court over this sort of dispute, unless the tenant's behavior was truly outrageous, is not a productive way to arrive at a decision. Your best bet is to set up a good responsive maintenance system and stick to it. We discuss this in more detail below. When deciding whether the tenant acted reasonably, a judge will consider how much it would have cost you to make the same repair. Obviously, a tenant who pays $300 for a simple toilet repair that should have cost only $100 is acting more unreasonably than one who paid $100 for a repair you could have accomplished for $75.

Common Myths About Responsibilities for Repairs

Paint. No state law requires a landlord to repaint the interior every so often. So long as the paint isn't actually flaking off, it should comply with the law. The situation is different, however, if you are dealing with deteriorating lead-based paint. (We discuss landlord liability for health problems caused by exposure to lead paint in Chapter 12.)

Drapes and Carpets. As for carpets and drapes, so long as they're not sufficiently damp or mildewy to constitute a health hazard, and so long as carpets don't have dangerous holes that could cause someone to trip and fall, you aren't legally required to replace them.

Windows. Quite a few landlords think a tenant is responsible for all broken windows. This is not true. A tenant is responsible only if the tenant or a guest intentionally or carelessly broke the window. If the damage was outside the tenant's control, however—for example, because a burglar, vandal, or neighborhood child broke a window—you are responsible for fixing the window.

The Tenant's Right to Withhold Rent When the Premises Aren't Habitable

The repair-and-deduct remedy isn't the only legal way a tenant can withhold part or all of the rent from a landlord who doesn't properly maintain residential property. A tenant can also legally refuse to pay all or part of the rent if the unit falls short of the minimum requirements for a habitable dwelling as set forth in Civil Code § 1941.1 and other applicable housing and industry codes. In addition, one court decision seems to have expanded tenants' rights by allowing them to withhold rents for deficiencies not even addressed by building or housing statutes. (For example, in *Secretary of HUD v. Layfield,* 88 Cal. App. 3d Supp. 28 (1979), an appellate court ruled that a tenant could withhold rent if the landlord failed to provide adequate security patrols, even though there is no law requiring security guards.)

What Justifies Rent Withholding

Under California law, every landlord makes an implied promise that a dwelling will be fit for human habitation—whether or not that promise is written down in a lease or rental agreement. (*Green v. Superior Court,* 10 Cal. 3d 616 (1974).) When landlords don't keep the place in a habitable condition at all times, they are said, in legal jargon, to have "breached the implied warranty of habitability." That breach justifies the tenant's withholding of rent.

For a tenant to legally withhold rent, the problems must not have been caused by the tenant, and both of the following must be true:

- The defects must be serious ones that threaten the tenant's health or safety.
- The tenant must have given the landlord reasonable notice of the problem. (*Hinson v. Delis,* 26 Cal. App. 3d 62 (1972).)

Severity of Problems

A tenant can withhold rent only if the premises have "substantial" defects. Examples of substantial defects are a bathroom ceiling that has collapsed and not been repaired; rats, mice, and cockroaches infesting

the building; lack of heat or hot water; the presence of lead paint hazards in sufficient concentration (and extent); or the absence or malfunctioning of required door and window locks. Fairly trivial defects, such as leaky water faucets or cracked windows or plaster, aren't enough to violate the implied warranty of habitability. A landlord's breach of the duty to provide a tenantable dwelling rarely excuses the tenant's duty to pay all of the rent due under the lease.

> **EXAMPLE:** Wilbert rents a two-bedroom apartment from Molly for $1,700 a month. Because the toilet makes an occasional running sound until Wilbert jiggles the handle, Wilbert withholds an entire month's rent. Molly gives Wilbert a three-day notice and follows this with an eviction lawsuit. The judge decides that because the problem wasn't substantial, Wilbert had no right to withhold the rent, and gives Molly a judgment for the $1,700 rent, court costs, and possession of the property. (Because Molly handled her own case, she is not eligible for attorney fees.)

Notifying the Landlord

A tenant who wants to withhold rent must first notify the landlord or manager of the problem. There are, however, no precise notice requirements—for example, that the notice be in writing or delivered a certain way. And, unlike the rules with the repair-and-deduct remedy, there is also no definite rule as to how much time the landlord has to fix the problem after receiving notice of it, except that 35 days is too long under any circumstances. (CC §§ 1942.3 and 1942.4.) In other words, the tenant can give the notice orally or in writing, but before withholding rent on account of a defect, she must give the landlord a "reasonable" time to respond. If the question ends up in court, what's reasonable will be decided by a judge.

Some tenants make false claims to try to get out of paying some rent or avoid being evicted. For example, a tenant who is simply unable to pay the rent calls the health department to complain about—and exaggerate the effect of—a minor plumbing problem that the tenant previously tolerated and never complained about to the landlord. The best way to thwart these kinds of tenants is to establish and follow a good maintenance and inspection system.

How Much Rent a Tenant Can Legally Withhold

If you do not fix a serious problem within a reasonable time, the tenant can withhold rent. But how much? Theoretically, the tenant can withhold as much rent as the defect lowers the value of the property. But as a practical matter, the tenant can withhold as much rent as the landlord—or a judge, if the case gets to court—will allow under the circumstances. A judge will make a decision based on an estimate of the rental value of the premises, in light of the seriousness of the defect.

Judges use various criteria to determine what's a reasonable amount of rent to withhold. Under the "percentage reduction" approach, the judge figures what percentage of the dwelling was rendered unfit, and reduces the rent accordingly. (For example, if a leaky roof made one room of a four-room apartment unlivable, the rent would be reduced by 25%.) Another method is to calculate the value of the dwelling in its defective state, subtract that amount from the fair market value of the rental (usually the agreed-upon rent), and allow the withholding of the resulting difference. Most courts use the percentage reduction approach.

> **EXAMPLE:** For $1,800 a month, Lou rents a two-bedroom house to Ken. The house is heated by two wall heaters, one in the kitchen and one in a bedroom, which is somewhat isolated in a separate wing. In mid-November, the bedroom heater stops working, and Ken notifies Lou immediately. This leaves one end of the house, including one of the two bedrooms and a bathroom, chilly and uncomfortable. On December 1, the heater is still not fixed, so Ken refuses to pay Lou any rent. Lou finally fixes the heater on December 15 and demands the rent. Ken claims he only owes $900, half the rent for December. Lou takes the $900 but insists on the other $900, giving Ken a three-day notice to pay up or get out, followed by an unlawful detainer (eviction) lawsuit when Ken doesn't respond.
>
> After hearing the case, the judge decides that Ken gave adequate notice to Lou regarding a substantial defect affecting the tenantability of the house, and that Lou should have fixed the problem by December 1. Since half the house was livable for the first half of December, Ken should

also pay half of that half-month's rent, or $450, in addition to what he already paid. However, because Ken was correct in withholding rent, he wins the suit and can stay in his apartment if he pays Lou the $450, and Lou must pay Ken's court costs and attorney fees. However, if Ken doesn't pay the additional $450, Lou wins, getting a judgment for the $450, possession of the property, and court costs.

In other situations, the judge might base a decision on the testimony of a real estate expert who knows what the property would rent for, with all its defects. Or, a judge may even guess at an amount due the tenant as compensation for the inconvenience or annoyance of putting up with a problem—such as water leaking into the living room during winter months—and subtract that from the monthly rent.

CAUTION

Tenants who successfully withhold rent must pay the adjusted rental value within a reasonable time, or they will lose the unlawful detainer action. A tenant who has convinced a judge that a substantial defect justified withholding some or all of the rent must pay the reasonable rental value of the premises up to the date of trial or risk losing possession. The rent must be paid within a "reasonable time," but in any event no more than five days after the date of the court's judgment (if the judgment is served by mail, then five days plus another five-day extension period provided by law). (CCP § 1013.) In other words, unless the tenant is ready to pay the accrued adjusted rent, the tenant will lose the unlawful detainer action even after establishing a breach of the warranty of habitability. (CCP § 1174.2(a)(1) and (2).)

If you do end up in court, be prepared to prove one or more of the following:

- The claimed defect was not so serious or substantial as to render the property untenantable.
- Even if the defect was substantial, you were never given adequate notice and a chance to fix it. (At this point, you should present your detailed complaint procedure to the court and show, if possible, that the tenant didn't follow it.)
- Assuming there was a substantial defect that wasn't fixed within a reasonable time (perhaps you were away and your manager screwed up), this defect justifies the withholding of only a small amount of rent because it didn't inconvenience the tenant much. For example, although an inoperable heater is a substantial defect, it won't cause the tenant too much discomfort in the summer; or perhaps a tenant who used a portable electric heater instead wasn't badly inconvenienced.

Court fights over rent withholding are covered below.

The Landlord's Options If a Tenant Repairs and Deducts or Withholds Rent

When confronted with a tenant who withholds all or part of the rent, whether justifiably or not, most landlords almost reflexively turn to a lawyer to bring an eviction lawsuit. But even if you eventually get the tenant evicted, it is often only after considerable cost. In most eviction suits, the lawyers are the only clear winners. Even if you get a judgment for unpaid rent and attorney fees, these amounts often turn out to be uncollectible.

If you feel your tenant improperly deducted the costs of repairs from the rent or withheld rent—perhaps by giving you little or no notice—try working things out with the tenant. Failing that, if you feel strongly enough about it, sue the tenant for the deducted part of the rent in small claims court or file an eviction lawsuit.

Working Out a Compromise

If you think the tenant is wrong but sincere, and is not simply trying to make up an excuse for not paying rent, you may want to go along with the tenant's withholding or repair-and-deduct proposal. If, for example, the tenant uses the repair-and-deduct remedy, but you feel you were never given adequate notice and could have had the problem fixed for $50 less than the tenant paid, it may make sense to drop the matter. Trying to evict the tenant will cost far more, and you may not win the suit.

This isn't to say you should roll over and accept any silly scheme a tenant invents. Set up a meeting with the tenant to review your repair procedures. Listen to any grievance the tenant has, and make sure that

the next time there is a problem, you will be notified promptly. Obviously, if a tenant persists in being unreasonable, you will eventually have to get more assertive.

You may want to try to work out a compromise with the tenant. A compromise would certainly include repairing any defect having to do with any of the tenantability factors listed above. You might also give the tenant a prorated reduction in rent for the period between the time the tenant notified you of the defect and the time it was corrected.

For example, suppose a leaky roof during a rainy month deprives a tenant of the use of one of his two bedrooms. If the tenant gave you notice of the leak and you did not take care of the problem quickly, the tenant might be justified in deducting $450 from the $1,200 rent for that month. However, if the tenant didn't tell you of the problem until the next month's rent was due, a compromise might be reached where the tenant bears part of the responsibility, by agreeing to deduct only $150 from the rent.

The first step in working toward a compromise with the rent-withholding tenant is to make a phone call. Dropping over unannounced to talk may threaten the tenant and put him in a defensive posture. If you're reluctant to call, you might want to try a letter. See the sample Letter Suggesting Compromise on Rent Withholding, below.

If you can't work something out with the tenant, consider mediation, where a neutral third party can help you arrive at a solution. Many cities have community organizations (sometimes called "boards") that conduct mediation between landlords and tenants. These organizations can be extremely helpful in resolving disputes over the amount of rent (if any) it is reasonable to withhold, the condition of the premises, or the need for repairs. (We discuss mediation in Chapter 8.)

Many organizations that offer mediation also conduct arbitration, if the parties can't reach an agreement. In arbitration, a neutral third party makes a decision—just like a judge in court, but after a much less formal hearing. In binding arbitration, the parties agree in advance, in writing, to abide by the decision. If you and the tenant agree to binding arbitration, you'll attend an informal hearing. Participants tell their side of the story, and an arbitrator reaches a decision, which is enforceable in court.

Court Fights Over Rent Withholding

Rent withholding almost always comes before a judge in the context of an unlawful detainer (eviction) lawsuit. In response to the tenant's failure to pay rent, the landlord serves a Three-Day Notice to Pay Rent or Quit and, when the tenant fails to do either, files suit.

A tenant normally has the burden of convincing a judge that the withholding was reasonable, unless the landlord took more than 35 days to fix any defect that a local health or building inspection department official insisted be repaired following an inspection. (CC §§ 1942.3 and 1942.4.) In this case, the burden falls on the landlord to prove the tenant was wrong to withhold rent.

Here's how judges typically rule on rent withholding:

- If the judge rules that the tenant had no right to withhold any rent at all, the landlord will win a judgment for the unpaid rent, court costs (and attorney fees if the rental agreement had an attorney fees clause), and possession of the property. The judge will order the tenant's eviction.
- If the judge decides that the tenant had the right to withhold rent and withheld the correct amount (having paid the balance to the landlord), the judge will rule for the tenant, who will be able to stay in the property. In addition, the landlord will be responsible for paying the tenant's court costs and attorney fees.
- If the judge decides that the tenant had a right to withhold rent, but not as much as the tenant withhheld, it's a little more complicated. The judge will normally order the tenant to pay the difference, sometimes giving the tenant up to five days to do so. If the tenant pays the landlord within the time the judge allows, he gets to stay, wins the lawsuit, and can even get a judgment against the landlord requiring the landlord to pay court costs. (The tenant is considered the winner because the tenant had a valid complaint, even if he did withhold too much rent. The tenant isn't penalized for having been unable to guess the right amount of rent to withhold.) (See CCP § 1174.2 and *Strickland v. Becks,* 95 Cal. App. 3d Supp. 18, 157 Cal. Rptr. 656 (1979).)
- On the other hand, if the tenant doesn't pay the difference between how much rent he withheld

Sample Letter Suggesting Compromise on Rent Withholding

May 3, 20xx

Tyrone McNab
Villa Arms, Apt. 4
123 Main Street
Monterey, California

Dear Mr. McNab:

I am writing you in the hope we can work out a fair compromise to the problems that led you to withhold rent. You have rented a unit at the Villa Arms for the last three years and we have never had a problem before. Let's try to resolve it.

To review briefly, on May 1, Marvin, my resident manager at Villa Arms, told me that you were refusing to pay your rent because of several defective conditions in your apartment. Marvin said you had asked him to correct these problems a week ago, but he hasn't as yet attended to them. Marvin states that you listed these defects as some peeling paint on the interior wall of your bedroom, a leaky kitchen water faucet, a running toilet, a small hole in the living room carpet, and a cracked kitchen window.

I have instructed Marvin to promptly arrange with you for a convenient time to allow him into your apartment to repair all these problems. I am sure these repairs would already have been accomplished by now except for the fact that Hank, our regular repairperson, has been out sick for the last ten days.

Because of the inconvenience you have suffered as a result of the problems in your apartment, I am prepared to offer you a prorated rebate on your rent for ten days, this being the estimated length of time it will have taken Marvin to remedy the problems from the day of your complaint. As your monthly rent is $900, equal to $30 per day, I am agreeable to your paying only $600 rent this month.

If this is not acceptable to you, please call me at 555-1234 during the day. If you would like to discuss any aspect of the situation in more detail, I would be pleased to meet with you at your convenience. I will expect to receive your check for $600, or a call from you, before May 10.

Sincerely,
Sandra Schmidt
Sandra Schmidt

and what he should have withheld, the landlord will win a judgment for that amount, possession of the property, court costs, and attorney fees. (See Chapter 18 for more on eviction lawsuits.)

A judge who determines that the tenant properly withheld rent based on a defect in the property may (1) order the landlord to repair it within a set period of time, (2) require the landlord to come back to court to show proof the repairs have been made, and (3) reduce the future rent the tenant will have to pay until repairs are made. (CCP § 1174.2(a)(3)–(5).) The judge can also order the landlord to pay the tenant's attorney fees (even in the absence of a written lease or rental agreement with an attorney fees clause), if the landlord failed to make necessary repairs within 35 days of receiving a notice from a health or building department official. (CC § 1942.4 (b); CCP § 1174.21.) In a suit brought by the tenant, the judge can also award "special damages" of $100 to $5,000.

EXAMPLE: Tillie stops paying her $1,000 monthly rent to Lenny in January because Lenny didn't repair a leaky roof. Lenny serves Tillie with a three-day notice, then files an unlawful detainer (eviction) lawsuit when Tillie still refuses to pay. Tillie defends, and wins. The judge reduces the rent to $700 a month and orders Tillie to pay $300 to Lenny for January's rent in order to stay. Tillie pays and stays. The judge also orders Lenny to show written proof from the Health Department that he fixed the roof at another hearing 30 days later. He also reduces the rent to $700 a month until such time as Lenny shows proof of repairs. After 30 days, if Lenny doesn't fix the problem, the judge can keep the rent reduced indefinitely, and can exercise what amounts to continuing supervision over the property until the repairs are made.

CAUTION

Retaliatory evictions and rent increases are illegal. Occasionally, a landlord, faced with a troublesome tenant who seems to be unreasonably asserting his legal remedies to the letter of the law—whether in the form of a complaint to local officials or the deduction of repair costs from the rent—gives the tenant a notice terminating the tenancy or raising the rent. A tenant can defend against this sort of eviction or rent increase on the basis that the landlord is illegally retaliating against him for exercising his rights. For a detailed discussion of retaliatory evictions, see Chapter 15.

The Tenant's Right to Move Out

In several situations, tenants have the right to move out because of defective conditions in the premises.

Asking Tenants to Move So Repairs Can Be Made

Local authorities may sue a landlord who fails to repair code violations in a reasonable time. If a court rules that the property's conditions "substantially endanger the health and safety of residents," and if the landlord must ask tenants to move in order to make repairs, the landlord must:

- provide the tenant with comparable temporary housing nearby or, if that's not possible, pay the difference between the old rent and the tenant's new rent elsewhere, for up to four months
- pay the tenant's moving expenses, including packing and unpacking costs
- insure the tenant's belongings in transit, or pay for the replacement value of property lost, stolen, or damaged in transit
- pay the tenant's new utility connection charges, and
- give the tenant the first chance to move back into the old place when repairs are completed. (H&S § 17980.7.)

The Tenant's Right to Move Out of Untenantable Premises

If there is a problem that allows a tenant to use the repair-and-deduct remedy, the tenant also has the option of simply packing up and leaving without further notice if the landlord fails to fix the problem in a reasonable time. (CC § 1942.) The tenant is not responsible for paying any rent after the time the repair should have been made. In addition, the tenant is entitled to a prorated refund of any rent paid in advance that covers the time during which the unit was in disrepair, and compensation for living in substandard housing.

EXAMPLE: On January 1, Lionel leases his house to Lisa for a year, and Lisa pays the first month's rent of $1,800. On February 1, Lisa pays the rent again, but the next day, the water heater springs a leak. Lisa tells Lionel about the problem, but Lionel does nothing. Several more anguished calls from Lisa, who has no hot water, produce no action. After 15 days, Lisa simply packs up and leaves. She is probably acting reasonably and legally under the circumstances.

Not only is Lisa relieved of any further obligation under the lease, but she's also entitled to a refund of $900, representing the prorated rent for the second half of the month, plus her security deposit (less any lawful deductions). In addition, Lisa is entitled to a further rent reduction on account of having no hot water for the half month she was there. If Lionel and Lisa can't agree on this figure, a judge will have to decide when Lisa takes Lionel to small claims court.

Destruction of the Premises

As California residents know all too well, natural disasters such as earthquakes, fires, and floods are a common threat. Also, despite your successful efforts to maintain a safe building, you cannot isolate your property from destructive forces that might start elsewhere, such as a fire that spreads from the neighboring property. If part or all of your rental property is destroyed in one of these events, what are your obligations to your tenants?

Landlords and tenants may address this issue in their lease or rental agreement and agree on the following questions between themselves:

- Who will determine whether the property is totally destroyed?
- Who will decide whether the totally destroyed premises will be rebuilt, and how quickly must that decision be made?
- Even if there is only partial destruction, who will decide whether the tenant may consider the premises unfit?
- If you repair a partially destroyed building and the tenant remains, who will decide how much rent the tenant must pay?
- How much time will you have to complete repairs?

Clause 18 (Damage to the Premises) of our form rental agreement and lease (in Chapter 2) addresses these questions and provides guidelines in the event that there is total or partial destruction of your rental property. If you and your tenants have not, however, considered these issues in advance and specified solutions in your lease or rental agreement, some guidelines are provided by law.

Under California law, unless you and the tenant have agreed otherwise, total destruction of the premises cancels the rental or lease contract. The tenant's obligation to pay rent ceases, and the landlord's duty to provide housing is also extinguished. (CC § 1933(4).) You do not need to return advance payments of rent. (*Pedro v. Potter,* 197 Cal. 751 (1926).)

But what about partial destruction? State law provides that the lease or rental agreement will be considered terminated if:

- the destruction is not the fault of the tenant
- the tenant had reason to believe, when the lease or rental agreement was signed, that the destroyed portion or aspect of the rental premises was a "material inducement" to the tenant (that is, a major reason why the tenant rented the premises), and
- the tenant gives notice to the landlord that he considers the lease to be over because of the destruction of an important aspect of the premises. (CC § 1932(2).)

EXAMPLE: Sandra wanted a rental with a large, fenced yard that would be a safe play area for her three small children. When she saw Alex's duplex, she was delighted at the spacious backyard and told him that it was the perfect answer to her needs. When he offered to show her another duplex that had no yard but a larger interior, she declined and told him that her most important requirement was the yard, and that she would make do with smaller rooms. Sandra signed a year's lease in late fall.

The weather that winter was exceptionally severe, and the rainstorms caused the hill behind Sandra's home to slide, burying the backyard in a foot of mud and crushing the fences. Although the house itself escaped damage, the yard was

ruined. Sandra wrote to Alex to tell him that she considered the lease to be over, since the backyard, now unusable, was a major reason for her decision to rent. Sandra moved out and although she did not recover the balance of that month's rent, she was not responsible for any future rent. She got her entire security deposit back when Alex examined the house and determined that there was no damage beyond normal wear and tear.

The Tenant's Right to Sue for Defective Conditions

As we have explained above, the landlord's failure to maintain rental property may result in the tenant's use of the rent withholding or repair-and-deduct remedies. When this happens, landlords often move to evict based on the tenant's failure to pay rent, and the tenant defends by pointing to the substandard conditions and arguing that he used the remedy appropriately.

A landlord who fails to maintain property can also be sued by a tenant. (*Landeros v. Pankey*, 39 Cal. App. 4th 1167 (1996).) This is true even if the tenant has withheld rent or was the subject of an eviction lawsuit. By failing to repair defective conditions, the theory goes, the landlord breached an implied term of the lease or rental agreement—that is, to provide a habitable dwelling. The tenant, whether he remains in the property or moves out, can sue the landlord for breaking the lease contract, and can ask for the following:

- partial or total refund of rent paid while conditions were substandard
- the value, or repair costs, of property lost or damaged as a result of the defect—for example, furniture ruined by water leaking through the roof
- compensation for personal injuries—including pain and suffering—caused by the defect
- an order requiring the landlord to repair the defects, with rent reduced, until the landlord shows proof to the court that the defects have been remedied (CC § 1942.4(c)), and
- attorney fees, even if the lease or rental agreement does not have an attorney fees clause. (Our form agreements do—see Clause 22 in Chapter 2.)

In the sections that follow, we'll explain the various ways that tenants can initiate lawsuits against landlords.

Lawsuits Authorized by Statute

Landlords who have failed to maintain their property in accordance with the habitability requirements of Section 1941.1–.3 of the Civil Code may be sued by a tenant if all the following requirements are met (CC § 1942.4.):

- The dwelling "substantially lacks" any of the habitability standards as set forth in Civil Code § 1941.1–.3—for example, hot water and heating systems.
- A housing officer has inspected the premises and has given written notice to the landlord (or the landlord's agent) that the condition must be repaired.
- At least 35 days have passed since the notice was issued, the defect has not been remedied, and there is no "good cause" for the delay.
- The defect was not caused by the tenant's act or failure to maintain the dwelling in good order.

Tenants typically use this statutory remedy—suing the landlord—when they decide to remain in the dwelling unit (despite its defects) and do not want to risk eviction if they withhold rent and lose the unlawful detainer lawsuit brought by the landlord.

Tenants may bring lawsuits of this type in small claims court if their claims do not exceed $10,000. The tenant may be awarded special damages of up to $5,000 as well, if the defective conditions caused unique hardship or losses to the tenant. If the defective conditions constitute a nuisance, the court may order the landlord to abate (cease) the nuisance, and the court may hold on to the case until it is satisfied that the threat to the tenant's health or safety has been removed. Finally, the winning party will get attorney's fees and costs (irrespective of whether this provision is included in the lease contract).

EXAMPLE: Lucy rented the top-story apartment in a building owned by Mike. During January, the roof above Lucy's bedroom leaked, causing water to saturate the walls and resulting in extensive

mildew. Lucy notified Mike of the leaking roof, but got no action. She then called the local health inspector, who came out to inspect her bedroom. The inspector declared that the leaking roof violated the state requirement that rental premises be adequately waterproofed, and ordered Mike to fix the roof. Three months later, the roof still leaked and Lucy sued Mike under Section 1942.4 of the Civil Code. She was able to recover:

- actual damages of several hundred dollars, representing the difference between the stated rent and the rental value of the apartment without a bedroom (since Lucy had been unable to use her bedroom because of the leaking roof)
- special damages of $1,000, representing the dry-cleaning costs for Lucy's clothes, the value of her damaged art on the walls, and the value of her ruined carpet, and
- attorney fees and costs.

Lawsuits for Rent Refunds

In some situations, tenants can sue landlords without first going to the local health department for an inspection and repair order, as explained earlier. A tenant who has moved out, in particular, has little interest in forcing the landlord to repair the habitability defect. Instead, a tenant who has left may file a garden-variety breach of contract lawsuit against the landlord for losses caused by the landlord's failure to provide habitable housing.

To win a breach of contract lawsuit, the tenant must establish that:

- a substantial defect in the premises rendered it uninhabitable
- the landlord was notified within a reasonable time of the tenant's discovery of the defect, and
- the landlord was given a reasonable time to correct the defect but failed to do so.

The winning tenant will collect a rent refund, equal to the amount by which the stated, agreed-upon rent exceeds the value of the damaged premises. For example, if a two-bath apartment rented for $1,500 per month, but a leak in one of the bathrooms made that room unusable, reducing the unit to a one-bath apartment, the damages would be the difference between $1,500 and the rental value of a one-bath unit. Also, the landlord will have to pay the tenant's court costs and attorney fees if the lease or rental agreement has an attorney fees clause.

Lawsuits for Emotional Distress

Landlords who fail to maintain habitable rental property may be vulnerable to lawsuits that charge them with the intentional or negligent infliction of emotional distress—even in the absence of actual physical injury caused by the defect. (Claims for emotional distress can also accompany lawsuits where there has been a physical injury, as is explained in Chapter 12.) Tenants who sue for emotional distress must show that the landlord's failure to repair was particularly extreme or outrageous because of the landlord's:

- **Recklessness.** The landlord wantonly failed to fix a significant problem, which would cause mental distress to any tenant, or
- **Willfulness.** The landlord's failure to repair the substantial defect was intentional, done with the knowledge that the tenant was susceptible to emotional torment.

EXAMPLE: Randy complained to his landlord, Al, about the leaking toilet in his apartment. Al checked the bathroom and confirmed that, indeed, the gasket was broken and sewage was leaking into the room, but he did not fix it. After a week had passed, Randy decided to use the repair-and-deduct remedy, so he had the problem fixed and deducted the repair costs from his next month's rent.

Al was furious when he received less than the full rent. He accosted Randy and told him to pay up "or else we'll handle this like real men, the way we used to in the old days." Randy felt he was being threatened, and felt fearful every time he left his apartment. Eventually, he was unable to leave his apartment at all. Randy sued Al for intentional infliction of emotional distress. The jury agreed with Randy and awarded him a judgment of several thousand dollars.

CAUTION

Managers can be personally liable for emotional distress. When tenants sue for general and special damages for habitability defects (rent refunds and the value of ruined property), the landlord is financially responsible, even if the manager had been given the repair responsibility. If the tenant claims that the manager caused emotional distress, however, the manager's liability may be shared with the landlord, and the manager himself may be responsible for a percentage of the damages.

Lawsuits for Maintaining a Nuisance

If the landlord's failure to maintain the property in a habitable condition results in an offensive or injurious condition, the tenant may sue for the maintenance of a private nuisance. (CC §§ 3479 and 3501.) Put another way, if the defects substantially interfere with the tenant's use or enjoyment of the property, a nuisance may exist. A tenant who sues over a private nuisance is limited to recovering for the value of his lost use of his property—but not for physical or mental suffering. (If the tenant claims that the nuisance has caused physical or mental anguish, he must use the public nuisance statutes, which are discussed in Chapter 12.)

Whether a habitability defect is so severe as to constitute a nuisance is always a question for the judge or jury. Factors include the number of people affected, the nature of the neighborhood and the surroundings, the duration and frequency of the behavior, the harm alleged, and the seriousness of the disturbance. A court that decides that a nuisance exists may order the landlord to fix the problem and compensate the tenant for having put up with the situation. If the landlord's conduct was intentional (and not merely negligent), the tenant may get punitive damages as well, which are monetary awards intended to punish the landlord for his malicious or willful behavior.

> **EXAMPLE:** John and Mary rented one-half of a duplex from their landlord Len, who lived in the other half of the building. Under their rental agreement, John and Mary shared use of the driveway and yards with Len.
>
> When he retired, Len started to collect and repair old cars. Because he did not have a garage, Len used the backyard and driveway to store and work on his cars. The presence of Len's cars made it impossible for John and Mary to use the yard or driveway, and they were constantly plagued by the stench of car exhaust and oil and the unsightly view of many old junkers. After unsuccessful attempts to get Len to remove the cars, John and Mary sued him in small claims court, alleging that the presence of the junkyard on their property constituted a private nuisance. The court agreed that the cars made it impossible for John and Mary to enjoy the yard and use the driveway, and ordered Len to remove the cars. The court also ordered Len to compensate John and Mary for the fact that their enjoyment and use of the property had been impaired.

When Does Legal But Annoying Behavior Become a "Nuisance"?

Landlords often hear complaints from tenants about annoying behavior of other tenants—for example, someone whose putting practice results in golf balls sailing onto the other tenants' patios. Or, a tenant may complain about his upstairs neighbor who arises every morning at 5 a.m. and clumps about in heavy work boots. While such annoying behavior will generally not violate the warranty of habitability, it still may create legal headaches for landlords.

It's unlikely that one tenant's annoying behavior is serious enough for another tenant to successfully sue you for the maintenance of a private nuisance. But rather than risk a court battle, address tenants' complaints quickly and reasonably, using the complaint handling system we recommend below. And if problems persist, you may need to evict the tenant with the annoying behavior. In some cases, you may want to first send a warning letter as discussed in Chapter 18.

Clause 16 of our form lease and rental agreements in Chapter 2 prohibits tenants from causing disturbances or creating a nuisance—that is, behavior that prevents neighbors from fully enjoying the use of their own homes.

CAUTION

A landlord may not retaliate against a tenant who files a lawsuit and stays in the property. It may seem inconsistent for a tenant to take the extreme step of suing the landlord and expect to remain on the property. Nevertheless, a tenant who sues and stays is exercising a legal right, and retaliation, such as with a rent increase or termination notice, is illegal and will give the tenant yet another ground on which to sue. (See CC § 1942.5 and Chapter 15 for a discussion of retaliatory eviction.)

Avoid Rent Withholding and Other Tenant Remedies by Adopting a High-Quality Repair and Maintenance System

A landlord's best defense against rent withholding hassles or tenant lawsuits is to:

- establish and communicate clear, easy-to-follow procedures for tenants to ask for repairs
- document all complaints
- respond quickly when complaints are made, and
- make annual safety inspections.

Recommended Repair and Maintenance System

Follow these steps to avoid maintenance and repair problems with tenants:

- Clearly set out the landlord's and tenants' responsibilities for repair and maintenance in your lease or rental agreement. (See Clause 11 of our form agreements in Chapter 2.)
- Use the written Landlord/Tenant Checklist form in Chapter 7 to check over the premises and fix any problems before new tenants move in.
- Don't assume your tenants know how to handle routine maintenance problems such as a clogged toilet or drain. Make it a point to explain the basics when the tenant moves into the unit. In addition, include a brief list of maintenance dos and don'ts as part of your move-in materials, for example:
  - how to avoid overloading circuits
  - proper use of garbage disposal
  - location and use of fire extinguisher, and
  - problems the tenant should definitely not try to handle, such as electrical repairs.
- Encourage tenants to immediately report plumbing, heating, weatherproofing, or other defects; or safety or security problems—whether in the tenant's unit or in common areas such as hallways and parking garages. A Maintenance/Repair Request form (discussed below) is often useful in this regard. Give every tenant a copy of your complaint procedure and safety and maintenance system. This should be part of a move-in letter, described in Chapter 7.
- Keep a written log (or have your property manager keep one) of all complaints (including those emailed and made orally) and correspondence, noting how and when they were handled. This should include a place to indicate your immediate and any follow-up responses (and subsequent tenant communications), as well as a space to enter the date and brief details of when the problem was fixed. The Maintenance Repair/Request form, below, can serve this purpose.
- Keep a file for each apartment or unit with copies of all complaints and repair requests from tenants and your response. As a general rule, you should respond in writing to every tenant repair request (even if you also do so orally or by email).
- Handle repairs (especially urgent ones) as soon as possible, but definitely within the time any state law requires. Notify the tenant by phone and follow up in writing if repairs will take more than 48 hours, excluding weekends. Keep the tenant informed—for example, if you have problems scheduling a plumber, let your tenant know with a phone call or a note.
- Twice a year, give your tenants a checklist on which to report any potential safety hazards or maintenance problems that might have been overlooked. See the Semiannual Safety and Maintenance Update, described below. Respond promptly and in writing to all requests, keeping copies in your file.
- Once a year, inspect all rental units, using the Landlord/Tenant Checklist as a guide. See Annual Safety Inspection, described below. (Keep copies of the filled-in checklist in your file.)

- Especially for multiunit projects, place conspicuous notices in several places around your property about your determination to operate a safe, well-maintained building, and list phone numbers for tenants to call with maintenance requests.
- As part of every written communication, remind tenants of your policies and procedures to keep your building in good repair. Be sure to include a brief review of the complaint procedure. For example, at the bottom of all routine notices, rent increases, and other communications, a landlord might remind tenants of the following:

  "The management's policy is to properly maintain all apartment units and common areas. If you have any questions, suggestions, or requests regarding your unit or the building, please direct them to the manager between 9 a.m. and 6 p.m., Monday through Saturday, either by calling 555-9876 or by dropping off a completed Maintenance/Repair Request form at the manager's office. In case of emergency, please call 555-6789 at any time."

Benefits of Establishing a Repair and Maintenance System

A repair and maintenance system gives you several benefits. First, it allows you to fix little problems before they grow into big ones. It also helps you communicate with tenants who do have legitimate problems and creates a climate of cooperation and trust that can work wonders in the long run.

And at least as important, it provides you with an excellent defense when it comes to those few unreasonable tenants who seek to withhold or reduce rent for no adequate reason other than their disinclination to pay. (In addition, if you need to establish that the repair problem is phony, you may want to have the repairperson who looked at the "defect" come to court to testify about it.) You may still have to go to court to evict them, but your carefully documented procedures will constitute a "paper trail" to help you accomplish this with a minimum of time and expense.

If you regularly solicit comments about the condition of your rental property, a tenant who doesn't report a problem will have a hard time in court if the tenant later refuses to pay the rent because of your failure to repair that problem. If you make it your normal business practice to log all verbal repair requests from tenants and save all written requests, the absence of a request or notification of one is evidence that the tenant has made no complaints.

Finally, this kind of repair and record-keeping system can also help keep down your potential liability to your tenants. If you're sued for injuries suffered as a result of allegedly defective conditions on your property, your chances of losing are less because, in many situations, injured persons must prove not only that they were hurt, but that you were negligent (unreasonably careless). This can be difficult to do if you adopt an extremely responsive repair scheme and stick to it. (Landlord liability for injuries is discussed in Chapter 12.)

> **EXAMPLE:** Geeta owns a 12-unit apartment complex and encourages her tenants to request repairs in writing, using the Maintenance/Repair Request form shown below. Most tenants use the form. Geeta routinely saves all tenants' filled-out forms for at least one year, and she also keeps a log of all verbal repair requests. One month, Ravi doesn't pay his rent, even in response to Geeta's three-day notice. When Geeta files an eviction suit, Ravi claims he withheld rent because of a leaky roof and defective heater Geeta supposedly refused to repair. At trial, Geeta describes her complaint handling and record-keeping system and even brings her logs and files to court. She testifies that she has no record of ever receiving a complaint from Ravi. The judge has reason to doubt Ravi ever complained, and rules in Geeta's favor.

Resident's Maintenance/ Repair Request Form

One way to assure that defects in the premises will be reported by conscientious tenants—while helping to refute bogus tenant claims about lack of repairs—is to include a clause in your lease or rental agreement requiring tenants to notify you of repair and maintenance needs. (See Clause 11 of our form agreements in Chapter 2.) Make the point again and

describe your process for handling repairs in your move-in letter to new tenants. (See Chapter 7.)

Many tenants will find it easiest (and most practical) to call the landlord or manager with a repair problem or complaint, particularly in urgent cases. Make sure you have an answering machine, voice mail, or other service available at all times to accommodate tenant calls. Check your messages frequently when you're not available by phone.

We also suggest you provide all tenants with a Maintenance/Repair Request form. Give each tenant five or ten copies when they move in, and explain how the form should be used to request specific repairs (see the sample, below). Be sure that tenants know to describe the problem in detail and to indicate the best time to make repairs. Make sure tenants know how to get more copies. Your manager should keep an ample supply of the Maintenance/Repair Request form in the rental unit or office.

You (or your manager) should complete the entire Maintenance/Repair Request form or keep a separate log for every tenant complaint (including those emailed or made by phone). (See "Tracking Tenant Complaints," below.) Keep a copy of our form or your log in the tenant's file, along with any other written communication. Be sure to keep good records of how and when you handled tenant complaints, including reasons for any delays and notes on conversations with tenants. For a sample, see the bottom of the Maintenance/Repair Request form (labeled For Management Use). Also, see "Responding to Tenant Complaints," below, for additional advice. You might also jot down any other comments regarding repair or maintenance problems you observed while handling the tenant's complaint.

FORM

You'll find a downloadable copy of the Resident's Maintenance/Repair Request on the Nolo website. See Appendix B for the link to the forms in this book.

A sample Maintenance/Repair Request form is shown below. You'll see that the repairperson has also made a note to return and fix a separate problem—a good way to keep on top of repair duties. But keep in mind that if you do make notes of this kind, it's important that you follow up and do the work. If you don't and the tenant later complains about unattended repairs—and resorts to repair-and-deduct or rent withholding—your note will be the best evidence that you knew about the problem but didn't attend to it.

Tracking Tenant Complaints

Most tenants will simply call you when they have a problem or complaint, rather than fill out a Maintenance/Repair Request form. For record-keeping purposes we suggest you fill out this form, regardless of whether the tenant does. It's also a good idea to keep a separate chronological log or calendar with similar information on tenant complaints.

Responding to Tenant Complaints

You should respond almost immediately to all complaints about defective conditions by talking to the tenant and following up (preferably in writing). Explain when repairs can be made or, if you don't yet know, tell the tenant that you will be back in touch promptly. This doesn't mean you have to jump through hoops to fix things that don't need fixing or to engage in heroic efforts to make routine repairs. It does mean you should take prompt action under the circumstances—for example, immediate action should normally be taken to cope with broken door locks or security problems. Similarly, a lack of heat or hot water (especially in winter in cold areas) and safety hazards such as broken steps or exposed electrical wires should be dealt with on an emergency basis.

One way to think about how to respond to repair problems is to classify them according to their consequences. Once you consider the results of inaction, your response time will be clear:

- **Personal security and safety problems = injured tenants = lawsuits.** Respond and get work done immediately if the potential for harm is very serious, even if this means calling a 24-hour repair service or having you or your manager get up in the middle of the night to put a piece of plywood over a broken ground floor window.
- **Major inconvenience to tenant = seriously unhappy tenant = tenant's self-help remedies (such as rent withholding) and vacancies.** Respond and attempt to get work done as soon as possible, or within 24 hours, if the problem is a major inconvenience

Resident's Maintenance/Repair Request

Date: August 29, 20xx

Address: 392 Main St., #401, Modesto

Resident's Name: Mary Griffin

Phone (home): 555-1234 Phone (work): 555-5678

Problem: Garbage disposal doesn't work

Best time to make repairs: Best times are after 6 p.m. or Saturday morning

Comments :

I authorize entry into my unit to perform the maintenance or repair requested above, in my absence, unless stated otherwise above.

Mary Griffin
Resident

FOR MANAGEMENT USE

Work done: Fixed garbage disposal (removed spoon)

Time spent: 1/2 hours

Date completed: August 3 , 20 xx

Unable to complete on _____, 20____, because: _____

Notes and comments: Faucet drips—needs follow-up call

Hal Ortiz
Landlord or Manager

August 9, 20xx
Date

to the tenant such as a plumbing or heating problem.

- **Minor problem = slightly annoyed tenant = bad feelings.** Respond in 48 hours (on business days) if not too serious.

Yes, these deadlines may seem tight and, occasionally, meeting them will cost you a few dollars extra, but in the long run you'll be way ahead.

CAUTION

Respect tenants' privacy. To gain access to make repairs, the landlord can enter the rental premises only with the tenant's consent, or after having given written and reasonable notice, presumed to be 24 hours. See Chapter 13 for rules and procedures for entering a tenant's home to make repairs and how to deal with tenants who make access inconvenient for you or your maintenance personnel.

If you're unable to take care of a repair right away, such as a dripping faucet, and if it isn't so serious that it requires immediate action, let the tenant know when the repair will be made. It's often best to do this orally (an email or a message on the tenant's answering machine should serve), and follow up in writing by leaving a notice under the tenant's door. If there's a delay in handling the problem (maybe the part you need has to be ordered), explain why you won't be able to act immediately.

FORM

You'll find a downloadable copy of the Time Estimate for Repair on the Nolo website. See Appendix B for the link to the forms in this book.

A sample Time Estimate for Repair is shown below. Notice that the form allows you to notify the tenant of the expected day and time for the repair. Under California law, even when tenants ask you to perform repairs, you must still give them proper notice, or advance warning, of your intended entry, and you may enter only on certain days and during certain hours. If you provide the required information (and stick to it), you will have satisfied your duty to give notice of your entry. Chapter 13 explains tenants' rights of privacy and the rules governing when, and for what purposes, you may enter.

If a tenant threatens to withhold rent, respond promptly in writing (see sample letter in this section), saying either:

- when the repair will be made and the reasons for the delay—for example, a replacement part may have to be ordered, or
- why you do not feel there is a legitimate problem that justifies rent withholding—for example, point out that the worn flooring may be annoying, but the floor is still intact and not dangerous. At this point, you might also consider suggesting that you and the tenant mediate the dispute.

Be careful not to retaliate against complaining tenants. When landlords are confronted by tenants asking that repairs be made, they sometimes—especially when they feel the particular tenant is unreasonable or otherwise unpleasant—look around for some tenant misconduct to justify not making the repair. This is a mistake, unless the tenant's failure to maintain the property is fairly outrageous. It can result in legal problems that are out of proportion to the maintenance problem. A landlord's tit-for-tat response may escalate into rent withholding on the part of the tenant, necessitating a nasty eviction lawsuit. Even if a landlord is legally right and is judged so in court, the time and expense involved are unlikely to be worth it.

The better response is usually to fix the problem and try to work out a clear maintenance plan with the tenant for the future. If this fails, you may want to think about trying to get rid of the tenant. This is fairly easy to do, unless you are in a jurisdiction containing a rent control law with a just-cause-for-eviction provision or have a long-term lease. Still, you must be careful that your move to end the tenancy cannot be legally interpreted as retaliating against the tenant for making a legitimate complaint. (See Chapter 15 for rules on retaliatory evictions.)

Limits on Using Handymen

Repair work that will cost over $500 per contract (labor and materials) must be done by a licensed contractor. You may use a handyman to do less-expensive work, but the handyman must disclose to you, in writing, that he or she is not a licensed contractor. Penalties for violating this law fall upon the worker, not the hiring firm or individual. (B&P §§ 7028.6 and 7030.)

Time Estimate for Repair

Stately Manor Apartments

October 10, 20xx
Date

Jane Walker
Tenant

123 Main Street, Apt. 12
Street address

San Jose, California
City and State

Dear Ms. Walker
Tenant

On October 8, 20xx, you notified us of the following problem in your rental unit:
The pilot light on the gas stove doesn't work.

We have investigated the problem and have found: The pilot light element is broken and is out of stock locally. We have ordered it and we expect it will be delivered on October 15, 20xx.

We expect to have the problem corrected on October 17, 20 xx.
Unless we hear from you to the contrary, we will enter your unit between 1 p.m. and 4 p.m. on the above date to perform the needed work.

We regret any inconvenience this interval may cause. Please do not hesitate to point out any other problems that may arise.

Sincerely,

Fred Tebbets
Landlord or Manager

Sample Letter When Tenant Threatens to Withhold Rent

Robin Lee
123 Davis Place
Venice, California

July 21, 20xx

Bruce Moore
456 Springsteen Square
Apartment 7
Los Angeles, California

Dear Mr. Moore,

This is in response to your letter of July 19, in which you suggested the possibility of withholding your next month's rent if the bathroom toilet is not repaired.

I have ordered the replacement parts necessary to prevent the stopper from improperly seating and allowing water to run from the tank to the bowl. An order was necessary through ABC Plumbing Supply because it's an old toilet, requiring special parts, and the part is not available locally. I expect to receive the part within one week. Until then, the toilet still flushes and is usable, despite the running sound it makes.

As you will recall, I came to check the toilet on three occasions and found it perfectly operable. I suspect that the stopper only occasionally does not seat properly into the hole separating the toilet tank from the bowl. In any event, a jiggle on the flush handle when the toilet makes a running sound will correct the problem on the few occasions when the stopper fails to seat. The problem is a minor one that does not make your unit uninhabitable, and therefore does not justify rent withholding under California law. Accordingly, should you withhold rent on this basis, I will have no choice but to give a three-day notice to pay rent or leave the premises, followed by an eviction suit if you fail to comply.

Sincerely,
Robin Lee
Robin Lee
Landlord/Manager

Tenant Updates and Landlord's Regular Safety and Maintenance Inspections

Encouraging your tenants to promptly report problems as they occur should not be your sole means of handling your maintenance and repair responsibilities. Here's why: If tenants are not conscientious, or if they simply don't notice that something needs to be fixed, the best reporting system will not do you much good. To back it up, you need to force the tenant (and yourself) to take stock at specified intervals. Below, we'll explain the tenant update system, and then we'll discuss the landlord's annual safety inspection. Make sure your lease or rental agreement and move-in letter cover these updates and inspections as well.

Tenant's Semiannual Safety and Maintenance Update

You can insist that your tenants think about and report needed repairs by giving them a Semiannual Safety and Maintenance Update on which to list any problems in the rental unit or on the premises—whether it's low water pressure in the shower, peeling paint, or noisy neighbors. Asking tenants to return this Update twice a year should also help you in court if you are up against a tenant who is raising a false implied warranty of habitability defense, particularly if the tenant did not note any problems on the most recently completed Update. As with the Maintenance/Repair Request form, be sure to note how you handled the problem on the bottom of the form. See the sample Semiannual Safety and Maintenance Update below.

FORM

You'll find a downloadable copy of the Semiannual Safety and Maintenance Update on the Nolo website. See Appendix B for the link to the forms in this book.

Landlord's Annual Safety Inspection

Sometimes even your pointed reminder that safety and maintenance issues need to be brought to your attention will not do the trick: If your tenants can't

Semiannual Safety and Maintenance Update

Please complete the following checklist and note any safety or maintenance problems in your unit or on the premises.

Please describe the specific problems and the rooms or areas involved. Here are some examples of the types of things we want to know about: garage roof leaks, excessive mildew in rear bedroom closet, fuses blow out frequently, door lock sticks, water comes out too hot in shower, exhaust fan above stove doesn't work, smoke alarm malfunctions, peeling paint, and mice in basement. Please point out any potential safety and security problems in the neighborhood and anything you consider a serious nuisance.

Please indicate the approximate date when you first noticed the problem and list any other recommendations or suggestions for improvement.

Please return this form with this month's rent check. Thank you.—THE MANAGEMENT

Name: Mary Griffin

Address: 392 Main St., #401

Modesto, California

Please indicate (and explain below) problems with:

- ☐ Floors and floor coverings _____
- ☐ Walls and ceilings _____
- ☐ Windows, screens, and doors _____
- ☐ Window coverings (drapes, miniblinds, etc.) _____
- ☐ Electrical system and light fixtures _____
- ☒ Plumbing (sinks, bathtub, shower, or toilet) Water pressure low in shower
- ☐ Heating or air conditioning system _____
- ☒ Major appliances (stove, oven, dishwasher, refrigerator) Exhaust fan doesn't work
- ☐ Basement or attic _____
- ☒ Locks or security system Front door lock sticks
- ☐ Smoke detector _____
- ☐ Fireplace _____
- ☐ Cupboards, cabinets, and closets _____
- ☐ Furnishings (table, bed, mirrors, chairs) _____
- ☐ Laundry facilities _____
- ☐ Elevator _____
- ☐ Stairs and handrails _____
- ☐ Hallway, lobby, and common areas _____
- ☐ Garage _____
- ☒ Patio, terrace, or deck Shrubs near back stairway need pruning
- ☐ Lawn, fences, and grounds _____
- ☐ Pool and recreational facilities _____
- ☐ Roof, exterior walls, and other structural elements _____

☐ Driveway and sidewalks _____

☐ Neighborhood _____

☒ Nuisances Tenant in #502 often plays stereo too loud

☐ Other _____

Specifics of problems: _____

Other comments: _____

Mary Griffin — February 20xx

Tenant — Date

FOR MANAGEMENT USE

Action/Response: Fixed shower, exhaust fan, and sticking front door lock on February 15. Pruned shrubs on February 21. Spoke with tenant in #502 about keeping stereo low on February 2.

Terri Zimet — February 22, 20xx

Landlord or Manager — Date

recognize a problem even if it stares them in the face, you'll never hear about it, either. In the end, you must get into the unit and inspect for yourself.

Landlords should perform annual safety and maintenance inspections as part of their system for repairing and maintaining the property. For example, you might make sure that items listed on the Semiannual Safety and Maintenance Update—such as smoke detectors, heating and plumbing systems, and major appliances—are in fact in safe and working order. If a problem develops with one of these items, causing injury to a tenant, you may be able to defeat a claim that you were negligent by arguing that your periodic and recent inspection of the item was all that a landlord should reasonably be expected to do. (Chapter 12 discusses in detail the consequences to a landlord if a tenant or guest is injured on the property.)

A landlord cannot insist on such inspections against the tenant's will, even if a lease or rental agreement clause so provides. This is because the law does not allow the landlord to enter the dwelling against the tenant's will—even on 24 hours' notice—solely to perform inspections. (CC § 1954.) Any lease or rental agreement provision allowing for this is illegal and unenforceable. (CC § 1953(a)(1).) Evicting a tenant who refused to allow such an inspection would constitute illegal retaliatory eviction. (CC § 1942.5(c).)

However, most tenants will not object to yearly safety inspections if you're courteous about it—giving 24 hours' notice and trying to conduct the inspection at a time convenient for the tenant. If you encounter hesitation, just point out that you take your responsibility to maintain the property very seriously. Remind the tenant that you'll be checking for plumbing, heating, electrical, and structural problems that the tenant might not notice, which could develop into bigger problems later if you're not allowed to check them out.

Tenants' Alterations and Improvements

Your lease or rental agreement probably includes a clause prohibiting tenants from making any alterations or improvements without your express, written consent. (See Clause 17 of our lease or rental agreement forms in Chapter 2.) For good reason, you'll want to make sure tenants don't change the light fixtures, replace the window coverings, or install a built-in dishwasher unless you agree first.

But in spite of your wish that your tenants leave well enough alone, you're bound to encounter the tenant who goes ahead without your knowledge or consent. On the other hand, you may also hear from an upstanding tenant who would like your consent to the tenant's plan to install a bookshelf or closet system. To know how to deal with unauthorized alterations or straightforward requests, you'll need to understand some basic rules.

CAUTION

Disabled tenants have rights to modify their living space that may override your ban against alterations without your consent. See Chapter 9 for details. Similarly, tenants' legal rights to telecommunications access (cable hookups, satellite dishes, and other antennas) will affect your ability to control the installation of access equipment, as explained below.

Improvements That Become Part of the Property

Anything your tenant attaches to a building, fence, deck, or the ground itself (lawyers call such items "fixtures") belongs to you, absent an agreement saying it's the tenant's. This is an age-old legal principle, and it's described in Civil Code § 1019. This means when the tenant moves out, you are legally entitled to refuse any request to remove a tenant-installed fixture and return the premises to its original state.

When a landlord and departing tenant haven't decided ahead of time as to who will own the fixture, the dispute often ends up in court. Judges use a variety of legal rules to determine whether an object—an appliance, flooring, shelving, or plumbing—is something that the tenant can take away or is a permanent fixture belonging to you. Here are some of the questions judges ask when separating portable from nonportable additions:

- **Did your tenant get your permission?** If the tenant never asked you for permission to install a closet organizer, or asked but got no for an answer, a judge is likely to rule for you—particularly

if your lease or rental agreement prohibits alterations or improvements.

- **Did the tenant make any structural changes that affect the use or appearance of the property?** If so, chances are that the item will be deemed yours, because removing it will often leave an unsightly area or alter the use of part of the property. For example, if a tenant modifies the kitchen counter to accommodate a built-in dishwasher and then takes the dishwasher out, you will have to install another dishwasher of the same dimensions or rebuild the space. The law doesn't impose this extra work on landlords, nor does it force you to let tenants do the return-to-original work themselves.
- **Is the object firmly attached to the property?** In general, additions and improvements that are nailed, screwed, or cemented to the building are likely to be deemed "fixtures." For example, hollow-wall screws that anchor a bookcase might convert an otherwise free-standing unit belonging to the tenant to a fixture belonging to you. Similarly, closet rods bolted to the wall become part of the structure and would usually be counted as fixtures. On the other hand, shelving systems that are secured by isometric pressure (spring-loaded rods that press against the ceiling and floor) involve no actual attachment to the wall and for that reason are not likely to be classified as fixtures.

Improvements That Plug or Screw In

The act of plugging in an appliance doesn't make the appliance a part of the premises. The same is true for simple connectors or fittings that join an appliance to an electrical or water source. For example, a refrigerator or free-standing stove remains the property of the tenant. Similarly, portable dishwashers that connect to the kitchen faucet by means of a coupling may be removed.

- **What did you and the tenant intend?** Courts will look at statements made by you and the tenant to determine whether there was any understanding as to the tenant's right to remove an improvement. In some circumstances, courts will even infer an agreement from your actions—for instance, if you stopped by and gave permission to install what you referred to as a portable air conditioner, or helped lift it into place. By contrast, if the tenant removes light fixtures and, without your knowledge, installs a custom-made fixture that could not be used in any other space, it is unlikely that the tenant could convince a judge that she reasonably expected to take it with her at the end of her tenancy.

Responding to Improvement and Alteration Requests

If a tenant approaches you with a request to alter your property or install a new feature, chances are that your impulse will be to say no. But perhaps the request comes from an outstanding tenant whom you would like to accommodate and would hate to lose. Instead of adopting a rigid approach, consider these alternatives.

Option One: Is the improvement or alteration one that is easily undone? For example, if your tenant has a year's lease and you plan to repaint at the end, you can easily fill and paint any small holes left behind when the tenant removes the bookshelf bolted to the wall (and you can bill for the spackling costs, as explained below). Knocking out a wall to install a wine closet is a more permanent change and not one you're likely to agree to.

Option Two: Is the improvement or alteration an enhancement to your property? For example, a wine closet might actually add value to your property. If so, depending on the terms of the agreement you reach with your tenant, you may actually come out ahead.

Before you accommodate your tenant's requests, decide which option makes sense in the circumstances and which you prefer. For example, you may have no use for an air conditioner attached to the window frame, and your tenants may want to remove it at the end of the tenancy. You'll need to make sure that the tenants understand that they are responsible for restoring the window frame to its original condition, and that if their restoration attempts are less than acceptable, you will be justified in deducting from their security deposit the amount of money necessary to do the job right. (And if the deposit is insufficient, you can sue them in small claims court for the excess.)

Agreement Regarding Tenant Alterations to Rental Unit

Iona Lott (Landlord) and

Doug Diep (Tenant) agree as follows:

1. Tenant may make the following alterations to the rental unit at 75A Cherry Street, Pleasantville, California.
   1. Plant three rose bushes along walkway at side of residence.
   2. Install track lighting along west (ten-foot) kitchen wall.

2. Tenant will accomplish the work described in Paragraph 1 by using the following materials and procedures:
   1. Three bare-root roses, hybrid teas, purchased from Jackson-Perky and planted in March.
   2. "Wallbright" track lighting system purchased from "Lamps and More," plus necessary attachment hardware.

3. Tenant will do only the work outlined in Paragraph 1 using only the materials and procedures outlined in Paragraph 2.

4. The alterations carried out by Tenant:

   [X] will become Landlord's property and are not to be removed by Tenant during or at the end of the tenancy, or

   [ ] will be considered Tenant's personal property, and as such may be removed by Tenant at any time up to the end of the tenancy. Tenant promises to return the premises to their original condition upon removing the improvement.

5. Landlord will reimburse Tenant only for the costs checked below:

   [X] the cost of materials listed in Paragraph 2

   [X] labor costs at the rate of $ 15 per hour for work done in a workmanlike manner acceptable to Landlord up to 10 hours.

6. After receiving appropriate documentation of the cost of materials and labor, Landlord shall make any payment called for under Paragraph 5 by:

   [X] lump sum payment, within 10 days of receiving documentation of costs, or

   [ ] by reducing Tenant's rent by $ _____ per month for the number of months necessary to cover the total amounts under the terms of this agreement.

7. If under Paragraph 4 of this contract the alterations are Tenant's personal property, Tenant must return the premises to their original condition upon removing the alterations. If Tenant fails to do this, Landlord will deduct the cost to restore the premises to their original condition from Tenant's security deposit. If the security deposit is insufficient to cover the costs of restoration, Landlord may take legal action, if necessary, to collect the balance.

8. If Tenant fails to remove an improvement that is his or her personal property on or before the end of the tenancy, it will be considered the property of Landlord, who may choose to keep the improvement (with no financial liability to Tenant), or remove it and charge Tenant for the costs of removal and restoration. Landlord may deduct any costs of removal and restoration from Tenant's security deposit. If the security deposit is insufficient to cover the costs of removal and restoration, Landlord may take legal action, if necessary, to collect the balance.
9. If Tenant removes an item that is Landlord's property, Tenant will owe Landlord the fair market value of the item removed plus any costs incurred by Landlord to restore the premises to their original condition.
10. If Landlord and Tenant are involved in any legal proceeding arising out of this agreement, the prevailing party shall recover reasonable attorney fees, court costs, and any costs reasonably necessary to collect a judgment.

Iona Lott	February 10, 20xx
Landlord or Manager	Date
Doug Diep	February 10, 20xx
Tenant	Date

On the other hand, a custom-made window insulation system may enhance your property (and justify a higher rent later on) and won't do your tenants any good if they take it with them. Be prepared to hear your tenants ask you to pay for at least some of it.

If you and the tenants reach an understanding, put it in writing. As shown in the sample Agreement Regarding Tenant Alterations above, you will want to carefully describe the project and materials, including:

- whether the improvement or alteration is permanent or portable
- the terms of the reimbursement, if any, and
- how and when you'll pay the tenant, if at all, for labor and materials.

Our agreement makes it clear that the tenant's failure to properly restore the premises, or removal of an alteration that was to be permanent, will result in deductions from the security deposit or further legal action if necessary.

FORM

You'll find a downloadable copy of the Agreement Regarding Tenant Alterations to Rental Unit on the Nolo website. See Appendix B for the link to the forms in this book.

Cable TV

Major changes in technology have expanded entertainment services available from cable TV. Tenants are often eager to take advantage of the offerings, but do not always realize that doing so usually involves installation of wires, cables, or other hardware.

The legal issues surrounding cable access are a bit more complicated than the rules you encounter when a tenant asks for permission to install a bookcase or paint a room. The federal government has something to say about your tenants' rights, as explained in the Federal Telecommunications Act of 1996 (47 U.S.C. §§ 151 and following). In this Act, Congress decreed that all Americans should have as much access as possible to information that comes through a cable or over the air on wireless transmissions. The Act makes it very difficult for state and local governments, zoning commissions, homeowners' associations, and landlords to impose restrictions that hamper a person's ability to take advantage of these types of communications.

Previously Unwired Buildings

Most residential rental properties are already wired for cable. In competitive markets especially, you'll have a hard time attracting tenants if you do not give them the option of paying for cable. However, in the event that your property does not have cable, you may continue to resist modernity and say "No" to tenants who ask you for access. Don't be surprised if, in response, your tenant mounts a satellite dish on the balcony, wall, or roof. See the text below for your ability to regulate these devices.

Buildings With Existing Contracts

Many multifamily buildings are already wired for cable. In competitive markets, landlords have been able to secure attractive deals with the service providers, passing savings on to tenants. Many landlords have signed "exclusive" contracts, whereby they promise the cable provider that they will not allow other providers into the building.

Here is where things get a bit tricky. In the residential context (but not in commercial rentals), federal law allows landlords to enter into exclusive deals, as does California. Even if you don't have an exclusive contract, you're under no obligation to allow other companies into your property. Although an incumbent cable company can in theory share its wires with other providers, they typically don't want to make their hardware available to competitors. You are not obliged to allow a hodgepodge of wires throughout your building, which may happen if several companies run cable. (*Cable Arizona v. Coxcom, Inc.,* 261 F.3d 871 (9th Cir. 2001).)

Satellite Dishes and Other Antennas

Wireless communications have the potential to reach more people with less hardware than any cable system. Tenants who enjoy watching sports programs are often eager to have a satellite dish antenna, which will deliver far more programs than cable. But there is one essential piece of equipment: A satellite dish facing south, with wires connecting it to the television set or computer.

Small and inexpensive dishes, two feet or less in diameter, are widely available. Wires can easily be run under a door or through an open window to an individual TV or computer. Predictably, tenants have attached dishes to balconies, windowsills, railings, and even the roof. Landlords are upset at the unappealing sight of wires and equipment that ruin a building's "curb appeal." They are concerned that dishes may fall and cause injuries, and that their installation may damage weatherproofing of walls and roofs and interfere with electrical or plumbing systems.

The Federal Communications Commission (FCC) has provided considerable guidance on residential use of satellite dishes and other antennas (Over-the-Air Reception Devices Rule, 47 C.F.R. § 1.4000, further explained in the FCC's Fact Sheet, "Over-the-Air Reception Devices Rule"). Basically, the FCC prohibits landlords from imposing restrictions that unreasonably impair tenants' abilities to install, maintain, or use an antenna or dish that meets criteria described below. Here's a brief overview of the FCC rule.

RESOURCE

For complete details on the FCC's rule on satellite dishes and other antennas, see www.fcc.gov/guides/installing-consumer-owned-antennas-and-satellite-dishes, or call the FCC at 888-CALLFCC. The FCC's rule was upheld in *Building Owners and Managers Assn. v. FCC,* 254 F.3d 89 (D.C. Cir. 2001).

Devices Covered by the FCC Rule

The FCC's rule applies to video antennas, including direct-to-home satellite dishes that are less than one meter (39.37 inches) in diameter, TV antennas, and wireless cable antennas. These pieces of equipment receive video programming signals from direct broadcast satellites, wireless cable providers, and television broadcast stations. Antennas up to 18 inches in diameter that transmit as well as receive fixed wireless telecom signals (not just video) are also included.

Exceptions: Antennas used for AM/FM radio, amateur ("ham"), and Citizen's Band ("CB") radio, or Digital Audio Radio Services ("DARS") are excluded from the FCC's rule. You may restrict the installation of these types of antennas, in the same way that you can restrict any modification or alteration of rented space.

Permissible Installation

Tenants may place dishes or other antennas only in their own, exclusive rented space, such as inside the rental unit or on a balcony, terrace, deck, or patio. The device must be wholly within the rented space (if it overhangs the balcony, you may prohibit that placement). Also, you may prohibit tenants from drilling through exterior walls, even if that wall is also part of their rented space.

Tenants *cannot* place their reception devices in common areas, such as roofs, hallways, walkways, or the exterior walls of the building. Exterior windows are no different from exterior walls—for this reason, placing a dish or other antenna on a window by means of a series of suction cups is impermissible under the FCC rule (obviously, such an installation is also unsafe). Tenants who rent single-family homes, however, may install devices in the home itself or on patios, yards, gardens, or other similar areas.

Restrictions on Installation Techniques

Landlords are free to set restrictions on how the devices are installed, as long as the restrictions are not unreasonably expensive and are imposed for safety reasons or to preserve historic aspects of the structure. You cannot insist that your maintenance personnel (or professional installers) do the work. Nor can you require your tenants to submit their installation plans to you for prior approval, unless the reason for the prior review is a safety concern or to preserve the historical integrity of the property. (*In re Frankfurt*, 16 FCC Rcd. 2875 (2001).)

Expense

Landlords may not impose a flat fee or charge additional rent to tenants who want to erect a satellite dish or other antenna. On the other hand, you may be able to insist on certain installation techniques that will add expense—as long as the cost isn't excessive and reception will not be impaired. Examples of acceptable expenses include:

- insisting that an antenna be painted green in order to blend into the landscaping, or
- requiring the use of a universal bracket, which future tenants could use, saving wear and tear on your building.

Safety Concerns

You can insist that tenants place and install devices in a way that will minimize the chances of obvious accidents and will not violate safety or fire codes. For example, you may prohibit placement of a satellite dish on a fire escape, near a power plant, or near a walkway where passersby might accidentally hit their heads. You may also insist on proper installation techniques, such as those explained in the instructions that come with most devices. What if proper installation (attaching a dish to a wall) means that you will have to eventually patch and paint a wall? Can you use this as reason for preventing installation? No—unless you have legitimate reasons for prohibiting the installation, such as a safety concern. You can, however, charge the tenant for the cost of repairing surfaces when the tenant moves out and removes the device.

If you set restrictions on placement or installation based on safety concerns, it's important to specifically explain how the restriction meets a particular safety concern, unless the reason for the restriction is obvious. For example, it's obvious that requiring an antenna to be securely fastened meets the safety concern that it not fall down and injure people or property. However, it's not self-evident why requiring installation on only one side of the building furthers legitimate safety concerns. You'll need to articulate exactly why that restriction is necessary for safety.

CAUTION

Be consistent in setting rules for tenant improvements. Rules for mounting satellite dishes or other antennas shouldn't be more restrictive than those you establish for artwork, flags, clotheslines, or similar items. After all, attaching these telecommunications items is no more intrusive or invasive than bolting a sundial to the porch, screwing a thermometer to the wall, or nailing a rain gauge to a railing. For general guidance, see the discussion above on tenants' alterations and improvements.

TIP

Require tenants who install antennas to carry renters' insurance. If the installation (or removal) causes damage to your property, you can charge the tenant or use the security deposit to cover the repair costs. If a device falls or otherwise causes personal injury, the tenant's rental insurance policy will cover a claim.

Preserving Your Building's Historical Integrity

It won't be easy to prevent installation on the grounds that doing so is needed to preserve the historical integrity of your property. You can use this argument only if your property is included in (or eligible for) the National Register of Historic Places, the nation's official list of buildings, structures, objects, sites, and districts worthy of preservation for their significance in American history, architecture, archaeology, and culture. For more information on how to qualify for the Register, see www.cr.nps.gov/places.htm.

Placement and Orientation

Tenants have the right to place an antenna where they'll receive an "acceptable quality" signal. As long as the tenant's chosen spot is within the exclusive rented space, not on an exterior wall or in a common area as discussed above, you may not set rules on placement—for example, you cannot require that an antenna be placed only in the rear of the rental property if this results in the tenant's receiving a "substantially degraded" signal or no signal at all.

Reception devices that need to maintain line-of-sight contact with a transmitter or view a satellite may not work if they're stuck behind a wall or below the roofline. In particular, a dish must be on a south wall, since satellites are in the southern hemisphere. Tenants who have no other workable exclusive space may want to mount their devices on a mast, in hopes of clearing the obstacle. They may do so, depending on the situation:

- **Single-family rentals.** Tenants may erect a mast that's 12 feet above the roofline or less without asking your permission first—and you must allow it if the mast is installed in a safe manner. If the mast is taller than 12 feet, you may require the tenant to obtain your permission

before erecting it—but if the installation meets reasonable safety requirements, you should allow its use.

- **Multifamily rentals.** Tenants may use a mast as long as it does not extend beyond their exclusive rented space. For example, in a two-story rental a mast that is attached to the ground-floor patio and extends into the air space opposite the tenant's own second floor would be permissible. On the other hand, a mast attached to a top-story deck, which extends above the roofline or outward over the railing, would not be protected by the FCC's rule—a landlord could prohibit this installation because it extends beyond the tenant's exclusive rented space.

How to Set a Reasonable Policy

The FCC has ruled that tenants do not need your permission before installing their antennas—as long as they have placed them within their exclusive rented space and otherwise abided by the rules explained above. (*In re Frankfurt,* 16 FCC Rcd. 2875 (2001).) This means that you won't get to review a tenant's plans before the tenant installs a dish or antenna—though you can certainly react if you find that the FCC's standards have not been met.

The smart thing to do is to educate your tenants beforehand, in keeping with the FCC's guidelines, so that you don't end up ripping out an antenna that has been placed in the wrong spot or attached in an unsafe manner. In fact, the FCC directs landlords to give tenants written notice of safety restrictions, so that tenants will know in advance how to comply. We suggest that you include guidelines in your rules and regulations, or as an attachment to your lease or rental agreement. For guidance on developing sound policies, see the FCC's website at www.fcc.gov/mb.

Supplying a Central Antenna for All Tenants

Faced with the prospect of many dishes and antennas adorning an otherwise clean set of balconies, you may want to install a central dish or other antenna for use by all.

If you install a central antenna, you may restrict the use of antennas by individual tenants only if your device provides:

- **Equal access.** The tenants must be able to get the same programming or fixed wireless service that they could receive with their own antennas.
- **Equal quality.** The signal quality to and from the tenants' homes via your antenna must be as good or better than what the tenants could get using their own devices.
- **Equal value.** The costs of using your device must be the same or less than the cost of installing, maintaining, and using an individual antenna.
- **Equal readiness.** You can't prohibit individual devices if installation of a central antenna will unreasonably delay the tenant's ability to receive programming or fixed wireless services—for example, when your central antenna won't be available for months.

If you install a central antenna after tenants have installed their own, you may require removal of the individual antennas, as long as your device meets the above requirements. In addition, you must pay for the removal of the tenant's device and compensate the tenant for the value of the antenna.

How to Handle Disputes About the Use and Placement of Satellite Dishes and Other Antennas

In spite of the FCC's attempts to clarify tenants' rights to reception and landlords' rights to control what happens on their property, there are many possibilities for disagreements. For example, what exactly is "acceptable" reception? If you require antennas to be painted, at what point is the expense considered "unreasonable"?

Ideally, you can try to avoid disputes in the first place, by setting reasonable policies. But, if all else fails, here are some tips to help you resolve the problem with a minimum of fuss and expense.

Discussion, Mediation, and Help From the FCC

First, approach the problem the way you would any dispute—talk it out and try to reach an acceptable conclusion. Follow our advice in Chapter 8 for

settling disputes on your own—for example, through negotiation or mediation. You'll find the information on the FCC website very helpful. The direct broadcast satellite company, multichannel distribution service, TV broadcast station, or fixed wireless company that your tenant will be using may also be able to suggest alternatives that are safe and acceptable to both you and your tenant.

Get the FCC Involved

If your own attempts don't resolve the problem, you can call the FCC and ask for oral guidance. You may also formally ask the FCC for a written opinion, called a Declaratory Ruling. For information on obtaining oral or written guidance from the FCC, see the FCC website at www.fcc.gov/guides/installing-consumer-owned-antennas-and-satellite-dishes. Once you find the document, look for "For More Information." Keep in mind that unless your objections concern safety or historic preservation, you must allow the device to remain, pending the FCC's ruling.

Go to Court

When all else fails, you can head for court. If the satellite dish or other antenna hasn't been installed yet and you and the tenant are arguing about the reasonableness of your policies or the tenant's plans, you can ask a court to rule on who's right (just as you would when seeking the FCC's opinion). You'll have to go to a regular trial court (not small claims court) for a resolution of your dispute, where you'll ask for an order called a "Declaratory Judgment." Similarly, if the antenna or dish *has* been installed and you want a judge to order it removed, you'll have to go to a regular trial court and ask for such an order. Unfortunately, the simpler option of small claims court will usually not be available in these situations because most small claims courts handle only disputes that can be settled or decided with money. They tend to shy away from issuing opinions about whether it's acceptable to do (or not do) a particular task.

Needless to say, going to regular trial court means that the case will be drawn out and expensive. You could handle it yourself, but be forewarned—you'll need to be adept at arguing about First Amendment law and divining Congressional intent, and you'll have to be willing to spend long hours doing legal research to prepare your case (before proceeding, at the very least read the cases already decided by the FCC, which you'll find on their website, referenced above). In the end, you may decide that it would have been cheaper to provide a buildingwide dish (or good cable access) for all tenants to use.

CHAPTER

12

The Landlord's Liability for Dangerous Conditions, Criminal Acts, and Environmental Health Hazards

FORMS IN THIS CHAPTER

Chapter 12 includes instructions for and a sample of the Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards form. The Nolo website includes a downloadable copy of this form (in both English and Spanish). The Nolo website also includes a copy of the EPA booklet "Protect Your Family From Lead in Your Home" (also in both English and Spanish). See Appendix B for the link to the forms in this book.

As a property owner, you are responsible for keeping the premises safe for tenants and their guests. You must also be sure that conditions on the property don't bother neighbors. If you fall short in either of these obligations, you could be faced with a lawsuit from an injured tenant or angry neighbor. In the legal world, this area of the law is known as "premises liability," and it is fertile ground for creative plaintiffs' lawyers.

Landlords may be liable for physical injuries caused by faulty premises, such as a broken step, inadequate lighting, or substandard wiring. Tenants can sue for past and future medical bills, lost earnings, and pain and suffering in small claims court (up to $10,000), or superior court (where the sky's the limit).

A tenant or a neighbor may sue the landlord for damages for maintaining a legal nuisance—a serious and persistent condition that adversely affects the tenant's (or neighbor's) enjoyment of their property—even if no physical injury occurs. For example, a tenant, plagued by the stench of garbage scattered about because the landlord hasn't provided enough garbage cans for the apartment building, can sue the landlord for the annoyance and inconvenience of putting up with the smell. Under a relatively new understanding of the term "nuisance," a tenant—or a neighbor or group of neighbors—can sue a landlord for tolerating the presence of a drug-dealing resident.

Landlords are also being sued with increasing frequency by tenants injured by criminals. You may be found liable if a rape or other assault occurs on your property and the jury finds that you failed to provide adequate security. The average settlement in these types of cases is very high, and the average jury award (when cases go to trial) is even higher. In some situations, you may even be held responsible for the violent acts of your own employees or tenants.

An explanation of premises liability would not be complete without a discussion of landlords' liability under federal law for tenant injuries due to environmental hazards such as asbestos, lead, radon, and carbon monoxide.

We don't have the space here to show you how to fight a personal injury or nuisance lawsuit brought by a tenant. If you are sued, unless the suit is filed in small claims court, you'll need a lawyer. (See Chapter 8 for advice on choosing a lawyer. For advice on small claims court, see *Everybody's Guide to Small Claims Court,* by Ralph Warner (Nolo).)

We do, however, give you an overview of the legal and practical issues involved, which will help you reduce the likelihood that you will be sued or found liable for tenant injuries. We also discuss the importance of liability insurance to limit your potential financial loss, should you end up facing a claim or in court.

RELATED TOPIC

Issues regarding landlord's liability are also covered in other chapters. See:

- Lease and rental agreement provisions on landlords' and tenants' responsibilities for damage to premises, repairs, and liability-related issues: Chapter 2
- How to minimize your liability for your manager's mistakes or illegal acts: Chapter 6
- Landlord's liability for intentional discrimination: Chapter 9
- How to comply with state and local housing laws and avoid safety and maintenance problems: Chapter 11
- Liability for invasion of privacy: Chapter 13
- Liability for retaliatory conduct against the tenant: Chapter 15
- Liability for illegal evictions: Chapter 17.

Legal Standards for Liability

As a general rule, a landlord is liable to a tenant for an injury caused by a defect in the premises if the landlord failed to exercise reasonable care in the maintenance of the property.

An injured tenant may sue a landlord under several different legal theories, the most common being negligence. In the sections that follow, we're going to explain what this means. You may be wondering why you should take the time and energy to read what looks like a short course in landlord/tenant law—after all, if you conduct your business carefully and always maintain your property, you probably won't get into trouble and shouldn't need to master the fine points of legal theory. In one sense, you're right: If you prefer, you can review our repair and maintenance suggestions in Chapter 11 or skip ahead for advice on how to avoid liability for criminal incidents on your property.

However, if you stick with us, you will see why understanding the theoretical basis for holding landlords liable for tenant injuries is important. Here are just a few ways this knowledge will help landlords:

- **Evaluate existing situations.** Understanding how injured tenants may successfully present their cases to the courts will help you to identify—and correct—potentially dangerous situations in your own rental property before an accident occurs.
- **Recognize red-flag situations.** Even a thoroughly conscientious landlord needs to understand that certain kinds of injuries pose a much greater risk for landlord liability and, consequently, deserve much more preventive attention. This may require you to allocate your repair and maintenance resources accordingly.
- **Appreciate the rules of the game.** Unfortunately, there is no foul in lawyer-land like football's "piling on": A single injury can give rise to multiple reasons why the landlord should be held responsible, any one of which will be sufficient to win the tenant's case. If you understand the rules by which the personal injury lawsuit game is played, you are in a good position to establish sound repair and maintenance procedures and explain to managers and tenants why they're necessary.

Our goal in this chapter is not to frighten you, but rather to convince you that it makes sense to develop a comprehensive and responsive maintenance and repair system designed to reduce, if not eliminate, tenant injuries and to keep you out of court.

Negligence: The Landlord's Careless Acts

Negligence is the most common legal theory under which injured tenants or guests sue landlords. Negligence is behavior that is unreasonable, considering all the circumstances. If someone sues you, alleging an injury caused by your negligence, a judge will first decide whether you owed the injured person a duty to refrain from acting negligently. If the judge decides that you owed that person a "duty of due care," as it's called in legalese, the injured person (the plaintiff) will then be allowed to take his case to the jury. At this point, the plaintiff will have to convince the jury that you failed to live up to your duty of due care, that your failure caused his injury, and that he is truly injured and deserves a certain amount of money in compensation.

Duty of Due Care

If a tenant is injured on your rental property and sues you, he must first convince the judge that you owed him a duty to refrain from acting negligently. Judges will ask the following four questions when asked to make that determination:

1. Control: How much control did the landlord have over the situation? In most cases, you will be held responsible for an injury if you were legally obligated to maintain and repair the injury-causing factor. For example, a landlord normally has control over a stairway in a common area, and if its disrepair causes a tenant to fall, the landlord may be held liable. The landlord also has control over the building's utility systems, and if their malfunction causes injury (like scalding water from a broken thermostat), he may likewise be held responsible.

Common areas and building systems are not the only areas the landlord controls. If you have established control over an area that might otherwise be controlled by the tenant, you may be responsible for injuries. For example, the lease may forbid tenants from making repairs inside their apartments. From the landlord's point of view, this is a wise policy because it prevents shoddy or expensive repairs by inept tenants. This policy does, however, have a flip side: Having prevented the tenant from addressing interior repair problems, the landlord is now responsible—that is, the landlord retains control. If you fail to make repairs (or do a faulty job), you will be liable for any consequent injuries. For example, a tenant who is injured in her apartment by a broken electrical switch will have a strong case against the landlord who prohibited interior repairs by tenants, knew about the problem, and failed to fix it.

Finally, you may be surprised to learn that you may have "control" even if you don't own the injury-causing defect. If you know about a dangerous condition on adjacent property and realize that your tenants are likely to encounter it, and if you have the ability to warn your tenants about it or fence off the dangerous condition, your failure to do so may expose you to liability. For example, a landlord who was repeatedly

told by some of his tenants about the broken and dangerous condition of a water meter box in the front lawn was found by the California Supreme Court to have a duty to warn and protect all tenants, even though the utility box belonged to the water company and in spite of the evidence that, in fact, the lawn was planted on city property! (*Alcaraz v. Vece,* 14 Cal. 4th 1149 (1997).)

2. Likelihood: How likely was it that an accident would occur? You will be responsible for an injury if it can be shown that it was foreseeable. A judge will consider whether any reasonable person in the position of the landlord should have realized that an injury was likely to happen. For example, common sense would tell you that loose handrails will lead to accidents, but it would be unusual for injuries to result from peeling wallpaper.

In California, a landlord's duty of due care extends not only to his tenants (who will be the most likely to be injured), but to the tenants' guests, delivery persons, repairpersons, and even trespassers. (The California Supreme Court ruled that a landlord has the same duty of care to maintain the property regardless of whether the person injured is a tenant, guest, or visitor. *Rowland v. Christian,* 69 Cal. 2d 108, 70 Cal. Rptr. 97 (1968).)

3. Burden: How difficult or expensive would it have been for the landlord to reduce the risk of injury? The chances that you will be held responsible for an accident are greater if an inexpensive and easy response to the situation could have averted the accident. In other words, could something as simple as warning signs and caution tape have prevented the accident, or would you have had to do major structural remodeling to reduce the likelihood of injury?

4. Seriousness: How serious an injury was likely to result from the problem? If a major injury was the likely result, you are expected to take the situation more seriously. By contrast, if the problem was only likely to cause a minor annoyance (even if in fact it caused a more serious injury), then your duty to fix it is less.

To understand how these four questions apply to your duty to refrain from acting negligently, let's look at some typical situations. In each, you'll see how the basic questions of control, likelihood, burden, and seriousness work together to help the judge decide whether the landlord owes the injured tenant a duty of due care. You'll also understand how, for every incident, there are no clear, universal answers.

EXAMPLE 1: Mark broke his leg when he tripped on a loose step on the stairway leading from the lobby to the first floor. The step had been loose for several months. Should the case go to court, Mark will point to the fact that the landlord was legally responsible for (in control of) the condition of the common stairways, that it was highly foreseeable (likely) to any reasonable person that someone would slip on a loose step, that securing the step was a simple and inexpensive repair (not a burden) and that the probable result (falling and injuring oneself on the stairs) is a serious matter. In this situation, the landlord's position appears weak. The best he could hope for would be to show that Mark, through inattention or carelessness, somehow brought the injury on himself. (See the discussion of comparative negligence, below.)

EXAMPLE 2: Lee slipped on a marble that had been dropped in the hallway outside his apartment by another tenant's child just a few minutes earlier. Lee twisted his ankle and lost two weeks' work. Lee will have a difficult time establishing that his landlord acted unreasonably under the circumstances. Although the landlord is responsible for the condition of the common hallways, he obviously does not have complete control over what his tenants negligently leave behind. The likelihood of injury from something a tenant drops is slim (especially assuming the landlord checks the condition of the corridors at regular intervals), and the burden on the landlord to eliminate all possible problems at all times by constant sweeping of the halls is unreasonable. Finally, the seriousness of the likely injury as a result of not sweeping constantly is open to great debate.

EXAMPLE 3: James suffered a concussion when he hit his head on an overhead beam in the apartment garage. He had been loading items onto the roof rack of his truck. James will have a more difficult time convincing a judge or jury that the landlord should be held responsible for

his injury. Although the landlord is, certainly, in charge of the parking garage, he probably won't be held responsible for the relatively unusual activity (loading items onto a truck roof) that led to James's injury. Or, put another way, the likelihood of injury from a low beam is slim, since most people don't climb on the roofs of trucks, and those who do normally see the beam and avoid it. As to eliminating the condition that led to the injury, it's highly unlikely a court would expect the landlord to rebuild the garage, but it's possible that a judge might think it reasonable to paint the beams a bright color and post warning signs. After all, injury from low beams is likely to be to the head, which is a serious matter.

Responsibility for Injuries

If a judge decides that you owed an injured person (tenant, guest, worker, or trespasser) a duty of due care, you are not automatically liable for the injury. The person suing you (the plaintiff, usually the tenant) must then take the case before a jury and convince them that:

- **You didn't fulfill your duty.** The injured person must show that you failed to live up to your duty—for example, that the landlord in Example 1 above did not in fact fix the broken step. In his defense, the landlord might be able to prove that he fixed the step (fulfilling his duty) but that the repair materials failed through no fault of his.
- **The accident was caused by your failure to exercise due care, and not by some other cause.** Even if the tenant can convince the jury that you breached your duty of due care, the tenant will have to convince the jury that the accident was a result of your failure and not, for example, because the plaintiff himself was careless.
- **There was a real injury caused by the accident.** Before plaintiffs can get monetary damages, they have to prove that they have a real injury that was caused by the incident and not the result of, say, a previous accident.

Here are some actual examples of injuries for which juries have held a landlord liable:

- Tenant falls off stairway due to a defective handrail. (*Brennan v. Cockrell,* 35 Cal. App. 3d 796, 111 Cal. Rptr. 1221 (1973).)
- Tenant trips over a rock on a common stairway not properly maintained by the landlord. (*Henrouille v. Marin Ventures,* 20 Cal. 3d 512, 143 Cal. Rptr. 247 (1978).)
- Tenant injured or property damaged by fire resulting from defective heater or wiring. (*Evans v. Thompson,* 72 Cal. App. 3d 978, 140 Cal. Rptr. 525 (1977); and *Golden v. Conway,* 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).)
- Tenant's child on tricycle run over by car on public street adjacent to steep driveway on landlord's property, where children often rode tricycles and sped down the hill into the street. (*Barnes v. Black*, 71 Cal. App. 4th 1473, 84 Cal. Rptr. 2d 634 (1999).)

Fences and Other Dangerous Conditions

You are not required to fence off your property, even if it is adjacent to a busy thoroughfare or dangerous open spaces. (*Brooks v. Eugene Berger Management Corp.,* 215 Cal. App. 3d 1611, 264 Cal. Rptr. 756 (1989).) However, once you have erected a fence around your property, you will be expected to maintain it and can be held liable if its deterioration leads to an injury. The rules change, however, with respect to dangerous conditions that are especially attractive to children: Landlords are expected to make these dangerous sites (called "attractive nuisances") inaccessible or remove them. In particular, many local ordinances require fences around swimming pools, and their absence, low height, or poor repair is considered negligence *per se*, discussed below.

CAUTION

The responsibility for safe residential rental property cannot be passed on to a manager or contractor. Under California law, your duty to repair and maintain your property cannot be delegated—in other words, you cannot escape liability for failing to maintain your property in a safe condition by making managers or independent contractors responsible for repair and maintenance. For example, you cannot avoid responsibility for the improper maintenance of elevators, water heaters, or roofs, even though you have hired or contracted with someone else to maintain them. (*Brown v. George Pepperdine Foundation,* 23 Cal.2d 256, 143

P.2d 929 (1943); *Knell v. Morris,* 39 Cal.2d 450, 247 P.2d 352 (1952); *Poulsen v. Charlton,* 224 Cal. App. 2d 262, 36 Cal. Rptr. 347 (1964).) Also, if the work involves a "peculiar," or inherent, risk of injury (like building demolition or major construction), an independent contractor's negligence will be laid upon the landlord. (Restatement 2d Torts § 416.)

Landlord liability for injuries to tenants by third parties and issues involving drug-dealing tenants are discussed below.

Negligence Per Se: Landlord Liability for Violating a Law

When a tenant is injured because the landlord violated a law designed to protect tenants, the landlord is presumed to be negligent. Lawyers call this "negligence *per se*." From a practical point of view, this means that all the questions that a judge considers regarding the landlord's duty to act reasonably in a straightforward negligence case (questions about foreseeability, seriousness of the probable injury, moral blame, and so on) are skipped. The only way that the defendant (the landlord) can escape liability is to prove that his violation of the law was not the cause of the injury, or that there was really no injury at all, or that somehow the plaintiff (usually the tenant) brought the accident upon himself.

Probably the most common example of landlords' negligence *per se* is failure to install smoke alarms as required by state and local law. (All multiple-unit

Landlord Liability for Dog Bites and Other Animal Attacks

You may be liable for the injuries caused by your tenants' animals, be they common household pets or more exotic, wild animals.

Dangerous domestic pets. Landlords who are aware that their tenants are keeping vicious or dangerous domestic pets, such as a vicious pit bull, may be held liable if the animal injures another person on the property. An injured person would have to show two things:

- that the landlord actually knew (or, in view of the circumstances, must have known) of the animal's dangerous propensities, and
- that the landlord could have prevented the injury. For example, the landlord could have evicted the tenant with the dangerous pet (on the grounds that the animal's presence constituted a danger to other tenants or guests).

To add insult to injury, a landlord's liability insurance policy may not cover him if the tenant had posted a "Beware of Dog" sign. Some insurance carriers have successfully argued that this type of warning sign indicates that the tenant expected (or even intended) that the dog would cause injury. Intentional assaults are not covered by insurance.

Dangerous exotic pets. The situation is a little different with respect to wild animals kept as pets: Unlike the accepted practice of keeping conventional pets, which aren't always dangerous, the keeping of wild animals is considered an "ultrahazardous activity," which the law considers always dangerous. While the landlord needs to know about the vicious tendencies of domestic animals before he will be held liable, the landlord will be presumed to know of the dangerous aspects of a wild animal *as soon as he learns that the animal is on the property.* Thus, if your tenant keeps a monkey and you know about it (or, in the exercise of reasonable care, should know about it), a court will assume that you understood the dangers presented, and you may be liable if the animal causes injury and you failed to take steps to prevent it.

You may wonder how your responsibility to prevent tenants from keeping wild animals squares with your inability to enter your tenant's home without his consent in order to inspect. (See Chapter 13 for legal rules regarding tenants' privacy rights.) If a wild animal is kept without your knowledge, you probably will not be held liable. In practical terms, however, this is rarely going to be the case: One court that ruled on an attack by a tenant's monkey noted that the manager had received complaints about wild animal noises but had failed to follow up. The court ruled that the manager was put on notice that the no-pets clause in the monkey owner's lease was being violated and therefore, irrespective of tenant privacy protections, had the right and duty to investigate. His failure to do so was negligence. (*Jendralski v. Black,* 176 Cal. App. 3d 897, 222 Cal. Rptr. 396 (1986).)

dwellings, from duplexes on up, must have smoke detectors installed. (H&S § 13113.7.) Violation is also a criminal offense.) For example, a tenant who suffers injury or damage as the result of a fire that would have been extinguished sooner but wasn't because the landlord violated a law requiring smoke detectors in the building does not have to convince a court that the landlord was negligent. The law assumes the landlord was negligent because he violated the law.

Other examples of negligence *per se* include:

- failure to equip rental units with deadbolt locks as required by state law and any local ordinances (see the discussion of the duty to maintain secure premises in Chapter 11), and
- failure to abide by other safety laws, including providing fire extinguishers and installing and maintaining interior sprinklers.

Tenants Can't Sign Away Their Right to Sue Landlords for Negligence

You cannot protect yourself from lawsuits brought by tenants by putting a clause in leases and rental agreements absolving yourself in advance for injuries suffered by a tenant as a result of your negligence. Known as "exculpatory clauses," these provisions are not legal or enforceable. (CC § 1953.)

Defenses to Negligence Charges

Even if a landlord has been negligent in failing to correct a problem that caused harm to a tenant or guest, there are still a few defenses and partial defenses available in some situations.

Comparative negligence. If the injured tenant or visitor was also guilty of negligence—for example, if he was drunk, or didn't watch his step when he tripped on a rock on the landlord's poorly maintained common stairway—the landlord's liability is proportionately reduced. For example, if a judge or jury ruled that a tenant who had suffered $10,000 in damages was equally (50%) as negligent as the landlord, the tenant would recover only $5,000.

Assumption of the risk. A person who knows the danger of a certain action and decides to take the chance anyway is said to "assume the risk" of injury. If the person is injured as a result, there's no entitlement to recover anything, even if another person's negligence contributed to the injury.

> **EXAMPLE:** A tenant falls and is injured when he takes a shortcut over a sidewalk that has fallen into disrepair and is littered with broken pieces of cement. The tenant knew that the sidewalk was dangerous but sues the landlord, claiming that the landlord was negligent for not fixing the sidewalk. Because the tenant knew the possible risk of walking on the dangerous sidewalk, he might not win a lawsuit against a landlord based on the landlord's negligence.

Breach of Warranty and Fraud

If you make an express promise in a written lease or rental agreement, such as to make even minor interior repairs, you are very likely to be held liable to a tenant who is injured if:

- you simply didn't make the repair and the defect caused injury
- you made the repair but did so in a shoddy way, causing injury, or
- the tenant was injured when he resorted to attempting the repair himself.

> **EXAMPLE:** Tom's lease included a clause prohibiting him from doing any interior repairs. When the lifting mechanism of his double-hung window broke, Tom reported the problem to his landlord Len. Len did nothing, leaving Tom to swelter in the summer heat. After repeated requests for repairs, Tom raised the window and attempted to secure it with a bar, but the window fell and severely injured his hand. Len was found liable on the grounds that, having obligated himself to perform interior repairs, he ought to have done so in a reasonably timely manner. Moreover, Tom's resort to self-help was entirely reasonable under the circumstances.

Even without a written lease or rental agreement provision, a landlord who advertises or tells current or prospective tenants about some special feature of the property, such as an immaculate laundry facility, is likely to be held liable if a soapy puddle next to the washing machine causes a tenant to slip and fall.

Strict Liability/Liability Without Fault: Will It Apply to Owner-Builders?

Between 1985 and 1995, landlords in California were subject to the rule of strict liability—meaning that they were liable for injuries caused by hidden defects in the property, present at the time the lease was signed. The law made even careful, conscientious landlords liable for hidden defects that even the most thorough inspection would not reveal. (The classic case involved a landlord who purchased a building in which the shower doors in the rental units were made of nonsafety glass. In spite of his careful inspection of the premises, and the fact that it would have taken an expert to determine that the tiny logo on the doors indicated that the glass was not shatterproof, the landlord was held liable when a tenant fell against a door and severely cut himself.)

In 1995, the California Supreme Court overturned the rule of strict liability, in most situations returning California landlords to the standard of negligence (which is the standard applied in 48 other states). (*Peterson v. Superior Court (Banque Paribas)*, 10 Cal. 4th 1185 (1995).)

The court decision left open the possibility that strict liability would continue to apply to the landlord who is also the builder of the premises. If you are the original builder of your rental property, you need to understand that, if a tenant is injured due to a hidden defect in the property that was present at the time the tenant signed the lease, you may be held liable regardless of your best efforts to properly repair and maintain the premises.

Reckless or Intentional Acts

A landlord who injures someone as the result of an intentional or reckless act—for example, assaulting a tenant or jerry-rigging an electrical repair instead of calling an electrician—is liable for the injury or property damage. "Recklessness" generally means extremely careless behavior regarding an obvious defect or problem. A landlord who has been aware of a long-existing and dangerous defect but neglects to correct the problem is guilty of recklessness, not just ordinary carelessness.

Intentional injuries are rarer, but they do occur. For example, if the landlord or manager harasses or verbally abuses the tenant, causing the tenant extreme emotional distress, the tenant may sue for compensation for emotional upset and mental suffering, as well as medical bills, lost wages, and future lost wages. Tenants who sue for emotional distress must show that the landlord's failure to repair was particularly extreme or outrageous.

In cases of reckless or intentional acts, a judge or jury may award "punitive" damages—extra money over and above the amount required to compensate the victim for his actual damages, such as medical bills. Punitive damages are designed to punish a person guilty of injuring someone through reckless or intentional conduct, with an eye toward preventing similar conduct in the future. (CC § 3294.) In California, punitive damages are not covered by insurance, and a landlord who is hit with a punitive damages award will always have to pay for it out of his own pocket.

> **EXAMPLE:** Andrew rented a split-level duplex from Ellen. Andrew told Ellen that the carpet covering the three interior stairs was loose and dangerous, and needed to be replaced or repaired. Ellen planned to replace all of the carpeting when Andrew's lease expired in a few months, and didn't want to waste time and money repairing carpet that was just going to be ripped out. Despite Andrew's repeated requests, Ellen refused to repair the carpet. Andrew was injured when the carpet pulled out and he fell down the steps.
>
> Andrew sued Ellen for recklessly and willfully failing to repair and maintain the rental property. He collected several thousand dollars for his past and future medical bills, loss of earnings, and pain and suffering. Because the jury found that Ellen acted intentionally and recklessly, they assessed punitive damages against her, which she had to pay for out of her own pocket.

CAUTION

Managers can be independently sued for emotional distress. When tenants sue for general and special damages for habitability defects (like asking for a rent refund and the value of ruined property when the roof leaks), the person who pays is the landlord, even if the manager had been given the repair responsibility. (Liability of the landlord for defects in the property that do not cause injury is discussed

in Chapter 11.) If the tenant claims that the manager caused emotional distress, however, the manager may be liable together with the landlord. Chapter 6 discusses an owner's liability for his manager's acts.

Lawsuits for Maintaining a Public Nuisance

The habitability requirements of housing laws and court decisions are not the only repair and maintenance requirements imposed on landlords. You may not create or tolerate any situation that is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of one's property. If you create or allow such a situation to develop, and if an entire neighborhood or community is affected, you are liable for maintaining a public nuisance. (CC § 3491.) Unlike the theory of private nuisance discussed in Chapter 11, tenants who sue under the public nuisance statutes can recover for mental suffering as well as the interference with their enjoyment of their property. As with the claim of emotional distress discussed above, the complaining tenants or neighbors need not claim that they were physically touched by the offensive behavior.

Public nuisance lawsuits are increasingly being filed against landlords whose tenants have established drug-using or -selling operations on the premises, a topic discussed in detail below. This is not the only use of the public nuisance remedy, however. The consequences of lawful activity may also rise to the level of a public nuisance. For example, a tenant's nightly jam session with 12 of his closest musician friends, continuing into the wee hours, may not be illegal, but it may interfere with his neighbors' abilities to sleep and cause them physical and mental suffering. Whether the music constitutes a public nuisance will depend on the evidence presented to the judge and the judge's view of the seriousness of the conduct and the harm caused.

If a court decides that a nuisance exists, it may order the landlord to fix the problem and compensate the neighbors or other tenants for the interference and suffering the nuisance caused. If the landlord's conduct was intentional (and not merely negligent), the tenants can get punitive damages as well.

Landlord's Responsibility to Protect Tenants From Crime

A landlord's duty to keep premises safe includes taking reasonable measures to protect tenants and visitors from foreseeable assault. If your negligence results in injury to a tenant or visitor from a criminal act by a stranger, another tenant, or an employee, you may be liable.

Understanding What Basic "Security" Means

Obviously, home security is a very general concept, covering everything from locks on doors and windows to landscaping and lights to environmental design. And, of course, multiunit buildings have a number of additional security considerations, such as needing to limit access to the premises and keep common areas safe. People are continually coming and going, and there are many common areas of the building where an attacker could hide. Excellent lighting is essential in stairwells, elevators, laundry rooms, basements, parking garages, and outdoor walkways.

To understand what the law requires of a multi-unit landlord, we'll start with a discussion of the basic security measures ("reasonable precautions") that every landlord must take to protect his tenants. The source of this universal duty is the landlord's implied warranty that the premises are habitable, and the requirement that the landlord maintain the property in a tenantable condition (CC § 1941) and exercise due care (CC § 1714(a)). (See Chapter 11.) In addition, state law requires locks on certain doors and windows. (CC § 1941.3). In other words, landlords must take both specific and reasonable measures to guard against criminal, as well as accidental, harm to their tenants.

These general requirements may be amplified by specific safety measures specified by local codes. For example, the building code in your city may go further than the state law requiring you to provide secure entryways and windows. Your duty to provide secure housing starts with requirements like these but usually doesn't end there, although landlords are most often found liable when criminals have gained access through broken locks and windows.

You may also be bound to provide what we'll call "enhanced" security measures, either because of what you have promised in your lease, rental negotiations, or ads, or because of what you know about the unique problems of your property or tenants. For example, if you have proudly advertised that your building has security personnel and an intercom system, the law is likely to impose a duty on you to continue to maintain these features. If a crime occurs when these features are either nonfunctional or missing, you are likely to be held liable. Similarly, if you know that criminal incidents have occurred on your property in the past, you may be required to beef up your security systems, especially if it is reasonably foreseeable that the same activity may occur again.

Security Duties Imposed by State Law

You must provide deadbolt locks on main exterior doors (except for sliding doors), existing common area doors and gates, and certain windows. (CC § 1941.3.) The law requires:

- A deadbolt lock that is at least thirteen-sixteenths of an inch long for each main entry door. A thumb-turn lock in place on July 1, 1998 will satisfy the requirement (but you must install a thirteen-sixteenths of an inch deadbolt whenever you repair or replace the lock). If you use other locking mechanisms, they must be inspected and approved by a state or local government agency in order to satisfy the requirements of the law.
- Locks that comply with state or local fire and safety codes in existing doors or gates that connect common areas (such as lobbies, patios, and walkways) to rental units or an area beyond the property (such as a main front door).
- Window locks on louvered and casement windows. Prefabricated windows with their own opening and locking mechanisms are exempt, as are those that are more than 12 feet above the ground. However, a window that is over 12 feet from the ground, but less than six feet from a roof or any other platform, must have a lock.

Basic Security Duties Imposed by Local Ordinances

Most building and housing codes adopted by local governments are rich with specific rules designed to minimize the chances of a criminal incident on residential rental property—for example, by requiring peepholes, deadbolts, and specific types of lighting on the rental property. On the other hand, some local ordinances give the landlord little specific guidance, requiring "clean and safe" housing but not filling in the meaning of these terms. If your local codes are not equipment-specific, you will need to do some independent homework: realistically assess the crime situation in your locality and implement security that provides reasonable protection for your tenants.

> **EXAMPLE:** The housing code in the city where Andrew owned rental property included several sections that dealt with minimum standards for apartment houses. One of the sections specified that parking garages and lots be maintained in a "clean and safe" condition. The garage in Andrew's apartment house was dark (because there were not enough lights) and fairly easily accessible from the street (because the automatic door worked excruciatingly slowly). When a tenant was assaulted by someone who gained entry through the substandard garage door, Andrew was sued and found partially liable for the tenant's injuries.

How the Landlord's Duty of Due Care Relates to Security

Learning what the local laws require isn't the only way rental property owners can discover the basic security measures needed on their properties. Basic security duties also derive from the property owner's general duty to act reasonably under the circumstances—or, put another way, to act with due care. Earlier in this chapter we saw that landlords must refrain from acting negligently and causing accidental injury to their tenants. For example, common areas must be maintained in a clean and safe condition so that they do not create a risk of accidents. In the area of security, too, you must take reasonable precautions to further your tenants' safety from criminal assaults.

Whether you have acted reasonably with respect to your tenants' safety from crime is analyzed in the same way as are your actions protecting tenants from structural defects. In the beginning of this chapter, we explained that several factors a judge considers before

deciding that the landlord had a duty to protect a tenant from accidental harm: the degree of control that the landlord has over the situation, the foreseeability of the injury, the severity of the probable injury, and the burden on the landlord that a duty to protect would entail. A judge asks the same questions when a tenant is injured by the act of a criminal. If the questions are answered in favor of the tenant, the judge will conclude that the landlord owed him a duty of care, and the rest of the case (whether the landlord actually breached that duty, whether his breach caused the incident, and whether the tenant was injured) will go to the jury. The questions asked by the judge are:

- **How much control did the landlord have over the situation?** Did the breach in security occur in a common area (over which the landlord traditionally exercises exclusive control) such as a hallway, or in the tenant's own apartment? If in a common area, the landlord's responsibility is heightened. If the crime was perpetrated on the sidewalk outside the building, are there reasonable measures the landlord could have taken to minimize the chances of this happening?
- **How likely, or foreseeable, was it that a crime would occur?** Was it an isolated event, or yet another in a string of neighborhood crimes? Had there been prior criminal incidents on the property itself? A landlord who knows that an offense is likely (because of a rash of break-ins or prior crime on the property) may be expected, as part of basic security, to take reasonable steps to guard against future crime. (See the discussion below for a fuller discussion of the role of the landlord's knowledge as it relates to enhanced security.)
- **How difficult or expensive would it have been to reduce the risk of crime?** For instance, would locks and lighting have discouraged most would-be assailants, or would the landlord have had to do major structural remodeling to reduce the chance of crime? If a relatively cheap or simple measure would have made a significant difference in the likelihood of crime, it is likely that the landlord will be held to a duty of due care.
- **How serious was the probable injury?** When assessing negligence in the context of an accidental injury, courts consider the seriousness of the probable (not the actual) injury. When it comes to the question of a criminal assault, however, the seriousness of probable injury is usually assumed: Very few judges or juries would consider an assault to be a minor matter.

To understand how these four questions work together to jointly determine whether a landlord has a duty to provide basic security, let's look at two examples that illustrate how the question of due care is completely dependent on the facts of each situation.

EXAMPLE 1: Sam was accosted outside the entryway to his duplex by a stranger who was lurking in the tall, overgrown bushes in the front yard next to the sidewalk. Both the bushes and the lack of exterior floodlights near the entryway prevented Sam from seeing his assailant until it was too late. The judge decided that the landlord owed a duty of due care to Sam, on the theory that the landlord controlled the common areas outside the duplex; that it was foreseeable that an assailant would lurk in the bushes and that, because there had been many previous assaults in the area, it was also probable that another assault would occur. Finally, the judge put all this together and concluded that the burden of preventing this type of assault was small in comparison to the risk of injury. It was then up to the jury to decide whether the landlord had breached this duty, whether this breach caused the injury, and whether Sam actually suffered any injuries.

EXAMPLE 2: Max was assaulted and robbed in the open parking lot next to his apartment house. Several muggings had recently been reported in the neighborhood. The lot was thoroughly lit by bright floodlights, but it was not fenced and gated. The judge in Max's case found that the landlord owed a duty of due care toward Max, since the lot was under the landlord's control, an assault seemed reasonably foreseeable in view of the recent nearby muggings, and the burden of securing the area was not overwhelming. When the jury got the case, however, they decided that the landlord had not, in fact, breached his duty of due care, for they decided that the bright lights were all that a reasonably conscientious landlord should be expected to provide in the circumstances.

Landlord's Responsibility to Provide Enhanced Security

Knowing the security requirements of your local laws, and being generally familiar with how the courts have ruled on cases holding landlords responsible for criminal acts against their tenants, is a good start. Your next step is to understand how your responsibilities may be increased by both your own acts and factors beyond your control:

- If you promise security features beyond the basics, you may well have to provide them. This includes your written promises (in the lease or rental agreement) and your oral representations about the security you provide—and even your representations about security in your advertisements.
- Although crimes against your tenants may be beyond your control, if your property is in a high-crime area, and especially if there have been crimes on the premises before, your duty to provide security will rise accordingly.

In the sections that follow, we'll explore how your basic security duties can be enhanced, either by virtue of your own promises or actions or because of the nature of the surrounding neighborhood or the prior occurrence of crime on the premises.

Offering or Agreeing to Provide Additional Security

Your advertisements, written promises in the lease, and oral representations made to a prospective tenant can trigger security responsibilities beyond the basics.

Be careful what you advertise or promise. The desire for secure housing is often foremost in the minds of prospective tenants, and landlords know that the promise (in an advertisement or while showing the rental) of safe housing is often a powerful marketing tool. During discussions with interested renters, you will naturally be inclined to point out security locks, outdoor lighting, and burglar alarms, since these features may be as important to prospective tenants as a fine view or a swimming pool.

Take care, however, that your written or oral descriptions of security measures are not exaggerated: Not only will you have begun the landlord/tenant relationship on a note of insincerity, but your descriptions of security may legally obligate you to actually provide what you have portrayed. And if you fail to do so, or fail to conscientiously maintain promised security measures in working order (such as outdoor lighting or an electronic gate on the parking garage), and if this lack of security is found by a court or jury to be a material factor in a crime on the premises, you may well be held liable for a tenant's injuries. This is true even though you might not have been found liable if you hadn't made the promise in the first place.

> **EXAMPLE:** The manager of Jeff's apartment building gave him a tour of the building before he moved in. Jeff was impressed with the security locks on the gates of the high fence at the front and at the rear of the property. Confident that the interior of the property was accessible only to tenants and their guests, Jeff didn't hesitate to take his kitchen garbage to the disposal area at the rear of the building late one evening. There he was accosted by an intruder who had gained entrance through a small side gate that did not have a lock. Jeff's landlord was held liable on the grounds that his manager's representations regarding the locked gates had created a false sense of security which led Jeff to do something (going out at night to a remote area of the building) he might not otherwise have done.

Ads That Invite Lawsuits

Advertisements like the following will come back to haunt you if a crime occurs on your rental property:

- "No one gets past our mega security systems. A highly trained guard is on duty at all times."
- "We provide highly safe, highly secure buildings."
- "You can count on us. We maintain the highest standards in the apartment security business."

Be especially careful what you promise in writing. The simple rule of following through with what you promise, discussed above in the context of ads and oral promises, is even more crucial when it comes to written provisions in your lease or accompanying

documents. Why? Because the fact that you have made the promise is preserved in black and white, in your own lease, whereas there is always room for interpretation when an oral representation forms the basis of the promise. For example, if your lease or rental agreement promises something either as vague as "safe and secure premises," or as specific as an electronic security system or a doorman after dark, you will be hard-pressed to deny this promise if it is brought up against you in court. If you have failed to follow through with the written promise, you will likely find that a court will hold you liable for criminal acts that were made possible through your lapse.

> **EXAMPLE:** The tenant information packet given to Mai when she moved into her apartment stressed the need to keep careful track of door keys: "If you lose your keys, call the management and the lock will be changed immediately." When Mai lost her purse containing her keys, she called the management company right away but was unable to reach them because it was Sunday morning and there was no weekend or after-hours emergency procedure. That evening, Mai was assaulted by someone who got into her apartment by using her lost key. Mai sued the owner and management company on the grounds that they had failed to live up to the standard they had set for themselves (to change the locks promptly) and were therefore partially responsible for the assailant's entry. The jury agreed and awarded Mai a large sum.

Be careful to maintain what you have already provided. Your actions can obligate you as much as an oral or written statement. If you "silently" provide enhanced security measures (such as security locks or a nighttime guard)—that is, you make these features available without enumerating them in the lease, in advertisements, or through oral promises—you may be bound to continue and maintain these features, even though you never explicitly promised to do so.

Many landlords react with understandable frustration when their well-meaning (and expensive) efforts to protect their tenants actually have the effect of increasing their level of liability. But the answer to this frustration is not to cut back to the bare minimum for security. Instead, turn a practical eye to the big picture: Over time, you are better off (legally safer) using sophisticated security measures (thereby ensuring contented, long-term tenants and fewer legal hassles) than you would be by offering the bare minimum and trusting to fate, the police, and hopefully the savviness of the tenants to keep crime at bay. But at least from the point of view of future liability for criminal acts, the less you brag about your security measures, the better.

Be careful how you handle complaints. Take care of complaints about a dangerous situation or a broken security item immediately, even if the problem occurs in the middle of the night or at some other inconvenient time. Failure to do so may increase your liability should a tenant be injured by a criminal act while the security system is out of service or the window or door lock broken. A court may even consider your receipt of the complaint as an implicit promise to do something about it. In short, if you get a complaint about a broken security item—even one you didn't advertise—you should act immediately to:

- fix it, or
- if it's impossible to fix it for a few days or weeks, alert tenants to the problem and take other measures. For example, if your front door security system fails and a necessary part is not immediately available, you might hire a security officer.

Security in Response to the Neighborhood

Your duty to provide enhanced security may have nothing to do with what is required by law or what you promise or provide. Your liability for damage and injuries caused by a criminal act can also be based on the prevalence of crime in your area, particularly the prior occurrence of crime on your rental property and your failure to take steps to reduce the risk of future crimes.

> **EXAMPLE:** Allison rented an apartment in Manor Arms after being shown the building by the resident manager, who assured her that the building was "safe." A month after moving in, Allison was assaulted by a man who stopped her in the hallway and claimed to be a building inspector. Unbeknownst to Allison, other similar assaults had occurred in the building, and the

manager even had a composite drawing of the suspect. Allison's assailant was captured and proved to be the person responsible for the earlier crimes as well. Allison sued the building owners, claiming that they were negligent in failing to warn her of the specific danger posed by the repeat assailant and in failing to beef up their security (such as hiring a guard service) after the first assault. The judge found that the landlords owed Allison a duty of care to protect and warn her of the danger; the jury found that the owners had breached that duty and that Allison was injured as a result.

Here are some actual cases in which landlords have been held liable for tenants' injuries and property damage caused by third parties on the property. All involved situations that the landlord might have guarded against.

- Tenant's visitor killed in dim, empty parking area with broken security system and a history of violent crimes. (*Gomez v. Ticor,* 145 Cal. App. 3d 622, 193 Cal. Rptr. 622 (1983).)
- Tenant robbed and assaulted in dimly lit common area where landlord knew or should have known about earlier robberies and assaults. (*Penner v. Falk,* 153 Cal. App. 3d 858, 200 Cal. Rptr. 661 (1984); and *Isaacs v. Huntington Memorial Hospital,* 38 Cal. 3d. 112, 211 Cal. Rptr. 356 (1985).)

How to Protect Your Tenants From Criminal Acts While Also Reducing Your Potential Liability

The job of maintaining rental units that are free from crime—both from the outside and, in the case of multiunit buildings, from within—can be a monumental task. Sometimes, your duty to protect your tenants can even seem to conflict with your duty to respect your tenants' rights to privacy and autonomy. How will you know if the premises are safe unless you perform frequent inspections of individual rental units—which you can't legally insist upon—and the common areas? How will you know about the activities of your tenants unless you question them thoroughly regarding their backgrounds and livelihoods, or unless you watch them carefully?

We recommend a seven-step preventive approach to effectively and reasonably protect your tenants and, at the same time, reconcile your need to see and know (and thus to protect) with your duty to respect tenants' privacy:

Step 1: Meet or exceed basic legal requirements for safety devices, such as deadbolt locks, good lighting, and window locks. (See Chapter 11.)

Step 2: Educate your tenants about crime problems and prevention strategies. Make it absolutely clear that they—not you—are primarily responsible for their own protection.

Step 3: Provide and maintain adequate enhanced security measures based on an analysis of the vulnerability of your property and neighborhood. If your tenants will pay more rent if you make the building safer, you are foolish not to do it.

Step 4: Don't hype your security measures.

Step 5: Conduct regular inspections of your properties to spot any problems (and ask tenants for their suggestions).

Step 6: Quickly respond to your tenants' suggestions and complaints.

Step 7: If an important component of your security systems breaks, be prepared to fix it on an emergency basis and provide appropriate alternative security.

These steps will not only limit the likelihood that criminal activity will occur on your property, but also reduce the risk that you will be found responsible if a criminal assault or robbery does occur there.

Provide Adequate Security Measures

A landlord who wants to improve the way his property looks knows that there are several steps toward discovering what needs to be done and how to do it. For example, he might study the property and make a list of possible improvements. Also, he might hire a professional designer or landscaper as a consultant or copy other properties that have achieved the "look" he is after. Finally, before spending a fortune, the sensible landlord will measure the cost of any potential improvement project against both his available funds and any increase in the property's rental or sales value.

The landlord who wants to improve the security of his property follows a very similar course: personal inspection, attention to what has worked in nearby properties, professional advice (including input from the local police and your insurance company), and a cost/benefit analysis will result in a sensible approach to providing safe housing.

The steps are the same for all kinds of housing and neighborhoods—whether you own a duplex or single-family home in a low-crime suburban area or a multiunit apartment building in a dangerous part of town.

Start With Your Own Personal Inspection

Walk around your property and, as you assess the different areas, ask yourself two questions:

- Would I, or a member of my family, feel reasonably safe here, at night or alone? and
- If I were a thief or assailant, how difficult would it be to gain access and approach a tenant?

Schedule your assessment walks at different times of the day and night—you might see something at 11 p.m. that you wouldn't notice at 11 a.m.

At the very least, we recommend the following sensible security measures for every multiunit rental property:

- Exterior lighting directed at entranceways and walkways should be activated by motion or on a timer. (Do not rely on managers or tenants to manually operate the lights.) The absence or failure of exterior lights is the single most common allegation in premises liability cases brought against landlords.
- Make sure you have good, strong interior lights that come on automatically, in hallways, stairwells, doorways, and parking garages.
- Sturdy deadbolt door locks and solid window and patio door locks (including bars) are essential, as are peepholes at the front door. (Best to install two—one at eye level for an adult and another at a level appropriate for a child.)
- Intercom and buzzer systems that allow the tenant to control the opening of the front door from the safety of his apartment are also a good idea for many types of buildings.
- Shrubbery/landscaping needs to be designed and maintained so that it is neat and compact. It should not obscure entryways nor afford easy hiding places adjacent to doorways or windows.
- Where necessary, a 24-hour door person is a good idea. In some areas, this is essential and may do more to reduce crime outside and inside your building than anything else. Spread over a large number of units, this may cost less than you think.
- Driveways, garages, and underground parking areas need to be well lit and as secure as possible (inaccessible to unauthorized entrants). Fences and automatic gates may be a virtual necessity in some areas of some cities. Several trade magazines in the rental housing industry often give good, practical information on available equipment.
- Elevators are an ideal space for a fast-acting assailant: While his victim is neatly confined to a small space, he can quickly accomplish his dirty deed. Limiting access to the elevators by requiring a pass key and installing closed-circuit monitoring reduce the chances that an assailant will choose this site.
- A 24-hour internal security system with cameras and someone monitoring them is often effective in deterring all but the most sophisticated criminals. Though these systems are expensive, some tenants will bear the extra cost in exchange for the added protection.

EXAMPLE: An assailant studied an upscale apartment building and waited until it was clear that large numbers of people were arriving for a party. When he entered the lobby, he told the guard that he, too, was headed for the party upstairs. Because the guard had not been given a list of invited guests and told to ask for identification from every party-goer, the assailant was allowed into the building, where he assaulted a woman in the laundry room. Had the owner or manager instructed his tenants to supply the guard with lists of guests, and told the guard that no one should be admitted without confirmation, the unfortunate incident would not have happened. The landlord was held partially liable for the tenant's injuries.

Should You Use a Doorman or Security Guard?

Security guards, or doormen, are appropriate in some situations. The presence of an alert human can make an empty lobby more inviting to a tenant and less attractive to a prospective criminal. But bear in mind that the "security" provided is only as good as the individual doing the job. If you hire a firm, choose carefully and insist on letters of reference and proof of insurance. You can also hire your own guard, but this tends to get complicated very quickly, since you will be responsible for the guard's training and weapons used (if any). It is essential to remember that, even with the best-trained and most visible security personnel, you must continue to pay attention to other aspects of security.

Security for a House or Duplex

Single-family housing and duplexes present opportunities for security that may not be appropriate in multifamily residences. For example, it may be wise to provide an alarm that is hooked up to a security service. Also, while yard maintenance may be the tenants' responsibility, you may need to supervise the job to make sure that bushes and trees are trimmed so that they do not obscure entryways or provide convenient hiding spots for would-be criminals.

Consider the Neighborhood as Well as Your Property

The extent of your security measures depends somewhat on the nature of the neighborhood and the property itself. If there have been no incidents of crime in your area, you have less reason to equip your property with extensive prevention devices. On the other hand, residential crime is a spreading, not receding, problem, and you certainly do not want one of your tenants to be "the first to be raped or robbed on your block." Especially if there have been criminal incidents in the neighborhood, talk to the neighbors and the police department about what measures have proven to be effective.

The physical aspects of the neighborhood, as well as its history, can be important indicators of the risk of crime on your property. Properties adjacent to late-night bars and convenience stores often experience more burglaries and assaults than housing that is removed from such establishments. In some cities, proximity to a freeway on-ramp (an effective avenue of escape) may increase the risk of crime.

Key Control

The security of your rental property extends from the locks on rental unit doors to the keys to those doors. Don't let keys get into the wrong hands:

- Keep all duplicate keys in a locked area, identified by a code that only you and your manager know. Several types of locking key drawers and sophisticated key "safes" are available. Check ads in magazines that cater to the residential rental industry, or visit a local lock shop.
- Strictly limit access to master keys by allowing only you and your manager to have them.
- Keep strict track of all keys provided to tenants and, if necessary, to your employees.
- Rekey every time a new tenant moves in.
- Give some thought to the problem of the front door lock: If it is operated by an easy-to-copy key, there is no way to prevent a tenant from copying the key and giving it to others or using it after he moves out. Consider using locks that have hard-to-copy keys; or (with small properties) rekey the front door when a tenant moves. There are also easy-to-change card systems that allow you to change front door access on a monthly basis or when a tenant moves.
- Give keys only to people you know and trust. If you have hired a contractor whom you do not know personally, open the unit for the contractor and return to close up when the job is done. Keep in mind that often even known and trusted contractors hire day laborers whose honesty is yet to be proven.
- Don't label keys with the rental unit number or name and address of the apartment building.

When a Tenant Wants to Supply Additional Security

Some tenants may be dissatisfied with your security measures, even if you've fully complied with state and any local laws, and may want to install additional locks or an alarm system to their unit at their expense. Clause 17 of our form lease and rental agreements forbids the tenant from rekeying or adding locks or a burglar alarm system without your written consent. If you provide such consent, make sure the tenant gives you duplicate keys, instructions on how to disarm the alarm system, and the name and phone number of the alarm company, so that you can enter in case of emergency. Be sure your name and contact information are given to the company. Think carefully before you refuse your tenant permission to install extra protection: If a crime occurs that would have been foiled had the security item been in place, you will obviously be at a disadvantage before a judge or jury.

Get Advice From Professionals

Increasingly, as the problems of urban crime escalate, the police will work together with you to develop a sound approach and educate tenants. Contact the local police department and ask for help in assessing the vulnerability of your property. Many police departments will send an officer to your property, and some will also meet with tenants to advise them on ways to recognize, avoid, and report suspicious behavior.

Another professional resource is your own insurance company. Many companies provide free consultation on ways to deter crime, having figured out that in the long run it's cheaper to offer preventive advice than to pay out huge awards to injured clients. For example, drawing on its experience with prior claims generated by security breaches, your company might be able to suggest equipment that has (and has not!) proven to be effective in preventing break-ins and assaults.

The obvious resource for advice is the private "security industry" itself. As the amount of residential crime has gone up, so too have the number of companies that specialize in providing security services. Listed online or in the telephone book under "Security Systems," these firms will typically provide an analysis of your situation before recommending specific equipment—whether it be bars on windows or an internal electronic surveillance system. Even if you do not ultimately engage their services, a professional evaluation may prove quite valuable as you design your own approach. Speak with other landlords or housing authorities to make sure that you choose a reputable outfit to examine your property.

Evaluate the Effectiveness of Security Measures Against Their Cost

The best security measures on the market will do you no good if, to pay for them, you have to raise rents so high that you end up with no tenants to protect. Short of going bankrupt (or getting out of the business altogether), the best approach is to provide the amount of security that is economically feasible. And, of course, no matter how much security you provide, you'll want to let your tenants know that no security can be counted on as foolproof, and that it's up to them to be wary. This at least puts your tenants on notice that they cannot entirely depend on you to ensure their safety. And, should an unfortunate incident occur on your property, you will be able to argue to a jury not only that you did the best you could in the circumstances, but that you were honest with your renters as to the limitations of your measures.

Be Candid About Security Problems

Your candid disclosures regarding the safety problems of your neighborhood and the limited effectiveness of the existing security measures may help shield you from liability if a criminal incident does occur on your property. From the tenants' point of view, such disclosures serve to alert them to the need to be vigilant and to assume some responsibility for their own safety. If you do not disclose the limitations of the security you provide (or if you exaggerate) and a crime does occur, one of the first things your tenant will say (to the police, his lawyer, and the jury) is that he was simply relying upon the protection you had assured him would be in place.

How to Educate Your Tenants

Few neighborhoods, particularly in urban areas, are free of crime, although, obviously, some areas are more dangerous than others. We recommend that you identify the vulnerabilities of your particular neighborhood—for example, by talking to the police. Don't keep this information to yourself, but make your tenants savvy to the realities of life in your neighborhood. We recommend a two-step process:

- Alert tenants to the specific risks associated in living in your neighborhood (problems are worst Friday and Saturday night between 10 p.m. and 1 a.m.) and to what they can do to minimize the chances of assault or theft (avoid being on the street or in outside parking areas alone).
- No matter how secure your building, warn tenants of the *limitations* of the security measures you have provided.

EXAMPLE: Paul recently moved into his apartment and had been told by the manager that doormen were on duty "all the time." One afternoon, he opened his door to someone who identified himself as a "building inspector" who needed to check his hot water heater. Paul was assaulted and robbed by this individual, and sued his landlord. At trial, he explained that he would never have opened the door but for the assurances of the manager that the doormen would screen visitors at any hour. (In fact, the service was in place only from 6 p.m. to 6 a.m.) Paul was able to convince the jury that the landlord bore part of the blame for the attack.

This approach allows you to "cover your bases" by both disclosing the risks and frankly informing the tenants that you have not (and cannot) ensure their safety in all possible situations. If, despite your best efforts, a tenant is assaulted on your property, you can point out that you disclosed as much as you knew about a potentially risky situation.

Identify Specific Risks

Making certain your tenants are aware of the possible dangers inherent in any urban living situation is a good start to their education, but it should not be the end of it. Follow through with information specific to your property. Here are some ideas:

- If there have been incidents of crime in the area (and especially in your building), inform your tenants (but be careful to maintain the confidentiality of the victim). It's best to do this at the start of the tenancy, when you first show the rental unit to prospective tenants.
- Update your information on the security situation in your building as necessary. For example, let tenants know if there has been a crime in or near the building by sending them a note or posting a notice in the lobby.
- If you have hired a professional security firm to evaluate your rental property, share the results of their investigation with your tenants.
- Encourage tenants to set up a neighborhood watch program. (Many local police departments will come out and meet with citizens attempting to organize such a program.)
- Encourage tenants to report any suspicious activities or security problems to you, such as loitering, high numbers of late-night guests, or broken locks.

Explain the Limitations of Your Security Measures

An important component of your disclosures to tenants involves disabusing them of any notion that you are their guardian angel. Let them know where your security efforts end, and where their own good sense (and the local police force) must take over. Specifically:

- Explain what each security measure will and will not do. For example, if the windows in each unit of your building can be locked only if they are fully closed, warn tenants that they may need to choose between ventilation and security.
- Highlight particular aspects of the property that are, despite your efforts, vulnerable to the presence of would-be assailants or thieves. For instance, a fast-moving person could, in most situations, slip into a garage behind an entering car despite the fact that it has a self-closing door. Pointing this out to your tenant may result in more careful attention to the rearview mirror or a second thought about whether to come and go at late hours.
- Place signs in any potentially dangerous locations that will remind tenants of possible dangers and

the need to be vigilant. For example, you might post signs in the parking garage, the laundry room, and common walkways: "Caution. Take steps to protect yourself from crime."
- Suggest safety measures. For example, tenants arriving home after dark might call ahead and ask a neighbor to be an escort.

Giving your tenants information on how they, too, can take steps to protect themselves will also help if you are sued. If a tenant argues that you failed to disclose a dangerous condition, you will be able to show that you have done all that could be expected of a reasonably conscientious landlord.

Maintain Your Property and Conduct Regular Inspections

Start by understanding that landlords are most often found liable for crime on their property when the criminal has gained access through broken doors or locks. Not only is the best security equipment in the world useless if it has deteriorated or is broken, but the very fact that it's not in operation can be enough to result in a finding of landlord liability. By contrast, a jury is far less likely to fault a landlord who can show that reasonable security measures were in place and operational, but were unable to stop a determined criminal.

Inspect your property frequently, so that you discover and fix problems before an opportunistic criminal comes along. At the top of your list should be fixing burned-out exterior floodlights and broken locks. Overgrown shrubbery that provides a convenient lurking spot can be easily detected by a thorough and regular walk-through by the owner or manager, and should be regularly cut back. Rather than trusting your memory or intuition as to what you should inspect and when you last did it, devise a checklist designed specifically for that property (perhaps in conjunction with a security or insurance expert), and conduct regular inspections. Enlist your tenants to help you spot and correct problems. In spite of your personal or even professional inspection of the property, remember that the people who actually live in your rental property will generally know first about security and repair problems. One good approach is to post several notices in central locations, such as elevators and main lobbies, asking tenants to promptly report any security problems, such as broken locks or windows. If you rent a duplex or house, periodically meet with your tenants and discuss any changes in the neighborhood and/or the structure of the building.

Chapter 11 provides a detailed system for inspecting rental property and staying on top of repair and maintenance needs.

Respond to Your Tenants' Complaints Immediately

Respond immediately to your tenants' complaints about broken locks or concerns about security problems and suspicious activities. Keep in mind that a serious breach in your security measures has much greater potential liability consequences than a garden-variety maintenance problem. That's why we recommend a truly fast response. For example, a stopped-up sink is certainly inconvenient to the tenant, and may result in rent abatement or repair-and-deduct measures if not fixed for a period of days or weeks (see Chapter 11), but it rarely justifies a four-alarm response by the landlord. On the other hand, a broken lock or disabled intercom system is an invitation to crime and needs to be addressed pronto. If you fail to do so and a crime occurs, your chances of being held liable increase dramatically.

Consider the following all-too-common scenarios, and our suggested response:

- The glass panel next to the front door was accidentally broken late one afternoon by a departing workman. The landlord, conscious of the fact that this created a major security problem, called a 24-hour glass replacement service to get it replaced immediately.
- The intercom system failed due to a power surge following an electrical storm. The landlord hired a 24-hour guard for the two days it took to repair the circuitry.
- Several exterior floodlights were knocked out by vandals throwing rocks at 6 p.m. A tenant who had been encouraged by management to report problems of this nature called the landlord. The landlord alerted the police and asked for an extra drive-by during the night, posted signs in the lobby and the elevator, closed off the darkened

entrance and advised tenants to use an alternate, lighted entryway instead. The floodlights were repaired the next day and equipped with wire mesh screen protection.

Establishing complaint procedures will help prevent crime on your rental property by alerting you to security problems. (See Chapter 11 for details.) Such procedures will also be of considerable value to you in limiting your liability, should you be sued by a tenant whose assailant gained access via a broken window lock that the tenant failed to disclose to you.

Protecting Tenants From Each Other (and From the Manager)

So far, we've focused on the landlord's duty to take reasonable measures to avert foreseeable crime on the premises by unknown, third-party criminals. This section will explore your responsibility when one of the tenants, your manager, or any other employee is responsible for criminal activity on the premises. (Tenants who engage in illegal drug trafficking are discussed below.) Like your duty to protect tenants from crime at the hands of unknown, third-party assailants, this duty is limited to what is reasonably foreseeable and to what a reasonable person in your position would do.

Landlord's Responsibility for Tenants' Criminal Acts

A tenant who is injured by another tenant may sue you, claiming that you knew, or should have known, of the other tenant's continuing criminal predisposition, and you:

- were negligent in renting to the person in the first place
- were negligent in not evicting the troublemaker, or
- at the very least, were negligent in not warning others about the individual.

Tenants who sue their landlord in these types of lawsuits face an uphill task. They must convince a jury of two things—that it is reasonable to expect a landlord to discover the details of his tenants' pasts, and that a landlord can predict and control tenants' behavior as well. Landlords usually win these cases, but not always. In one case, the landlord knew of a tenant's bizarre behavior and that she owned a gun. This knowledge, however, did not give the landlord reason to anticipate that this tenant would get into an argument with and fatally shoot another tenant. Moreover, the court noted that the landlord could not reasonably have been expected to discover the precise details of the tenant's mental condition, nor control her behavior. (*Davis v. Gomez,* 207 Cal. App. 3d 1401, 255 Cal. Rptr. 743 (1989).)

You are far more likely to be found liable under the legal theory of negligence for a tenant's injuries when the injured party can show that the incident was foreseeable and could have been avoided had you taken simple and precautionary measures—for example, by evicting a tenant whom you believe may physically harm another tenant. In the face of repeated threats and assaultive behavior by one tenant toward another, a landlord who knew about the situation but took no action against the first tenant was liable to the second tenant when she was assaulted again by the first tenant. (*Madhani v. Cooper*, 106 Cal. App. 4th 412 (2003).)

Keep in mind that your duty to rid your property of dangerous types extends to tenants' guests, including unauthorized occupants, whose presence (and dangerous propensities) you know about. For example, in one case a court ruled that a landlord could be liable for the stabbing of a tenant's young child by the adult son (an unauthorized occupant) of other tenants, because complaints had been made in vain by other tenants concerning the son's menacing actions—including an attempt to force entry into another's apartment unit. (*Valencia v. Michaud*, 81 Cal. App. 4th 190, 94 Cal. Rptr. 2d 268 (2000).)

EXAMPLE: Al had a quick temper and a mean disposition, and he particularly disliked Larry, who rented an apartment in the same building. Al had threatened Larry several times. Their landlord knew about these threats but did nothing—he didn't try to evict Al, post extra security guards, or even discuss the situation with him. When Al attacked Larry, Larry sued the landlord. Larry claimed that the landlord's knowledge of the situation and his ability to take some steps to protect Larry made the landlord partially responsible for the attack. A jury agreed and awarded damages to Larry.