

MIND YOUR BUSINESS – Tia’s Tips for Better Rental Management
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Lease Break: Landlords’ Rights and Responsibilities

So, you’ve rented your property, signed your new tenants up on a fixed-term lease and you think, “Great, now I can relax until their lease is almost up.” Not so fast. Just because your tenants have signed a lease doesn’t mean they can’t break it. Residents break leases all the time for all sorts of reasons, and while the law has established guidelines for this potentiality, the guidelines don’t address every specific circumstance, which can leave you scratching your head wondering what your obligations and rights are. As with many areas of landlord-tenant law, the answer is, “It depends...”

With schools closed and classes being held online only due to COVID-19, landlords are reporting a lot of students have just up and left their units, leaving them vacant and unprotected as they flee home. Frustrated parents and co-signers are demanding that they be released from responsibility for the full lease. So, are landlords obligated to release them from responsibility? So far there are no orders from the Governor on that, and her Executive Order 20-13 does not include a prohibition on charging lease break fees, or a requirement that landlords release tenants from the contract early.

Note: In our current situation, campus landlords may experience long-term vacancies. Many rental insurance policies have provisions that reduce coverage if a property has been vacant for more than 30 days. Check with your insurer if you expect a long-term vacancy.

Lease-Break Fee or Actual Damages?

What does your lease say will happen if the lease is broken? Some leases specify a fee only, others have no fee provision which then only allows the landlord to charge their actual damages resulting from the lease break. But some leases state the landlord may charge a fee not to exceed 1-1/2 times the monthly rent, or actual damages. Which choice you make will depend on a number of factors, including why the lease was broken, the length of the remaining term, the time of year the lease is broken, and how quickly the unit can be re-rented to another. If you choose to charge the fee, then you cannot charge the tenant for any other costs related to re-renting the unit to someone else.

Some attorneys assert that if a lease states a lease-break fee, even with an actual damages option, then the landlord is obligated to charge only that amount; others disagree. Our ***Fixed-Term Lease – ORHA form #3***, provides that the landlord has a choice, but the choice must be made within 31 days of the tenants moving out and delivering possession to the landlord. What choice you make will depend on the reasons for the lease break, and your chances of re-renting the unit.

Lease-Break Fee – Cause or No Cause?

Many landlords believe that a lease-break fee can be charged regardless of why a tenant breaks a lease, unless the lease break is related to domestic violence, or termination by an active duty military family. That may or may not be the case. ORS 90.302 states that a landlord may charge a fee for:

“(e) The abandonment or relinquishment of a dwelling unit during a fixed term tenancy without cause.” (emphasis mine)

So, the language reads “without cause.” Then we have to look at what would be the interpretation of abandonment or relinquishment “for cause.” Non-payment of rent or fees? Lease violations? There is no case law I am aware of that addresses this issue.

Unless it’s clear that the tenant is abandoning the unit for greener pastures, for example, they bought a house or moved away for a different job, charging actual damages as opposed to a lease-break fee may be the safer option. Certainly, with students fleeing campus for home, actual damages will likely benefit the landlord more than charging a lease-break fee.

What is included in Actual Damages?

Actual damages can include all rent through the lease term, unless the property is re-rented prior to the expiration of the lease, utilities, yard care (if applicable), the landlord’s time and efforts required to secure the property, check on the property during the vacancy, advertise, show and re-lease the property to another, in addition to any other lawful charges.

I once had a tenant sign a lease for a campus unit in September to end the following June at a rent price of \$1995. Her November rent check bounced and she moved out on my **72-Hour Notice to Pay or Vacate for Non-Payment of Rent – ORHA form #4**. She and her six children left the home in pretty bad shape, and because the unit was large (7-8 bedrooms) and on campus, we had a heck of a time trying to re-rent. We finally leased the unit during winter break, but had to lower the price by \$500 per month to get the unit rented. In this case, not only was the tenant responsible for the normal costs to turn the unit (cleaning, carpet cleaning, blinds, repairs), she was also responsible for our upkeep of the yard, utilities during the vacancy, advertising, showing, unpaid rent and late fees for November, rent for most of December and the \$500 difference in rent amount through June 30th. Her final bill ended up being somewhere north of \$11,000.

This is an extreme case of actual damages, but illustrates the very good reasons why you might want to choose actual damages over a lease-break fee.

Mitigation

If you’re charging actual damages for a lease break, remember you are required to mitigate damages in situations of early termination or abandonment, and do your best to re-rent the unit as quickly as possible to minimize the financial impact of the surrender on the tenant. With campus rentals currently, that will be difficult, but it doesn’t mean the landlord doesn’t have to try. If you don’t try, then you’ve accepted the surrender as a termination of the rental agreement, and cannot continue to charge the tenant beyond the date you knew or should have known of the abandonment.

90.410 Effect of tenant failure to give notice of absence; absence; abandonment

“... (3) If the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it for a fair rental. If the landlord rents the dwelling unit for a term beginning before the expiration of the rental agreement, the rental agreement terminates

as of the date of the new tenancy. If the landlord fails to use reasonable efforts to rent the dwelling unit at a fair rental or if the landlord accepts the abandonment as a surrender, the rental agreement is deemed to be terminated by the landlord as of the date the landlord knows or should know of the abandonment.”

I had a recent Helpline caller who was dealing with a lease-break and she planned to be moving in to the rental unit at the end of the lease, but there would be two months between the time the tenants moved out and she moved in. We both thought it would be unlikely that she could fill a vacancy for just two months, but I told her she needed to try or just charge the lease-break fee and be done with it. **She advertised and surprisingly** found a tenant who needs a place for just that amount of time. In this case it worked out. If it hadn't the tenants may have been on the hook for the full lease term.

Lease-Break in situations of domestic violence or for active-duty military

If you have one or more tenants break their lease in a situation of domestic violence, sexual assault or stalking, or who terminate the rental agreement based on active-duty military service, the tenant and any immediate household members are legally released and their rental agreement terminated within either the 14 or 30 days prescribed by law. Read ORS 90.453 (2), 90.472 or 90.475 for the parameters and requirements of tenants terminating for either reason.

I once got a call from a property manager friend asking how to deal with a lease-break situation where two young women had leased a campus property. During a party, at which all participants became extremely intoxicated, a guest of one roommate allegedly sexually assaulted the other roommate. The victim pressed charges and immediately moved out, notifying the manager of the situation. The manager complied with landlord requirements for victims of domestic violence and after the victim provided a copy of the police report, released her from the lease with two-week's written notice, as required by law. The more difficult issue was what to do with the remaining roommate. She was not a participant to the assault, and didn't know it had happened until after the fact. There were no co-signers, the manager knew the remaining roommate would not be able to pay the full rent, and she wanted out too.

Many times, the statutes do not address the specifics of what can be very confusing situations such as this. When that happens, you enter the murky realm of reasonability. The Reasonable Person Standard denotes a hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining liability.

In this case, was it reasonable to expect a college student to be able to advertise and procure another roommate who would qualify to live there? Or would it be reasonable to expect her to be able to absorb the full rent (even though legally she was obligated)? That was their decision to make, they were in a really good rental market, and they ended up allowing both tenants to terminate their lease and move out, thereby absorbing some loss of rent and the work required to move in new tenants. Would they have made a different decision if they had been operating in a poor rental market? Could the remaining roommate have made a case that she was an unintended victim as well? Did the company want to go to court to find out? Those are the questions they had to ask themselves, and only they could make the decision about which way to go.

What if one person in a multi-tenant tenancy wants out of the lease?

You are not required to release a tenant from a lease except under specific circumstances outlined previously, but can choose to release one or more tenants if you and all other tenants agree in writing - use *Add or Delete Tenant Rental Agreement Addendum – ORHA form #59*. The landlord and all tenants incoming or departing sign the addendum and it's a straightforward process. Anyone departing releases their right to a deposit accounting or refund, but are also released from responsibility for damage. Anyone coming in accepts responsibility for the existing condition of the property and becomes entitled to a deposit accounting and a refund, if any, at the end of the tenancy. (If you are doing this, I would also have any incoming tenants sign the existing lease and all addenda, and provide a copy of, **Protect Your Family from Lead in the Home**, and have them initial and sign the *Lead-Based Paint Disclosure – ORHA form #51* for properties built before 1978.)

On the other hand, there may be good reasons to decline to release someone prior to the lease expiration. I once got a call from a landlady friend who was dealing with two roommates who had signed a one-year lease and moved in to one of her houses a couple of months before. They were now arguing and one of them wanted to move out. The one who wanted out, however, was the one with the good job and the good co-signer. In this case, she did not want to let the financially stable tenant out of her obligation, which left the tenants to figure out their own solution. If the one roommate had decided to move out, the landlord couldn't force her to live there, but she would remain financially liable for the full lease term. Just because a person wants out of their lease, doesn't necessarily obligate you to release them.

Reconciling the Security Deposit

Whatever the lease-break situation, you may still be required to send out a security deposit accounting within the 31 days of receiving possession of the property. While some attorneys feel that if a landlord is choosing to charge actual damages as opposed to a lease-break fee, they don't have to start counting their 31 days until they re-rent the property to someone else, not all agree. And even though the tenancy may not be considered terminated until the unit is re-rented, do you want to take a chance that a judge in small claims court would disagree?

If you are charging a lease-break fee, deposit accounting is easier. Just list the fee as one of the charges to the deposit accounting. If you are charging actual damages, have not re-leased the property, and don't want to take a chance on skipping the 31-day deadline until the property is re-rented, your accounting will be incomplete, and a follow-up accounting will need to be sent when the final tally of rent damages is assessed.

Some tenants who break a lease continue to pay the landlord the monthly rent until the property is re-rented, but some do not. If not, can the landlord charge a late fee for each month the tenant doesn't pay? Maybe. ORS 90.260 specifies that landlords may charge a late fee if listed in a written rental agreement. Up to you if you want to give it a try; however, some tenants who break leases, are doing the responsible thing by leaving when they know they can't pay, so should they be punished further?

In the example I gave earlier for a tenant who broke a lease on campus, I only charged her the one late fee for November's rent because that seemed fair to me. She was a single mom with six

children, and many charges that would already burden her for years to come. I didn't think another late fee charge for December would have been reasonable. You may think differently, but consider what a judge would say, as that may be where you end up defending your charges.

Collecting damages or fees

Whether there is a co-signer or not, pursuing damages can be a frustrating experience. When I've had one or more guarantors to a rental agreement, I go straight to the co-signer for payment. It's up to them to work things out with the tenant. Many times, the co-signer comes through but not always, and co-signers can be as challenging to pursue as tenants, especially if they're out of state. If they refuse to pay, you need to go after them in small claims court, and if you win in the end, you are presented with a piece of paper that says someone owes you money. You then have to continue your pursuit through garnishment or hire a collection agency to see what they can do to get you paid.

The takeaway

While a lease can often be a good guarantee of the length of a tenancy, it can give you a false sense of security. So, lease or no lease, always be ready to deal with an unexpected vacancy, and all the decisions that come with it.

This column offers general suggestions only and is no substitute for professional legal counsel. Please consult an attorney for advice related to your specific situation.

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