Mind Your Business

Serve it Right: The Perils of Perfecting Service of Notice

Follow the rules and win every time – ignore the rules and you can lose big

By Tia Politi

I staff five landlord helplines around the state and invariably most calls are about terminating tenancy, raising rent or security deposits, or dealing with tenant noncompliance all of which require serving legal notice to the tenant. Seems easy enough, but landlords mess it up all the time.

First you must select the correct form, then you must prepare the notice just right, calculate your timing with precision and finally, serve the notice perfectly. If the tenant does not perform according to the direction in the notice, your notice will become the basis for a court action, and the tenant can defend against your notice in court.

I've seen landlords lose because they chose the wrong form, checked the wrong box on the form, put a date where a time should be, or a time where a date should be, failed to provide supporting facts, raised rent too high or too soon, failed to calculate their time correctly based on how the notice was served, or made another mistake like they included a late fee in a notice for nonpayment of rent, but a large number lose just because they didn't know how to legally serve the notice. A tenant attorney would be happy to educate you for an exorbitant fee.

There are four ways to serve legal notice to your tenant: Personal Delivery, Mail Delivery, Post and Mail Delivery, or Email and Mail Delivery. Actual Notice is another method defined in ORS 90.150 but is only legitimate in specific circumstances. Let's start there.

Actual Notice
90.150 Service or delivery of actual notice. When this chapter requires actual notice, service or delivery of that notice shall be executed by one or more of the following methods:

(1) Verbal notice that is given personally to the landlord or tenant or left on the landlord's or tenant's telephone answering device.

(2) Written notice that is personally delivered to the landlord or tenant, left at the landlord's rental office, sent by facsimile to the landlord's residence or rental office or to the tenant's dwelling unit, or attached in a secure manner to the main entrance of the landlord's residence or tenant's dwelling unit.

(3) Written notice that is delivered by First-Class Mail to the landlord or tenant. If the notice is mailed, the notice shall be considered served three days after the date the notice was mailed.

(4) Any other method reasonably calculated to achieve actual receipt of notice, as agreed to and described in a written rental agreement. [1995 c.559 §3; 1997 c.577 §5; 1999 c.603 §9; 2003 c.14 §33]

Actual notice is allowed in various aspects of the law and is most used to communicate various things throughout the tenancy such as in **ORS 90.147** where a landlord can provide **actual notice** to the tenant that they have the right to occupy the dwelling unit, or where the tenant can provide **actual notice** to the landlord that they have surrendered the right of possession. Other areas of the law that allow **actual notice** are for the right to enter or a denial of entry, for reports of maintenance issues by the tenant, for

terminating tenancy by the tenant when the landlord is out of compliance, when asserting counterclaims to a landlord's claims, when dealing with abandoned personal property, or when the tenant is a victim of domestic violence, sexual assault or stalking, or is the victim of a bias crime.

While some forms of **actual notice** can serve to terminate tenancy such as by First-Class Mail or personal delivery, the rules are more clearly defined in the next statute.

Serving Written Notice
90.155 Service or delivery of written notice. (1) Except as provided in ORS 90.300, 90.315, 90.425 and 90.675, where this chapter requires written notice, service or delivery of that written notice shall be executed by one or more of the following methods:

Notice by Personal Delivery
90.155(a) Personal delivery to the landlord or tenant. To accomplish personal service, you or your agent must hand-deliver the notice to the tenant. I've had members declare they personally served a notice and when I ask whether they handed the notice to the tenant they say, "No, they didn't answer the door, so I taped it to the door." Well, that's not personal service. Personal means person-to-person. The tenant does not need to take the notice from your hand, but you must at least make eye contact and let them know you have notice to serve them. You may then drop the notice at their feet if they refuse to take it from your hand and the notice is considered served.

In one case out of Portland a landlord slid their notice under the door after the tenant's son slammed the door in his face and the judge accepted it as personal service because before the tenant told his son to shut the door, the manager had made eye contact with dad and said he was there to serve a notice. So, eye contact and communication are key if the tenant refuses to take the notice from you or your server.

The benefit of personal service is that the time for performance begins immediately. The downside is the personal part. It can be challenging to know whether the tenant will be home when you arrive, or even get a tenant to come to the door.

Notice by Post and Mail
90.155(c) If allowed under a written rental agreement, both first class mail and attachment to a designated location. For written notices from the landlord to the tenant, the First-Class Mail notice copy shall be addressed to the tenant at the premises and the second notice copy shall be attached in a secure manner to the main entrance on the same day.

To have the right to serve notice by Post and Mail, you must meet three criteria: 1) The right to do so must be included in your written rental agreement; 2) The agreement must provide a reciprocal physical address and a location at that address described with particularity where the tenant can Post and Mail notice back to you; 3) The address and location much be available at all hours and located a reasonable distance from the dwelling unit. 4) The notice must be securely affixed.

Reciprocity is integral to your right to serve notice by this method.

Pay attention to that. Because reciprocity is required, landlords must have everything just right in the written rental agreement. First, you must designate a reciprocal, physical place, or address in the written rental agreement. Second, the location for posting at the address must be described with particularity. Third, that location must be reasonably located in relation to the tenant and available at all hours. Fourth, you must securely affix the notice to the main entrance.

So, what does reasonably located mean? I think it means that wherever that location is, it can't be too far away from the tenant's location. I don't think there's a specific definition and it may largely depend on the tenant, their capacity, and their transportation options. Another thing to consider is whether there are barriers to access to your reciprocal location. Can the tenant get there? Are there stairs, and your tenant is physically limited? I once had a renter who lived close to my office, but she was morbidly obese and struggled to get up the few short steps to our office door. Because of this fact, I would never serve notice to her by Post and Mail because even though we met the criteria otherwise, reciprocity was a challenge for her.

In another matter, I once had a rental owner come to me wanting to evict their residents for non-payment of rent. The right to Post and Mail their notices was listed in the written rental agreement for posting notice on their front door, the address provided by the owner was located a reasonable distance from the dwelling unit, and the residents had appropriate transportation, were able-bodied and physically capable of providing reciprocal service to their landlord at that location. Believing all the criteria were met, the notice was served by Post and Mail, the tenants failed to tender rent and the case ended up in court.

They requested a trial, and we began to prepare when the landlord mentioned a gate at their home. What?!! A gate? Oh, yeah, they had forgotten to mention the very important fact that a locked gate prevented access to the front door of their stated physical address. The case ended up being settled without a trial, but this one tiny detail could have resulted in a spectacular loss for them even though the residents clearly owed the money specified in the notice, the notice was otherwise perfect, and they acknowledged receiving it.

What if you don't care to let your tenants know your physical address? First of all, remember that if you don't have a PO Box, your address is public record on the Department of Assessment and Taxation website. Also, the address does not have to be your home. It can be any physical address such as your place of business, or another designated physical address, just not a PO Box. **No physical address = no right to Post and Mail.** And even with a physical address listed remember the other requirements – a location at the address described with particularity in the written rental agreement, reasonably located in relation to the tenant and available at all hours.

You must look at each tenancy and your rights with this type of critical eye. I've had some tenants in wheelchairs, and my old office had stairs. I couldn't Post and Mail because there's no way these tenants had the ability to climb the stairs to our door.

Landlords have also lost in court on Post-and-Mail delivery when they didn't securely affix the notice or didn't affix it to the main entrance.

The benefit of service by Post and Mail is that the time for performance begins at 12:01 a.m. of the day following service. The risks are iterated above.

Email and Mail

90.155(5) A party to a rental agreement may use electronic mail to give a written notice terminating the tenancy only if allowed under subsection (1)(d) of this section and the termination notice is sent by both first-class mail and electronic mail. Effective January 1, 2024, parties to a rental agreement may agree to exchange legal notices by email and mail. It requires the signing of an agreement to do so after the tenancy has begun, and the tenant has taken possession of the unit. Each party may then send a legal notice to the other by First-Class Mail and the same day send an email with the notice. We have a new form ***Agreement to Exchange Notice by Email and Mail – ORHA form #O17*** to facilitate the option. The law allows either party to cancel the agreement or modify the agreed-upon email addresses at any time with three days' written notice, and includes the required warning for the tenant:

THIS IS AN IMPORTANT NOTICE ABOUT YOUR RIGHTS REGARDING RECEIPT OF WRITTEN NOTICES
By signing this addendum, you agree to receive written notices from your landlord by e-mail. This may include important legal notices, including rent increase and tenancy termination notices. Failure to read or respond to a written notice could result in you losing your housing or being unaware of a change in rent. Signing this addendum is voluntary. Only agree to service of written notices electronically if you check your e-mail regularly.

The benefit of service by email and mail is that the time for performance begins at 12:01 a.m. the day following service and you don't have to drive over to the property to post, but there are pitfalls. What if the power is out? What if their internet is down? What if you misspell the email address and never get notified? What if you add someone new to the tenancy and forget to add them to the email-and-mail agreement?

With all the pitfalls, how do you serve notice on your tenant and sleep at night? Serve by First-Class Mail.

First-Class Mail

90.155(b) First-class mail to the landlord or tenant. Mailed-only notices are the safest and most reliable way to serve notices, but the minimum period for compliance or termination of tenancy, as appropriate, must be extended by three days, and the notice must include the extension in the period provided. While this method does cost you three days before the notice becomes effective, you will have fewer worries about technicalities costing you a court defeat.

Does your resident have an alternate mailing address? It's important to ask the question at the outset of the tenancy, and our rental agreements require them to disclose that to you. I had tenants in one of my rentals who did not tell me, but they did put their PO Box return address on their envelope every time they paid rent. I made note of that and had no problems, but I could foresee a possibility that a judge could rule in favor of a tenant who made a practice of that, claiming that you should have noticed

or asked about it, so if their mailing address is different than the physical address of the property, mail the notice there.

Another obstacle to mailed-only notices can be the lack of a mail receptacle. I once tried to serve a notice for a client, who had failed to provide a mail box or slot at the rental property, and he had no alternate mailing address for the tenants. By the time he came to me, the relationship between them had soured and they would not answer the door or return any of his calls or emails.

I went and attempted to personally serve them, but 15 minutes of sustained knocking failed to garner any response. He was forced to put the property under surveillance and wait for them to come out. After many hours, he was able to accomplish personal service, but what a pain. Make sure there's a mail box or mail slot at the property or get an alternate mailing address before you hand over keys. I've had clients who had to install mailboxes on their property just so we could serve a notice.

By far the most common error with mailed notices is the failure to send the notice by First-Class Mail. All notices to your tenants must be by First-Class Mail only. It may seem counterintuitive, but that's the law. If you want proof that you mailed something by First-Class Mail, you may purchase a proof of mailing certificate at the post office. It's inexpensive and if it will ease your mind, do it.

The other issue with mailed-only notices is whether the tenant receives the notice. The law doesn't say they must receive it, only that you must mail it, but while most mail arrives within a day or two of mailing, that isn't always the case. Mail gets delayed, lost or stolen all the time. I recommend a courtesy service of any legal notice by email or text, or by posting a courtesy copy on their door. While this additional courtesy notification is not a legal service of notice (and is clearly not required under the law) it does make it less likely they will claim they never got it. And while this claim is rarely if ever successful, a lot of things in the courtroom are open to a judge's discretion. You want to do whatever you can to prevent offering any technical defenses to your tenant.

I've also had mailed notices returned for some reason. In one case, the postal employees said they thought the unit was vacant, in another they didn't recognize the named party, ugh. Then you must start again.

Alternative Methods of Service

90.155(3) A landlord or tenant may utilize alternative methods of notifying the other so long as the alternative method is in addition to one of the service methods described in subsection (1) of this section.

If you want to serve your tenant in alternate ways, like certified mail, you can. But pick which type of service is going to be the legal service and indicate that on the form accordingly.

Calculation of Time

90.160 Calculation of notice periods. (1) Notwithstanding ORCP 10 and not including the seven-day and four-day waiting periods provided in ORS 90.394, where there are references in this chapter to periods and notices based on a number of days, those days shall be calculated by consecutive calendar days, not

including the initial day of service, but including the last day until 11:59 p.m. Where there are references in this chapter to periods or notices based on a number of hours, those hours shall be calculated in consecutive clock hours, beginning immediately upon service.

Unless you're serving personally, the day of service is day zero. It is sometimes called a wasted day.

90.155(2) requires notice periods to be extended by three days when serving notice by First-Class Mail. What often messes up the timing is when landlords count the day of service as day one. The first day doesn't start until the next day but you'll see on all notices produced by the Oregon Rental Housing Association, that it says to add four days for mailing. We've done this as too many private landlords were messing up their calculation of time and counting the day of service by First-Class Mail, Post and Mail, or Email and Mail as day one, when it's really day zero. And remember, you can always give more time, you just can't give less. I recently had a client whose case got tossed out because the judge didn't know how to calculate time and thought he hadn't given enough notice when he had.

Other Issues with Service of Notice

Legal Holidays – 187.010

When your rent due date or notice 'pay by' date falls or expires on an 'official' holiday, you need to add time to your notice periods.

> Each time a holiday, other than Sunday, falls on Sunday, the succeeding Monday shall be a legal holiday. Each time a holiday falls on Saturday, the preceding Friday shall be a legal holiday. The following days are legal holidays in this state: Each Sunday; New Year's Day on January 1; Martin Luther King, Jr.'s Birthday on the third Monday in January; Presidents Day, for the purpose of commemorating Presidents Washington and Lincoln, on the third Monday in February; Memorial Day on the last Monday in May; Juneteenth on June 19; Independence Day on July 4; Labor Day on the first Monday in September; Veterans Day on November 11; Thanksgiving Day on the fourth Thursday in November; Christmas Day on December 25. Any act authorized, required or permitted to be performed on a holiday as designated in this section may be performed on the next succeeding business day; and no liability or loss of rights of any kind shall result from such delay.

The easiest way to remember this rule is that your notice to pay money must expire on a banking day.

Veterans' Disclosure Required – ORS 90.391

Since January 1, 2020, all notices of termination, whether for-cause or no-cause, must include a disclosure for veterans regardless of whether the tenant is a veteran. Termination forms should contain the following statement or a similar statement:

> "If you are a veteran of the armed forces, assistance may be available from a Veterans Services Officer or Community Action Agency. Call the 2-1-1 information service to learn about resources in your area."

Failure to include this language **in the body of the notice** (not attached to the notice) will result in the notice being materially defective.

The Takeaway

Notices to your residents are legal documents and they must meet legal requirements – don't let your tenant beat you on a technicality. Losing an eviction trial, paying for your tenant's attorney, and having a judgment rendered against you has got to be one of the more frustrating and costly experiences for a rental owner. Know the rules and follow them exactly or you may experience a very painful outcome.

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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