

Mind Your Business – Tia’s Tips for Better Rental Management

By Tia Politi, ROA President

The Problem of Waiver – ORS 90.412, 414, 416

Waiver is a problem rental owners create for themselves when they fail to act upon knowledge of a breach of contract for three separate rental periods or longer. You must act on your knowledge or lose your enforcement rights. Waiver can be created by acceptance of payments from an unknown third party, thereby creating a tenancy by waiver, or by failing to bill your tenant for monies owed in a timely fashion, creating waiver on your ability to enforce payment of the unbilled amounts. It can result in several unintended consequences.

How does this happen and what can be done to fix it? Most of the time, waivers are created by simple laziness or unwillingness to address a problem that the tenant is creating due to fear or even just a busy schedule. If you never bill your tenants for late fees when they pay late, you can lose your right to charge or collect those fees. Let three or more months go by without serving notice for nonpayment of rent, and you can re-set your due date. Don’t respond to the unauthorized animal you know is on the property? You can get a pet by waiver. Same with an unauthorized occupant. Don’t act and you will waive your rights.

It’s up to you to enforce the terms of the agreement the tenant signed.

90.412 Waiver of termination of tenancy. (1) As used in this section and ORS 90.414 and 90.417, “rent” does not include funds paid to a landlord:

- (a) Under the United States Housing Act of 1937 (42 U.S.C. 1437f).
- (b) By any other local, state or federal housing assistance program.

This part of the statute exempts rent assistance payments from the creation of waivers, so if an agency pays part of the rent whether through an ongoing program like Section 8 or VASH, or as part of a one-time assistance grant, you can keep those funds while not creating waivers.

(2) Except as otherwise provided in this section, a landlord waives the right to terminate a rental agreement for a particular violation of the rental agreement or of law if the landlord:

- (a) During three or more separate rental periods, accepts rent with knowledge of the violation by the tenant; or
- (b) Accepts performance by a tenant that varies from the terms of the rental agreement.

So, whether you receive rent and keep it while not addressing a known violation three times (not consecutively, but separately), or just ignore a lease violation you will create waiver regarding that violation.

To prevent Waiver regarding payments, the statute allows you a remedy:

- (3) A landlord has not accepted rent for purposes of subsection (2) of this section if:
 - (a) Within 10 days after receipt of the rent payment, the landlord refunds the rent; or
 - (b) The rent payment is made in the form of a check that is dishonored.

You must return the funds within 10 days of receiving them and you will not create a waiver and if the tenant’s check is returned from the bank, that doesn’t create waiver either.

(4) A landlord does not waive the right to terminate a rental agreement for a violation under any of the following circumstances:

(a) The landlord and tenant agree otherwise after the violation has occurred.

One of my tenants underpaid rent by \$25 one month and made it up the next month, which I wasn't worried about, but a couple of months later, it happened again. I reached out and let him know that I understood it was just an oversight and he would make it up next month, but while it might seem picky to him if I let it keep happening, I would create waiver. I asked if he would stop that and would agree these short payments and subsequent overpayments did not create waiver and he agreed in writing. Sometimes, it can be as simple as that.

(b) The violation concerns the tenant's conduct and, following the violation but prior to acceptance of rent for three rental periods or performance as described in subsection (2) of this section, the landlord gives a written warning notice to the tenant regarding the violation that:

(A) Describes specifically the conduct that constitutes the violation, either as a separate and distinct violation, a series or group of violations or a continuous or ongoing violation;

(B) States that the tenant is required to discontinue the conduct or correct the violation; and

(C) States that a reoccurrence of the conduct that constitutes a violation may result in a termination of the tenancy pursuant to ORS 90.392, 90.398, 90.405 or 90.630.

(c) The violation concerns the tenant's failure to pay money owed to the landlord for damage to the premises, damage to any other structure located upon the grounds, utility charges, fees or deposits and, following the violation but prior to the acceptance of rent for three rental periods or performance as described in subsection (2) of this section, the landlord gives a written warning notice to the tenant regarding the violation that:

(A) Describes specifically the basis of the claim and the amount of money owed that constitutes the violation;

(B) States that the tenant is required to correct the violation by paying the money owed; and

(C) States that continued nonpayment of the money owed that constitutes a violation may result in a termination of the tenancy pursuant to ORS 90.392.

This is the easiest way to prevent the creation of waiver – serve a written warning notice. Use Notice of Noncompliance – ORHA form #V1. (Remember that a written notice must be served in accordance with ORS 90.155 & 90.160. Read my article "Serve it Right!" for the ways you can serve written notice.) And a written warning can be a gentler and sometimes successful way to see if the tenant will fix the problem before escalating to a higher level of lease enforcement such as a Notice of Termination with Cause – ORHA form #VT5. Service of a written warning notice is not a prerequisite to serving a for-cause notice, however, as many callers to Helpline believe. Depending on the severity of the violation I might go ahead and serve the for-cause notice.

(d) The tenancy consists of rented space for a manufactured dwelling or floating home as described in ORS 90.505, and the violation concerns:

(A) Disrepair or deterioration of the manufactured dwelling or floating home pursuant to ORS 90.632; or

(B) A failure to maintain the rented space, as provided by ORS 90.740 (2), (4)(b) and (4)(h) and (i).

This part is for manufactured housing parks.

(e) The termination is under ORS 90.396.

ORS 90.396 Acts or omissions justifying termination 24 hours after notice. This statute terminates tenancy very quickly if the tenant commits an act that is outrageous in the extreme and if rent has already been accepted will not waive your right to terminate under this statute.

(f) The landlord accepts:

(A) A last month's rent deposit collected at the beginning of the tenancy, regardless of whether the deposit covers a period beyond a termination date;

A last-month's rent deposit is required to be accounted for, and any surplus refunded to the tenant along with any security deposit within 31 days of termination of tenancy – see 90.300 – and holding one does not create waiver regarding a violation or termination notice.

(B) Rent distributed pursuant to a court order releasing money paid into court as provided by ORS 90.370 (1);
or

Litigation in eviction court can result in a tenant paying rent into court to pursue a legal defense. This part of the statute clarifies that the money held by the court, if released to the landlord, does not create waiver.

(C) Rent paid for a rent obligation not yet due and paid more than one rental period in advance.

This section refers to prepaid rent, which is defined in ORS 90.100 (38) as, "...any payment of money to the landlord for a rent obligation not yet due. In addition, 'prepaid rent' means rent paid for a period extending beyond a termination date." Careful here. Holding prepaid rent will not create waiver but rent paid for a period extending beyond a termination date will. It can be confusing, which is why it can be a good idea to extend termination deadlines in a landlord-provided notice of termination to expire at the end of a rental period.

(5)(a) For a continuous or ongoing violation, the landlord's written warning notice under subsection (4)(b) of this section remains effective for 12 months and may be renewed with a new warning notice before the end of the 12 months.

If you have served a written warning notice and behavior continues, you will need to serve another notice after one year, but really, why wouldn't you just terminate for cause if the tenant remains uncooperative?

(b) For a violation concerning the tenant's failure to pay money owed to the landlord, the landlord's written warning notice under subsection (4)(c) of this section remains effective for 12 months from the date of the tenant's failure to pay the money owed.

According to this part of statute, if your tenant owes money for damages or fees – late fees, noncompliance fees, statutory fees – you can send a written warning notice demanding payment and if you don't act right away, but within one year, you haven't created waiver regarding your ability to terminate for cause during that time. After that, they still owe the money, but you can't terminate their tenancy for failing to pay.

(6) A landlord that must refund rent under this section or **ORS 90.414** shall make the refund:

(a) To the tenant by personal delivery or first-class mail in any form of check or money or electronically as provided in ORS 90.300 (13); or

(b) To any other payer by personal delivery or first-class mail in any form of check or money. [2007 c.906 §27; 2013 c.443 §7; 2015 c.388 §4; 2023 c.296 §6]

Any money due the tenant must be paid in a specific way; if personally delivered, you must hand them the payment; if mailed use First-Class mail only; if refunded electronically the tenant must agree to this method of payment in writing. Use Agreement to Accept Electronically Transferred Funds – ORHA form #O16.

90.414 Acts not constituting waiver of termination of tenancy. (1) If a notice of termination has been given by the landlord or the tenant, the following do not waive the right of the landlord to terminate on the notice and do not reinstate the tenancy:

(a) Except when the notice is a nonpayment of rent termination notice under ORS 90.394, ***(If you have an active notice of termination pending for nonpayment of rent, accepting any amount will waive your right to terminate on that specific notice.)*** the acceptance of rent if:

(A) The rent is prorated to the termination date specified in the notice; or

(B) The landlord refunds at least the unused balance of the rent prorated for the period beyond the termination date within 10 days after receiving the rent payment.

This part says it's okay to take rent that goes through the last day, just nothing beyond that. If the tenant pays full rent when only a partial amount is owed, you have 10 days to return the difference by one of the methods described in the previous section.

(b) Except if the termination is for cause under ORS 90.392, 90.398, 90.405, 90.630 or 90.632, the acceptance of rent for a rental period that extends beyond the termination date in the notice, if the landlord refunds at least the unused balance of the rent for the period beyond the termination date within 10 days after the end of the remedy or correction period described in the applicable notice.

This part applies if you have a for-cause termination notice pending. If the termination date falls partway through the month, once you know the tenant hasn't cured within the cure period, if you have accepted full rent for that month, you have 10 days to return the difference by one of the methods described in the previous section.

(b) If the termination is for cause under ORS 90.392, 90.398, 90.405, 90.630 or 90.632 and proceedings have commenced under ORS 105.100 to 105.168 to recover possession of the premises based on the termination:

(A) The acceptance of rent for a period beyond the expiration of the notice of termination during which the tenant remains in possession if:

(i) The landlord notifies the tenant in writing in, or after the service of, the notice of termination for cause that the acceptance of rent while an action for possession is pending will not waive the right to terminate under the notice; and

(ii) The rent does not cover a period that extends beyond the date the rent payment is accepted.

This part of the statute has always confused me (remember, I'm not an attorney). It seems like it says that if you have an eviction action pending on a for-cause notice but you send the tenant a written notice that continuing to accept rent will not waive your rights you can accept rent, but then it goes on to say that the rent you accept wouldn't go beyond that day...I can't make heads or tails of that – best get some good legal advice if you're in that situation. On the other hand, you can just refuse rent in this circumstance and not worry about this part.

(B) Service of a nonpayment of rent termination notice under ORS 90.394.

I think this means that you can also serve notice for nonpayment of rent notice while for-cause notice is pending in court.

(2) The following do not waive the right of the landlord to terminate on a notice of termination given by the landlord or the tenant and do not reinstate a tenancy:

(a) The acceptance of a last month's rent deposit collected at the beginning of the tenancy, whether or not the deposit covers a period beyond a termination date.

This part further clarifies the status of holding last month's rent deposit as not creating waiver.

(b) The acceptance of rent distributed under a court order releasing money that was paid into the court as provided under ORS 90.370 (1).

In the event of eviction proceedings where the tenant is ordered to pay rent into court, this clarifies that distribution of those funds from the court does not create waiver.

(c) The acceptance of rent paid for a rent obligation not yet due and paid more than one rental period in advance. [2007 c.906 §28; 2023 c.296 §7]

This part readdresses prepaid rent and allows the acceptance of prepaid rent without creating waiver. Sometimes, a tenant will want to pay rent in advance, and you can accept it without creating waiver. When I was in college and got my student grant and loan money, I would pay my landlord three months of rent in advance, so I knew my housing was covered. They could still have evicted me if I broke the rules without having created waiver by accepting those prepaid funds.

90.417 Duty to pay rent; effect of acceptance of partial rent. (1) A tenant's duty regarding rent payments is to tender to the landlord an offer of the full amount of rent owed within the time allowed by law and by the rental agreement provisions regarding payment. A landlord may refuse to accept a rent tender that is for less than the full amount of rent owed or that is untimely.

This clarifies that tenants owe rent, must pay full rent, not part, and that you can refuse a partial payment.

(2) A landlord may accept a partial payment of rent. The acceptance of a partial payment of rent in a manner consistent with subsection (4) of this section does not constitute a waiver under ORS 90.412 (2)(b) of the landlord's right to terminate the tenancy under ORS 90.394 for nonpayment of the balance of the rent owed.

(3) A landlord and tenant may by written agreement provide that monthly rent shall be paid in regular installments of less than a month pursuant to a schedule specified in the agreement. Installment rent payments described in this subsection are not partial payment of rent for purposes of this section.

While it is legal if put in writing and signed by the parties, I don't recommend splitting up rent payments. It creates a problem for you with no commensurate benefit.

(4) The acceptance of a partial payment of rent waives the right of the landlord to terminate the tenant's rental agreement under ORS 90.394 for nonpayment of rent unless:

(a)(A) The landlord accepted the partial payment of rent before the landlord gave a nonpayment of rent termination notice under ORS 90.394 based on the tenant's agreement to pay the balance by a time certain and the tenant does not pay the balance of the rent as agreed;

(B) The landlord's notice of termination is served no earlier than it would have been permitted under ORS 90.394 had no rent been accepted; and

(C) The notice permits the tenant to avoid termination of the tenancy for nonpayment of rent by paying the balance within the time period allowed under ORS 90.394 or by any date to which the parties agreed, whichever is later; or

This section seems to allow acceptance of partial rent if paid prior to service of a notice for nonpayment with the tenant's agreement to pay the rest later and would appear to allow the landlord to serve notice of termination for nonpayment if they fail to pay when they promise. It doesn't require a written agreement, but out of an abundance of caution I wouldn't move forward on something like this without one.

(b) The landlord accepted a partial payment of rent after giving a nonpayment of rent termination notice under ORS 90.394 and entered into a written agreement with the tenant that the acceptance does not constitute waiver. The agreement may provide that the landlord may terminate the rental agreement and take possession as provided in ORS 105.100 to 105.168 without serving a new notice under ORS 90.394 if the tenant fails to pay the balance of the rent by a time certain.

This part is what most landlords are used to. It allows acceptance of a partial payment, but only if you enter into a Partial Payment Agreement – ORHA form #V5, and only if you've already served a notice of nonpayment.

(5) Application of a tenant's security deposit or prepaid rent to an obligation owed to a landlord in foreclosure under ORS 90.367 does not constitute a partial payment of rent.

Holding security deposits or other deposits or the application of tenant money demanded after a property has entered foreclosure are also not considered partial payments and will not create waiver.

(6) Notwithstanding any acceptance of a partial payment of rent under subsection (4) of this section, the tenant continues to owe the landlord the unpaid balance of the rent.

If you mess up and don't follow the process and must wait to act, this part clarifies that the tenant still owes the remainder of the rent.

Other issues regarding payments

Remember that **ORS 90.220** requires that landlords apply payments in a specific order:

(9)(a) Notwithstanding a provision in a rental agreement regarding the order of application of tenant payments, a landlord **shall** apply tenant payments in the following order:

(A) Outstanding rent from prior rental periods;

(B) Rent for the current rental period;

(C) Utility or service charges;

(D) Late rent payment charges; and

(E) Fees or charges owed by the tenant under ORS 90.302 or other fees or charges related to damage claims or other claims against the tenant.

By improperly applying payments received and allowing minor under or overpayments, you can create waiver. Keep your tenant's ledger clean; apply payments properly; refund any overpayments; and only accept a partial payment with a signed agreement.

ORS 12.125 Action arising under rental agreement. An action arising under a rental agreement or ORS chapter 90 shall be commenced within one year.

There is a statute of limitations for pursuing money owed under a rental agreement. Fail to pursue your tenant's rent or other debt for more than one year and the debt incurred more than a year ago will be legally uncollectable.

Final Thoughts

Always serve a non-payment of rent notice when your tenant pays beyond midnight of the 4th or midnight of the 7th day. Always bill your tenant promptly for late fees and serve a 30/14 for failure to pay those or any other monies owing. To bill for late fees, you can provide the **Past Due Rent Reminder – ORHA form #V3**. If you're using our updated rental agreement, all fees are due immediately upon default thereby allowing you to serve notice immediately.

Always serve a for-cause notice if the tenant refuses to pay late fees or violates the agreement in any other way. It's not the fun part of the job but it must be done.

If you have created a waiver, some, but not all waivers can be cured with a 30-day notice of change in terms. Use **Change of Terms Notification – ORHA form #O6**. I took a class from a very smart lady attorney from Portland who said that a landlord can even cure many waivers in a fixed-term lease so long as the landlord is reverting to an original condition of the lease such as charging a late fee or requiring on-time rent.

And remember, the best way to prevent the creation of Waiver is by serving a **Notice of Noncompliance – ORHA form #V1**. Even if you suspect a violation, it doesn't hurt to serve it while you're trying to figure out if the tenant's guest is now living on the property, for example.

Always respond when you become aware of a violation, and if you can't bring yourself to enforce the terms of the rental agreement, maybe you should consider hiring a property manager.

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.

Rev 10/2024