FREQUENTLY ASKED QUESTIONS

Why must I have a written agreement with the tenant if the tenant is responsible for the payment of utilities?

When a tenant pays for utilities based solely on an oral agreement, the tenant may later claim a breach of the State Sanitary Code (105 CMR 410.190, 410.201) and/or a violation of the Consumer Protection Act (G.L. c. 93A). If the tenant prevails based on the State Sanitary Code, he/she will receive the cost of the utilities. If he/she prevails based on the Consumer Protection Act, he/she will receive either actual damages or $25.00, whichever is greater, or up to three times but not less than two times that amount if the court finds that there was a willful or knowing violation.

There are two schools of thought regarding oral agreements that assign the payment of utilities to the tenant. Some courts cite *Young v. Patukonis* and follow the strict construction of the State Sanitary Code which requires a written agreement for the assignment of the payment of utilities, awarding tenants damages when there is no written agreement. Other courts cite *Poncz v. Loftin* and follow the concept that the tenant should pay up to the fair market value of the premises and should only be awarded damages when they show that they have actually paid beyond that amount. While it does appear that the more recent cases support the idea that when there are no actual damages and the rent plus the utilities equals the fair market value of the premises, the tenant will not recover costs or be awarded damages, it is important to execute a written agreement whenever the tenant agrees to pay for any utilities that the landlord is required to pay for by statute to avoid this potential problem.

Young v. Patukonis, 24 Mass.App.Ct. 907 (1987) - Tenant at will and landlord had an oral agreement that tenant would purchase fuel oil to heat apartment. The Court held that the landlord had violated the State Sanitary Code, which requires a writing when the obligation to pay for heat or hot water is transferred from the landlord to the tenant. The Court awarded the tenant all costs for utilities based on the plain language of the statute.

Lavallee v. Perrault, 92-SP-00392 (1992) - Tenant and landlord had an oral agreement that the tenant would pay for the utilities. The court held that the State Sanitary Code requirement of a written agreement may not be waived. The court cited *Young v. Patukonis* and the judge awarded the tenant all costs of utilities.

Poncz v. Loftin, 34 Mass.App.Ct. 909 (1993) - While the Court agreed that requiring the tenant to pay for heat and hot water without a written agreement violated the State Sanitary Code, the Court awarded the tenant only "out of pocket" expenses. The Court found that, because the cost of the rent plus utilities did not exceed the fair market value of the premises, the tenant suffered no actual damages.

Cogliano v. Lyall, 97-SP-00155 (1997) - Tenant and landlord had an oral agreement that the tenant would pay for the utilities. The Court held that this oral agreement violated the State Sanitary Code, however it cited *Hodge v. Klug*, 33 Mass.App.Ct. 746 (1992), which stated that, "concerning the utilities, the longstanding arrangement, on principles of laches, if no other, presents a limiting case to *Young v. Patukonis*". The Court held that, although the agreement did violate the State Sanitary Code, it did not breach the tenant's quiet enjoyment and is, therefore, not void and unenforceable as a matter of policy. There was no evidence that the rent plus the cost of the utilities did not equal the fair market value of the premises, and, therefore, the tenant did not suffer damages as a result of the breach of the implied warranty of habitability. The tenant received nothing.

Now that Massachusetts state law allows tenants to pay for their own water, I want to make that change in my building. What do I need to do?

A landlord can only require tenants who signed a lease on or after March 16, 2005 to pay for their own water. An existing tenant cannot be forced to accept that change to his/her current lease.

Before a new tenant can be responsible for his/her own water bill, the landlord must install separate metering systems for each individual unit. Also, water conservation devices must be installed on every faucet, toilet and shower. The landlord then needs to fill out and file with the Department of Public Health a Submetering of Water and Sewer Certification form which includes a plumber's documentation that the

work has been done in accordance with accepted plumbing standards and G.L. c. 186, §22.

The submeter can also be used to require a tenant to pay his/her own sewer charges. This also must be provided for in the lease.

What type of accommodations must I make for a tenant with a disability?

A disability is a physical or mental impairment which substantially limits a major life activity. The landlord must allow tenants with disabilities to make reasonable modifications to their unit if the modifications are needed by the tenant to make the unit livable. In rental housing consisting of less than ten units, the modifications are at the tenant's expense. In rental housing of ten units or more, the modifications are at the landlord's expense, within reasonable guidelines. The modifications might include the installation of grab bars in the bathroom or the installation of smoke alarms or door bells that light up. In most cases, the tenant is required to restore the unit to its original condition when the unit is vacated.

The landlord must also make reasonable accommodations in rules and policies relating to the building so that a disabled tenant may live in the building. This might include allowing a person to keep a guide dog even though pets are not allowed or providing a parking spot next to the front door for a mobility impaired tenant even though other tenants must park in the rear of the building. In all cases, reasonableness on the part of the landlord is required.

I am an owner-occupant of a three family dwelling. Am I exempt from the laws relating to discrimination?

No. The Massachusetts fair housing law covers all housing except, in some cases, owner-occupied two family dwellings. Owner-occupants of three family dwellings may be exempt from the requirements that they rent to families with children in cases where one of the units is occupied by an elderly or infirm person and the presence of children would be a hardship.

Who is considered handicapped under the fair housing laws?

A person is considered handicapped if they have a disability, either physical or mental, which substantially limits a major life activity. While persons with drug addiction and/or alcoholism are considered handicapped and therefore protected under the fair housing laws, those who are currently using illegal drugs are not protected. Furthermore, a landlord need not rent a unit to any person whose tenancy would be a direct threat to the health or safety of other tenants or would result in physical damage to the property of others.

What is breach of quiet enjoyment?

A tenant has the right to freedom from serious interference with their tenancy and from the landlord's acts or omissions which impair the character and value of the premises. When the tenant's rights have been violated, this is referred to as a breach of quiet enjoyment. Landlords breach the tenant's right to quiet enjoyment by failing to make repairs to property, harassing a tenant, trying to illegally evict a tenant, entering a tenant's unit illegally or without permission, failing to provide required utilities, or otherwise interfering with the tenant's use of the property. If the landlord breaches a tenant's quiet enjoyment, the tenant may sue the landlord for damages and/or prevent the landlord from succeeding in an eviction.

If a tenant has damaged the unit he/she lives in, must I repair the damage?

Yes. Although the tenant is required to exercise reasonable care in the use and care of the property, damages caused by the tenant or his/her guests may occur. In such cases, the tenant should notify the landlord. The landlord must repair the damage caused by the tenant or his/her guests within a reasonable period of time after receiving notice, but may bill the tenant for the cost of the repairs. This is because the landlord has the duty to maintain the premises in a safe and decent manner during the term of the tenancy. The landlord warrants that the property is fit for habitation at the beginning of the tenancy and will remain habitable during the term of the tenancy. This is referred to as the warranty of habitability. If the landlord breaches this obligation, the tenant is entitled to damages.

A tenant who lived in a unit for three years has just vacated. In deciding how much of the security deposit to return to the tenant, how can I determine what is damage and what is reasonable wear and tear?

Reasonable wear and tear is the acceptable deterioration of property that occurs as a natural result of tenants living in a rental unit for a period of time. Landlords may not charge a tenant for costs associated with repairing conditions that are deemed the result of wear and tear. There are no definitive rules on the issue but a landlord must be fair and

reasonable, consider the length of the tenancy, and make a determination on a case by case basis.

If the landlord finds that there are damages, the landlord may deduct the costs of repairs from the security deposit. In doing so, the landlord must provide the tenant with a list of the damages, sworn to by the landlord or agent, itemizing the damages and the repairs necessary to fix them. The landlord should attach to this list written documentation such as estimates, invoices, or receipts for the repairs. If the landlord does not provide the tenant with the itemized list of damages within thirty days of the end of the tenancy, the landlord forfeits his right to keep the security deposit for damages and the tenant may also have a claim for damages.

A tenant has moved out of a unit and left behind a couch and a bureau. What should I do with these items?

If the tenant vacated the unit and made no arrangement with the landlord for picking up any items that he/she left behind and the landlord has no reason to believe that the tenant will be returning for the items, the landlord may consider the items abandoned. In such cases, the landlord should collect the items and hold them for the tenant for a minimum of thirty days. There is no requirement that the landlord pay for a storage facility to hold the items. If the landlord chooses to place the items in a storage facility, the tenant would be responsible for payment of the storage charges. While the landlord has no duty to locate the tenant to reunite him/her with their belongings, the landlord could send a letter to the tenant at his/her new address if known, or to the former address hoping that it gets forwarded to the tenant. At all times, the landlord should act in a reasonable manner with respect to the tenant's property. Finally, the landlord has no right to keep the tenant's property and the landlord must turn it over to the tenant at the tenant's request, even if the landlord is owed rent by the tenant.

Do I need a lawyer to terminate a tenancy, raise a tenant's rent, or evict a tenant?

No. There is no law that requires a landlord to retain an attorney except in cases of an eviction where the landlord is a corporation. In all other cases, a landlord may proceed on his/her own, provided he/she understands the requirements of the law. The fact that a landlord is not required to retain an attorney should not be interpreted to mean that a landlord might not benefit from such legal assistance. In fact, legal advice should be considered a legitimate and expected cost of doing business.

I need to have my rental property deleaded but do not have the money to do it. What should I do?

Massachusetts has many financing programs available to help property owners pay for deleading their homes, including low interest loans, loan subsidies, and tax credit assistance. Private banks may also have deleading programs. To obtain further current information, contact the Massachusetts Childhood Lead Poisoning Prevention Program at (800) 532-9571.

I have deleaded my rental property. Is there a tax deduction available to me?

The Commonwealth of Massachusetts provides a tax credit to landlords who delead their property. The credit is $1,500.00 per housing unit. A credit is different that a tax deduction. A tax deduction reduces the amount of taxable income that a taxpayer will base their tax on while a tax credit directly reduces the amount of tax that a taxpayer pays. Therefore, a tax credit saves the taxpayer the full amount of the credit. If the taxpayer owes less than the tax credit in any one year, the credit may be carried over into future years.

My tenant has just informed me that he/she is adopting a child who is three years old. The property has lead paint. What should I do?

The State Sanitary Code requires landlords to remove lead paint in any property where a child six years or under resides. This includes the unit in which the child lives, the common areas, and the outside of the property.

It is discriminatory and a violation of the law to evict a family because they have children and the unit has lead paint. The landlord is liable for all damages caused by the failure to delead.

There are two ways to comply with the lead paint laws:

1. Have all lead hazards removed or covered. Landlords must first hire a licensed lead inspector who will test the residence for lead and record all lead hazards. The landlord should then hire a licensed deleader to perform the work. After the work is approved, the owner will receive a Letter of Full Compliance.

2. Have only urgent lead hazards corrected, while controlling remaining hazards. This temporary method, known as interim control, requires that a licensed risk assessor show the landlord what work must be done for interim control. The landlord should

then hire a licensed deleader to perform the work. After the work is approved, the owner will receive a Letter of Interim Control. Owners then have up to two years to remove or cover the remaining lead hazards and receive a Letter of Full Compliance.

Tenants will have to be relocated while certain deleading work is taking place inside the home. They will be able to return to the property only after the licensed lead inspector or risk assessor determines that it is safe. The landlord has the right to move the tenant to a substitute unit upon reasonable notice, provided that the owner pays the reasonable moving expenses and cost of the substitute unit which exceeds the rent of the unit being deleaded. If the tenant does not accept the substitute unit offered by the landlord, the landlord will not be responsible for any expenses other than the moving expenses and cost of the substitute unit offered by the landlord which exceeds the rent of the unit being deleaded.

My tenant gave me a notice on the first of the month telling me that he/she is moving out at the end of the month and to use his/her security deposit for the last month's rent. Is this legal?

While the security deposit law would not prohibit this arrangement, it is not in the best interests of the landlord to do so. The security deposit was required so that the landlord would have money to pay for damages to the unit after the tenant moved out. While the security deposit may be used to cover any unpaid rent after the tenant has moved out, it is in the best interest of the landlord to attempt to collect the rent due from the tenant while the tenant is living on the premises so that there will be money available to pay for damages. If the landlord uses the deposit as last month's rent, the landlord will have to bill the tenant for the amount of damages to the unit, if any. If the tenant does not voluntarily pay the bill, the landlord would have to go to court to recover the amount due.

I took a security deposit three months ago before I understood the requirement that a security deposit must be placed in an escrow account in the bank. What should I do?

The landlord must deposit a security deposit in an interest bearing account in a Massachusetts bank within thirty days from the date the landlord receives it. This account must be beyond the claims of the landlord's creditors, meaning it may not be in the landlord's name nor mingled with the landlord's money.

Since you have not followed the law, you have two choices. The best choice is to give the tenant back the security deposit even though he/she may be unaware that you have failed to place it in an account within thirty days of receiving it. In addition to being the ethically preferable choice, legally, the tenant may discover the mistake and use the security deposit violation to defeat the landlord's attempt to regain possession in a later eviction action. This is because a tenant who is successful in proving that the landlord owes him/her money damages, even if that amount is less than he/she owes the landlord for rent, will not lose possession to the landlord. Any failure to comply with the law, even a security deposit violation, may give rise to a counterclaim for money damages which may prevent the landlord from getting their property back in an eviction proceeding, even if the tenant has not paid rent.

The less desirable choice if the tenant has not demanded that you return the deposit, is to deposit the money in a proper account immediately with the understanding that at any time during the tenancy, the tenant has the right to demand the return of the security deposit because you failed to deposit it in an appropriate bank account within the required time. If the tenant makes the demand, you should return the deposit immediately without making the tenant file in court. If the tenant does go to court to get his/her security deposit back, the Court may award the tenant up to three times the amount of the security deposit, plus interest, costs, and attorney's fees.

My tenant has informed me that there are bad conditions in his/her unit. Shouldn't the tenant have to notify me in writing?

There is no requirement that the tenant notify the landlord in writing. If the landlord does not repair damages or bad conditions of which they have actual notice from the tenant, whether oral or written, or of which they have constructive notice (the landlord should have known about the damage or bad condition), the tenant may decide to withhold rent, may be able to defeat a later eviction, or may bring an action for damages.

I have a small one bedroom apartment and want to limit occupancy to one person only. Is this legal?

The State Sanitary Code states that there is a minimum square footage requirement for residential properties. Landlords may limit the number of occupants that are allowed to live in an apartment based on that formula. In order to comply, the landlord must measure the square footage of the entire apartment and of the bedroom. The apartment

must have at least 150 square feet (s.f.) of floor space for the first occupant and at least 100 s.f. for each additional occupant. The bedroom must contain at least 70 s.f. of floor space if the bedroom is to be occupied by one person. If more than one person is occupying a bedroom, there must be at least 50 s.f. for each occupant. Children under the age of one are not counted as occupants. Therefore in this case, if the apartment contains at least 150 s.f. but less than 250 s.f., or the one bedroom contains at least 70 s.f. but less 100 s.f., the unit may be rented to only one person. But, if the unit contains 250 s.f. or more and the bedroom contains 100 s.f. or more, and the landlord limits occupancy to only one person, it is possible that this may be discriminatory. Landlords are permitted to limit occupancy for legitimate business reasons but not when this results in discrimination, especially against families with children.

I own a large apartment building and want to convert the building into condominium units, but I have existing tenants. What do I do?

If the building contains more than four units, it becomes subject to the Condo Conversion Law. Each municipality has the right to pass its own version, and you should contact your local town or city for that information. However, if the municipality has not adopted its own provision, the state law is applied, which has a number of requirements:

1. Give the tenant one year notice or until his/her lease expires, whichever is greater. The notice must be in writing and state that the building is being converted into condos, how long the tenant has until he/she needs to move out, and that the tenant has the right to first refusal. The notice should be hand delivered or sent by certified mail.

2. Give the tenant the right of first refusal to buy the condo unit. If the tenant does not agree to purchase the unit after ninety days, you may offer the unit to the public.

3. Reimburse the tenant for moving expenses of up to $750.00.

An elderly, handicapped, or low or moderate income tenant is entitled to two years notice, up to $1,000.00 for moving expenses, and the landlord's assistance in finding a new suitable apartment.