



HOW TO BE A LANDLORD AND AVOID LEGAL TROUBLE

By A. Joseph Ross



HOW TO BE A LANDLORD IN MASSACHUSETTS AND AVOID LEGAL TROUBLE

Revised, August 2017
Housing Court chapter updated, September 2017

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A publication of the

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Introduction

In many years of practicing landlord-tenant law, mostly, though not always, as a tenant advocate, it has become clear to me that most landlords, especially small property owners, don't fit the stereotype of the "evil" landlord. More often than not, they cause trouble for their tenants and themselves simply because they **don't know** their legal rights and obligations.

If you are like many small property owners, you may have assumed that there was nothing to renting a unit but finding a tenant and collecting the rent.

Guess again. Most of us heard at an early age that ignorance of the law is no excuse for violating it. But all too often, the small property owner winds up in the lawyer's office only **after** getting in trouble. When that happens, all a lawyer can do is try to cut your losses. Please review these materials and consult with your attorney if you have any questions. The best time to learn about these things is **before** you have a problem. My experience has shown that better informed landlords are better landlords and have better tenants. This guide is a summary of things you may not know that **can** hurt you. Many of the same things also hurt your tenants.

Most tenants want nothing more than to enjoy their apartment, pay a reasonable rent, and go about their lives. But economic hardship can drive some people to desperate measures, and the Landlord from Hell that they had last year may have seriously damaged their ability to trust you and made them all too willing to try to get the edge before you do. There are also, unfortunately, bad tenants in the world. I cannot tell you how to absolutely avoid getting a bad tenant. The world is not that predictable. But I can tell you how to improve your odds immeasurably. And if you do get the Tenant from Hell, I can help you to minimize the damage and, if necessary, get rid of the bad tenant as quickly and inexpensively as possible. I can also help you to have good tenants, to be a better landlord to your good tenants and thereby encourage them to continue to be good tenants.

This guide is based on Massachusetts law covering residential rentals. In many instances, the laws are similar in other states, but there are no guarantees. Many situations are very complicated. This booklet does not constitute legal advice and is no substitute for individual legal advice by a competent attorney who is familiar with the landlord-tenant laws of your state and with all the details of your situation.

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1. Some Basics

Whether you own a large apartment building or a single rental unit, you must treat the business of being a landlord as just that: a business. This means that you must act in a businesslike manner at all times. Even if your tenant is a friend and neighbor, you must be certain to treat the business relationship as a business relationship. This does not mean being unfriendly, but it does mean keeping proper records and dealing with business in a businesslike manner.

Large landlords can afford to have lawyers on retainer and fight lawsuits on a regular basis. But if you are reading this guide, you are most likely a small landlord. As such, even one lawsuit can cost you a great deal in legal fees, aggravation, and lost rent, even if you win. But legal information is not enough, by itself, to avoid legal trouble. You also need certain business policies. Since you cannot afford a lawsuit, you must try to keep your tenants from wanting to take you to court. This is easier than it seems.

Most businesses in our society have a fundamental rule: The customer is always right. Much of the acrimony between landlords and tenants arises because people in the rental housing business all too often forget that rule. If you are dissatisfied with your purchase at a local department store, they will give you a refund with a smile. Many businesses will give a courtesy gift card to a complaining customer, along with an apology. They would never scowl and say, "If you don't like it, don't shop here." Most consumer businesses would never try to get rid of a customer for complaining. Yet many landlords do exactly that. Your tenant is your customer, and a satisfied customer is less likely to give you trouble.

This doesn't mean you have to comply with every request. It does mean that you should try to respond promptly to reasonable requests. It means being friendly and courteous. If you approach your tenants with a chip on your shoulder, don't be surprised if they respond in kind.

Much of the secret of getting along with tenants is nothing more than the secret of getting along with people in general.

This may also mean not charging the absolutely highest rent that you think you can get. It can be well worth your while to keep the rent a little lower than market in order to keep a good tenant. Even if you follow all of our advice on screening tenants (Chapter 4), keeping a tenant that you already know is a good tenant is less risky. For some suggestions on keeping good tenants, see

<http://www.allpropertymanagement.com/blog/2013/03/04/ten-things-you-must-do-to-keep-a-great-tenant/>

2. Keep a Paper (or Electron) Trail

If you learn nothing else from this guide, learn to keep good written records. Roughly six thousand years after the invention of writing, in a society with almost universal literacy, many people are inexplicably reluctant to keep written records of even the simplest things. As we said in the previous chapter, even if you own only one rental unit, you must operate in a businesslike manner.

Maintain a file for each tenant. Keep a rent ledger, copies of the lease, correspondence between you and the tenant, security deposit and last month's rent documents, and any other relevant documents. If you do this by computer, back up the files regularly.

An important part of keeping a paper trail is keeping clean documents. We often see documents from clients on which they have written their own notes, hi-lightings, random phone numbers, or doodles. Courts want to see clean documents, preferably originals. If you must mark up a document, print out a copy or make a photocopy and make your notes on that. Don't mark up the originals. The original of the letter from your tenant is not a good place to write your notes. If you take pictures, don't write descriptions directly on the printed pictures. Keep your notes separate or on another print or with an electronic copy of the picture. Your own notes on a document may make the document inadmissible in court.

Your rent ledger should show the day the rent was received (not just the posting date), the check number, the amount, and the name of the account the check is drawn on or who paid the money. This is important. If a group of tenants sharing an apartment pay in multiple checks, your

records should show the amount of each check, the date it was received, and the person who wrote it. In a dispute over rent, the winner tends to be the person with better rent records.

Pay attention to the distinction between a last month's rent and a security deposit, and make sure that any receipt that you give for these deposits states the purpose correctly. Generate the proper documentation for these deposits (see Chapter 2) and keep copies in the tenant's file.

It is important to communicate with tenants in writing. If you do communicate orally, send a letter or e-mail confirming the conversation in writing. Landlord-tenant disputes often turn on variant interpretations of the same conversation. When you write a letter, be sure to spell everything out in detail. Your letter to your tenant isn't just for the tenant. It's also for your own records, to refresh your memory years later, and, if necessary, to show a court. Date each letter and keep a copy. Archive e-mails and back them up safely or print them out. If you deliver letters personally by sliding them under the apartment door, note the date and time you did so on your copy. Save the originals of all correspondence you receive from the tenant. Note on each document the date you received it. If you correspond by fax, be sure to print out and save a transmission record for every fax that you send. We have seen judges refuse to admit a fax communication into evidence without a transmission record.

When you advertize an apartment, keep copies of any ads you place. Especially if you place an ad online, you may not be able to get a copy of the ad later. So print out a copy and keep it in your files. Write on it the date you placed the ad and the dates it ran.

While e-mails can be very useful in keeping a "paper" trail, text messages can be difficult or impossible to archive, copy, or use in court. We've tried photocopying the phone display, without success. Some smart phones have the ability to capture a "screen shot" of whatever is on the display. This can be used to create copies of text messages, which can then be emailed to yourself, archived on a computer, and printed out. Some phone services offer the service, for a fee, of providing copies of text messages. Consider doing this for important messages, especially whenever you get a new phone. Unless you know how you will copy and archive text messages, they are not useful as a written record.

Some people still prefer to keep hard copies of correspondence. If you fax by computer, print out and save a hard copy of every fax with the transmission record. If you use e-mail, print out and save every e-mail to and from each tenant. Be sure that the header on the printout

contains the basic information of to, from, subject, and date. We've seen some e-mail software which omits this information on printouts. Write any missing information on the printout as soon as you print it out. If you keep electronic copies, be sure to make regular backups and make sure that each document contains a hard date. The copy in your computer of a letter you sent to your tenant will be a much less useful record if, when you open it a year later, it shows the current date, rather than the date you wrote the letter.

If you learn that a tenant is violating the lease, send the tenant a letter or e-mail demanding that s/he cure the violation promptly. State in the letter that any future rent will be accepted without waiving your right to insist that the violation be cured. If your tenant can show a court that you accepted rent, month after month, while knowing of a lease violation, and without reserving your rights, the court may find that you have waived your right to complain about the lease violation.

We once saw a case where a tenant moved out, turned in the keys, left some property in the apartment, and then, a month or so later wanted the apartment back. He brought suit in Housing Court, claiming that he had been illegally evicted, without judicial process. This could have been prevented by a paper trail, preferably something from the tenant in writing about his moving intentions. Failing that, the landlord might have written letters or e-mails to the tenant about the impending move or kept a record copy of a receipt given the tenant for the keys he turned in.

Keep a tickler system to keep track of lease expirations and notice dates. If you use leases with automatic renewal clauses (which we don't recommend), this is particularly important – unless you enjoy the frustration of a self-extending lease that has just extended itself automatically for another year at the old rent.

As a property owner, you have probably already learned the need to keep careful records of operating expenses for tax purposes. When Massachusetts had rent control, these records also were important in justifying a rent increase. That may still be the case if you own property subject to a subsidy program which regulates rents.

When you talk to anyone at any business or government agency, get the name of the person you talk to. "Somebody in the office told me..." has little credibility. If anyone won't give you their name, ask for someone who will.

A casual, informal system of recording and responding to tenant complaints is a lawsuit waiting to happen. Document tenant complaints, work assignments, repairs made, and denials of access for repairs in an organized way. The more organized your records, the more credible your presentation will be, if necessary, before a court or administrative agency.

3. Use Written Agreements

There are two reasons for using written agreements. The first is that an oral agreement is only as good as the memory and the honesty of the parties to the agreement. With a written rental agreement, you can spell out without ambiguity, and without fear of later memory lapses, the terms of the tenancy and who is responsible for what. This is part of keeping a paper trail.

The second reason for using a written agreement is to take advantage of explicit provisions defining the terms of the tenancy. For example, if you have a written agreement, you can restrict the tenant's right to sublet or to have pets. Without express provision in writing, the tenant has virtual carte blanche ownership of the premises during the tenancy.

Unless the contract says otherwise, the tenant has the right to bring in new occupants without your approval. The tenant has the right to have pets unless there is a written agreement to the contrary. It comes as a surprise to many landlords, but there is no law entitling you to a key to the apartment. If you want the right to a key, and to restrict the tenant's right to change locks, you must reserve that right in a written agreement.

Under provisions of the State Sanitary Code, you are responsible for paying for electricity, gas, and the fuel for heat and hot water. You can only require the tenant to pay for heat and hot water in a written agreement. Small, nonprofessional landlords renting unheated apartments by oral agreement have been sued successfully for tenant's heating fuel costs.

Make sure that the rental agreement reflects reality. Your ability to enforce lease provisions depends to a great extent on the lease provisions' relation to reality. For example, the standard RHA lease forms widely used in the Boston area provide that only the persons named in the agreement can occupy the apartment. If you intend to enforce that provision rigorously, make sure that all persons, including children, who are going to live in the apartment are listed somewhere in the lease. Otherwise, you create an ambiguity which may work against you. All

adults who will be living in the apartment and responsible for the rent should be listed as tenants. Children are best listed in a lease addendum.

The other side of making sure the written document reflects reality is that you should be sure to follow your own rules. That doesn't mean you need to be a stickler to the point of fetish, or never make exceptions or forgive lapses, but you will have fewer problems with tenants if you communicate, by your own actions, that you mean your rules and expect them to be followed.

If you are going to allow the tenant to have a pet, delete or alter the clause in the standard lease form which prohibits pets. If it says that you must give your permission in writing and you intend to give permission, give it in writing. If you are allowing the tenant to have a washing machine, air conditioner, or waterbed, make sure that the standard lease clauses prohibiting those items are crossed out. Make sure that all changes are made on all copies of the lease. You and the tenant should both initial each change.

Make sure the lease doesn't contain illegal provisions. Examples of illegal lease provisions are provisions which require tenants to make all repairs or to waive their legal rights. Another illegal provision is one which charges the tenant a penalty for late payment of rent when the rent is less than thirty days late. Illegal clauses are unenforceable and can result in damage awards under the Consumer Protection law.

Make sure, when you meet with the tenants, that the broker didn't tell them that some lease clause which is important to you doesn't really matter. Brokers may say that you don't really care if the tenant has pets, or that the no-smoking clause is just there for insurance purposes, etc. This happens all too often and causes no end of headaches for both landlords and tenants.

Make sure it is clear what is included in the rent. The agreement should accurately reflect whether heat, hot water, electricity, and gas are included in the rent or are to be paid for separately. If you are making additional charges for parking or recreational facilities, make sure the agreement says so. If you are providing parking, make sure the clause in standard lease forms prohibiting parking is altered accordingly. If you are charging for water, make sure you comply with the law, as described in Chapter 7.

Make sure all the blanks have been filled in correctly. Make sure the tenant initials the rent clause where provided. If you are relying on a tax escalator clause, make sure that it is filled in

correctly, with the correct tax years and with the correct amount, expressed as a percentage and in figures, not simply the word “proportionate.”

Make sure that all paperwork is complete before you give the tenants the keys and let them move in. We've seen too many problem tenants who never signed a lease before they moved in and refuse to do so afterwards. This includes any forms required by the bank for escrowing deposits. A recent court case held that a landlord was still responsible for escrowing the security deposit, even where the tenants didn't sign and return the W-9 form required by the bank. Under those circumstances, the court ruled, the landlord could have put the money in an account in their own name and tax ID.

If you collect rent and let the tenants move in before the lease is signed, you have created a tenancy at will. Even if you give a key without collecting money, you may be held to have created a tenancy. We once heard of a prospective tenant who was given a key to measure rooms, moved some possessions into the apartment, and tried to claim a tenancy. Let a prospective tenant measure rooms with you or the broker present.

If you are renewing a lease, make sure that a new lease or lease extension is signed before the old lease expires. Once the tenant has held over after the expiration of the lease, a tenancy at will can be created if you accept rent.

If an oral tenancy at will is created, you can lose some of the benefit of having a written rental agreement. If you find yourself with tenants who have moved in without completing the paperwork or with tenants who have held over their lease, be careful how you accept rent. See Chapter 31 and accept rent in the manner described there for tenants at sufferance.

If you listed the apartment with a realtor, and the realtor prepared the lease, be sure you go over it, with your lawyer if necessary, to make sure that it reflects your understanding of the arrangement. Just because someone else prepared the lease doesn't make it any less a binding contract.

It is not uncommon for a landlord to offer tenants a rent discount in exchange for doing snow removal, taking out the trash, or fixing up the apartment. Often, the rent discount isn't spelled out, it exists only as a lower rent figure in the lease. Since these things are your responsibility as landlord, the tenant can then refuse to do them and still insist on paying the rent

set forth in the lease. You can't condition a lease on the tenant's willingness to do what is your responsibility as a landlord.

However, you can agree, in a separate written agreement that the tenant will perform certain services in exchange for payment. The payment may take the form of a rent deduction. Then, if the tenant doesn't do what s/he agreed to do, or doesn't do it to your satisfaction, you can simply terminate that agreement and stop accepting the rent deduction. Make sure you keep records of the amounts involved. If you have such an agreement and you pay or credit the tenant more than \$600.00 in any calendar year, be sure to send the tenant IRS form 1099-MISC.

4. Screen Tenants

Good tenant relations starts with your choice of tenants. It's **hard** to evict tenants, even for non-payment of rent. It's much easier not to rent to a problem tenant in the first place.

Have each tenant fill out an application. A simple form is available from the Greater Boston Real Estate Board/Rental Housing Association, whose address appears in the "Resources" chapter at the end of this book. Be careful not to ask for irrelevant or unlawful information, such as race, religion, age (other than making sure the tenant is over 18), or sex, which could give rise to a discrimination claim. If you have access to a credit reporting agency, do a credit check and speak with the present and previous landlords and work references.

But beware. Landlords are sometimes hesitant to speak about a problem tenant. The current landlord may have a special incentive to give a glowing recommendation to a tenant he or she wants to get rid of. A more useful reference may be the landlord **before** the current one, who will have less reason to be untruthful. Ask specific questions. Did the tenant pay all rent due? On time? Did they keep the apartment clean?

Check sex offender registries. If you rent to a registered sex offender, you may be held liable for any injuries which the offender causes to other tenants or neighbors. Check criminal records at <http://www.mass.gov/eopss/crime-prev-personal-sfty/bkgd-check/cori/cori-forms-and-applications.html>, the website of the Massachusetts Executive Office of Public Safety and Security CORI page.

Despite all your efforts, no system is perfect, and some problem tenants may slip through the cracks. One answer is to rent to someone responsible who is known to you or your friends. Lowering the rent to get a responsible tenant can pay off by saving you unpaid rent, broker's commissions, and legal fees – not to mention aggravation. Once you find good tenants, keeping rent increases moderate will help you keep them. Remember this rule about investments: The higher the return, the higher the risk.

Students, especially undergraduates, are a particular problem. At best, they may be in their first apartment and not know how to take care of the place or how to be considerate of neighbors. They may simply not realize that their loud stereo at 3:00 AM disturbs other residents or neighbors, or they may not care. At worst, they may hold daily keg parties and do extensive damage to your property. Many landlords have found that, in general, undergraduate students and working people simply do not mix in the same building. Communities that have large student populations have adopted local bylaws or ordinances holding landlords responsible for tenants who disturb neighbors, and police in those communities actively enforce those laws.

There are now tenant screening services who will provide credit, prior landlord, and reference checks on tenants. Some check court indexes to see if a tenant has been involved in legal proceedings with a prior landlord. Some claim to be able to access criminal records, but in general their information may be less accurate than that furnished by the state. Court dockets are now available online at <https://www.masscourts.org/eservices/home.page.2>. Look at the docket for the local housing court, if there is one, and for the local district court. These services are generally less expensive than the cost of evicting a problem tenant. But they must be used with judgment. A tenant who had a bitter dispute with a bad landlord may appreciate a good landlord and go out of their way to be a good tenant in return.

A professional landlord we once knew advised trying to sign a new lease in the tenant's kitchen. He felt, with some justification, that he could learn valuable information about new prospective tenants by seeing how they kept their kitchen. Seeing a prospective tenant's current living quarters isn't a bad idea.

A special problem arises when you buy a building with tenants already there. It's usually best to try to meet the tenants before you sign an agreement. Then ask the seller for information about them and decide whether you want to buy a building with those tenants in it or find out whether they are moving soon. Any representations by the seller about tenants (or anything else,

for that matter) should be written into the purchase and sale agreement. You have good reason to be suspicious about any representations that the seller doesn't want to put in writing.

Ultimately, the decision on whom to rent to is up to your own judgment, subject only to anti-discrimination laws. One landlord we knew had a blanket rule against students. But if he met the students and believed that they would be responsible tenants, he would make an exception. No rule needs to be absolute. Keep your eye on the goal: to have tenants who will take care of your property, get along with their neighbors, and pay the rent on time.

About real estate brokers. Some brokers are competent. Some are honest. Many are both honest and competent. Unfortunately, some are neither. If you list a rental with a broker, make sure you meet with the tenant yourself. Not only do you want your own chance to approve the tenant, but you want to find out what the broker promised in your name. Some of the most intractable landlord-tenant disputes have to do with things the broker promised the tenants but never told the landlord. Others arise because the broker told the tenant that certain lease clauses, such as no pets or no smoking in the apartment, don't really matter or mean what they say.

5. Insurance

Despite your best efforts to follow the advice in this book, if you have tenants, you are at risk of eventual litigation with a tenant, right or wrong. When a tenant brings claims or counterclaims against you, it can be very expensive, even if you win. You must plan for the eventuality of a legal dispute with a tenant. Most ordinary homeowner's policies don't cover the legal costs involved in a suit by a tenant. You should check with your insurance agent try to get insurance which will cover tenant claims.

Standard lease forms often contain provisions that it is the tenant's responsibility to insure his or her own property. But this clause does not absolve you from damages caused by your own failure to care properly for the property.

6. Utilities

The State Sanitary Code provides that you can only require a tenant to pay for utilities if the utilities are separately metered, through meters which serve only that tenant's unit. You cannot, even inadvertently, make the tenant pay for utilities for any other part of the building. In

some small buildings, it is common for basement or hallway lights, outlets, or laundry facilities to be metered to the unit once occupied by the owner and now occupied by a tenant. When you acquire a building, have the gas and electric service checked to make sure that the metering is proper. Otherwise, you could find yourself reimbursing tenants for their electric or gas bills.

There is one exception. In a building of three or fewer units, a light fixture in a common hallway may be metered to a unit on the same floor **provided** that the rental agreement explicitly states that the tenant is responsible for paying for that light **and** the owner notifies the occupants of all other units. These requirements are strict and must be observed to the letter. For that reason, we recommend that you straighten out the metering, rather than trying to rely on this exception.

The best arrangement is to have common area electricity hooked to a separate "public" meter. This is inexpensive and permanently solves the problem.

An agreement for the tenant to pay for electricity, gas, or fuel for heat and hot water must be in writing. When the agreement is not in writing, tenants have been known to sue the landlord for all funds the tenant has expended on fuel. Under the most recent decisions of the Massachusetts Appeals Court, your liability in such cases is usually limited to \$25.00 if the tenant has verbally agreed to pay for a utility and there was no actual misrepresentation or cross-metering involved. But if the tenant can convince the court that he or she was deceived in some way, you could be liable for considerably more. Even if the tenant is only awarded \$25.00, you can also be ordered to pay the tenant's attorneys fees, which may be substantial. The safest course is to have the agreement in writing. The consequences of violation can be expensive.

7. Water Charges

Until recently in Massachusetts, it was unlawful for a landlord to charge a tenant for water. Legislation enacted in 2004 now allows you to charge tenants for water and sewer usage, provided that the very detailed requirements of the law are followed carefully. If you don't follow all requirements exactly, you may be unable to charge tenants for water and may even be required to refund to tenants all charges already collected.

The requirements include the installation of submetering devices for each unit in the building and any common-area water usage, so that each tenant can be billed for only his or her own water usage. Also required is installation of low-flow water conservation devices by a licensed plumber and certification of such installation to the local code enforcement agency. The tenant must be a new tenant in that unit who has signed a written rental agreement that clearly and conspicuously provides for separate water charges and fully discloses the details. The previous tenant must have vacated the unit voluntarily or been evicted for nonpayment of rent or for breach of lease or noncompliance with a rental agreement for the dwelling unit, and the new tenant must not have relocated involuntarily from another dwelling unit in the same building or building complex.

Single-family homes. Submetering devices are not required for a single-family home, where the tenant will use all the water. But if you reserve to yourself the job of doing yard work and will use an outside water tap, a court may say that you are using some of the water and need separate sub-meters. Even where submeters are not required, you must have a licensed plumber install low-flow water fixtures and certify the installation to the local Board of Health. If you don't do so, you cannot charge the tenants for water.

For further information, please see the document *Charging Tenants for Water*, on our website.

8. Housing Discrimination

Under state and federal law, you cannot discriminate against any prospective tenant based on the person's race, religious creed, color, national origin, sex, gender identity, sexual orientation (unless the person's sexual orientation involves minor children as the sex object), age, genetic information, ancestry, or marital status, veteran status or membership in the armed forces, blindness, hearing impairment, or because the person has a trained dog guide as a consequence of blindness or hearing impairment, or has any other handicap. You are not even allowed to ask questions about these subjects, even in casual conversation. We once saw a landlord who, after the interview was over, casually asked prospective tenants about their accent. When they didn't get the apartment, he was faced with a discrimination complaint because he had asked about their national origin.

The prohibition against age discrimination does not apply to minors or to residency in state-aided or federally-aided housing developments for the elderly or to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age if the housing owner or manager registers every two years with the Massachusetts Department of Housing and Community Development.

Discrimination includes refusing to rent, setting different rental terms, providing different services or facilities, stating falsely that an apartment is unavailable, and advertising or making any statement which indicates a preference based on race, religion, color, etc.

You also cannot discriminate against any person who receives federal, state, or local public assistance, including medical assistance, or who is a tenant receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, either because the person receives the subsidy or because of any requirement of the public assistance, rental assistance, or housing subsidy program. But you may refuse to rent to someone because, regardless of source, his or her income is not enough to be able to afford the rent. You must take care to apply the same standard of affordability to everyone, regardless of the source of their income. Here again, careful record-keeping can avoid problems.

Take care what you tell people when you turn them down for an apartment. If you tell them you're turning them down because you don't take subsidized tenants, or you don't take children, you're asking for a lawsuit. If you apply a neutral standard which applies to all prospective tenants, you can explain that the rent is too high for their income, and you don't think they can afford the apartment. A common rule of thumb is that no tenant should be paying more than one-third of his or her monthly income in rent. Verify income. It may come as a surprise to you, but some people lie (Really!).

In general, you may not refuse to rent to a tenant because the tenant has children. This creates a problem for many small property owners because of the dangers of lead paint and the high cost of de-lead ing. Your liability insurance carrier may also pressure you to avoid renting to families with children. But since discrimination is against the law, you must find other ways to protect yourself from liability. See Chapter 13 for more details.

Under state law, you may refuse to rent to a tenant with children in a two-family house if you occupy the other apartment as your residence or in a dwelling containing three or fewer apartments if one apartment is occupied by an elderly or infirm person for whom the presence of children would constitute a hardship. For this purpose, an elderly person is someone age 65 or over. An infirm person is one who has a disability or suffering from a chronic illness.

You may also refuse to rent to a tenant with children in a temporary rental of a single unit for a period of one year or less if you are the owner or tenant of the unit and usually occupy it as your principal residence.

The law on discrimination against a tenant with children is subject to any local, state, or federal restrictions regarding the maximum number of persons permitted to occupy a dwelling.

However, even when you are allowed to refuse to rent to a tenant with children, you are still subject to the prohibition in the law against discriminatory advertising or statements. In other words, you may be allowed to discriminate, but you are not allowed to say so. You are also prohibited from refusing to rent to tenants with children because of the presence of lead in the premises and the obligation to de-lead. To avoid a discrimination complaint, it is best to say as little as possible to prospective tenants about why you are choosing not to rent to them.

9. Tenants with Disabilities

Both state and federal law prohibit discrimination against tenants with disabilities. This is a difficult area because it is not sufficient just to treat all tenants or rental applicants equally. The law also requires you to treat some people differently by making “reasonable accommodations” for a tenant who has a physical or mental impairment which substantially limits one or more major life activities. Some examples are hearing, mobility and visual impairments, alcoholism, mental illness, mental retardation, or AIDS.

The really hard question is what is a “reasonable” accommodation. The answer depends on the situation. If a tenant needs a wheelchair, you will have to install a wheelchair ramp if you can do so easily and inexpensively. On the other hand, installing an elevator in a building that doesn’t have one, is expensive and probably not reasonable. If you have a “no pets” policy, you must make an exception for an assistance animal (see Chapter 10). If you have to make changes to the physical facilities, you may condition any changes in the physical facilities on the tenant's

agreeing to restore the property to its original condition when the tenant moves out, provided that the requirement is “reasonable.”

“Reasonable accommodation” does not mean that a person with a disability is excused from complying with the basic obligations of a tenancy. But it does mean that they can have help or can comply in a manner different from other tenants. The law does not require you to rent to a person who directly threatens the health or safety of others or who is currently using illegal drugs.

Environmental Intolerance (aka Chemical Sensitivity). One form of disability needs specific mention here: a person who is sensitive to many of the substances that are commonly used in paint, cleaning materials, carpet cement, and other applications in the apartment or in the common areas. If you have a tenant with this condition, you know how thoroughly frustrating it can be, both for you and for your tenant. You can save a lot of headaches and expense by acting proactively. One company which does environmental consulting, and can provide help in choosing appropriate materials for the living environment, can be found at <http://www.eheinc.com>. Other resources can be found on the web at <http://www.webmd.com/allergies/multiple-chemical-sensitivity> and <http://www.holistichelp.net/multiple-chemical-sensitivity.html>.

10. Pets and Assistance Animals

It is common in Massachusetts for rental agreements to contain clauses banning pets in the apartment. This may run up against certain health needs and rights of tenants, as established by the federal Fair Housing Act and Americans with Disabilities Act, as well as Massachusetts anti-discrimination laws. Landlords and tenants need to understand their respective rights in this area. This is complicated by the fact that this area of law is new and constantly evolving.

You are entitled to include in a written rental agreement a clause prohibiting the tenant from having pets in the apartment. This is a common clause in Massachusetts rental agreements and is usually binding. When the rental agreement contains such a clause, you can evict a tenant for having animals in the apartment without your permission. If you want to prohibit or even regulate pets in your building, you need to use written leases or tenant-at-will agreements which contain such a clause. Without a “no-pets” clause, tenants may have whatever animals they want

in their apartment, so long as the animals don't damage the building or cause disturbance to other tenants..

If you want to ban pets, you need to make sure that leasing agents call this to the attention of prospective tenants and don't tell the tenants something like "the landlord just wants that in there for insurance reasons, they don't really care." See Chapter 4 for further discussion of this. And remember that if you know that a tenant has a pet in the apartment, and you accept rent without objection, you may be held to have waived your rights with respect to that pet – even if you have a no-pets clause in the rental agreement.

If you have agreed to allow a tenant to have a pet, the tenant is still obligated to control the behavior of the pet. You may withdraw permission for a pet which disturbs other residents or causes damage to the property, such as a loud dog, cat, or bird, which makes noise that disturbs other residents or an animal which is not housebroken and does its business in the apartment, the hallway, or in the wrong places outdoors. If you agree to a clause in the rental agreement permitting a pet, make sure that the clause reserves your right to withdraw permission if the pet causes problems.

Your right to ban animals is not absolute; there are exceptions. The federal Fair Housing Act requires accommodation for an "assistance animal," which is defined as an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability. This requirement is effective regardless of whether you or the tenant receive federal financial assistance.

The federal Americans with Disabilities Act, which is enforced by the Justice Department, makes a distinction between a "service animal" and an "emotional support animal," but the federal Fair Housing Act, which is enforced by the Department of Housing and Urban Development, does not. Both laws are enforced in Massachusetts by the Massachusetts Commission Against Discrimination (MCAD) and the Massachusetts Attorney General's Office.

An assistance animal is not a pet. The oldest and perhaps best-known assistance animal is a seeing-eye dog. There are also animals which can alert a hearing-impaired owner when a doorbell rings, pull a wheelchair, fetch dropped articles for an owner in a wheelchair, perform

other needed tasks, or provide emotional support to a person whose disability requires such support.

You are required to evaluate a request for a reasonable accommodation to possess an assistance animal in a dwelling using the general principals applicable to all reasonable accommodation requests. See Chapter 9 and the links in the "Resources" chapter for further information.

You are required to allow a tenant to have an assistance animal if they need one despite any no-pets clause in the rental agreement. You may not inquire into the nature of the tenant's disability, but you may ask for medical documentation of the tenant's need, unless that need is obvious. You still have the right to require the tenant to control the behavior of the animal so that it will not disturb other residents or cause damage to the property.

It is reasonable to assume that the tenant is actually a patient of a doctor or some other health professional who provides a letter stating a tenant's need for an assistance animal, and the health professional has actually examined the tenant. But there are websites which purport to provide "medical documentation" for the asking for an "emotional support animal" for a fee and without any examination of the person making the request. While you cannot inquire into the nature of the tenant's disability, you do have the right to go on the web and check out a doctor who purports to provide medical documentation and to reject any "medical documentation" that does not appear bona fide.

This area is complicated and changing. For further information on this topic, see the links in the "Resources" chapter at the end of this book.

11. Lead Paint

By law, you can be held responsible for the presence of lead paint in a unit **sometimes even if you did not know it was present**. You can even be held liable for lead poisoning of a child who regularly visits your tenants. For this reason, it is important to find out all you can about lead paint when you are negotiating to buy a property. Ultimately, de-lead ing properties as soon as possible is the only completely effective way to deal with lead paint issues. When you are considering a purchase, figure the cost of de-lead ing into your budget. This can both increase the

value of your property and, if done properly, eliminate lead paint as a source of problems. Cities and towns often have programs, including loans and grants, to provide financial assistance for de-lead ing. For state programs, see the next chapter.

If a child under age 6 resides or will reside in the unit, the unit must be de-lead ed completely to the currently-required standard. You cannot refuse to rent to a tenant because the tenant has children and the unit contains lead paint (see Chapter 8). If the tenant must vacate the unit while de-lead ing is taking place, you will also be required to pay for the tenant's temporary lodging during de-lead ing.

At the same time, you may not be able to afford to de-lead. Some landlord advocates suggest that you try to market the unit only to friends or relatives without children. Although there has been no court ruling on this, it may well violate anti-d iscrimination laws. Furthermore, you can be liable if a childless tenant has (or adopts) children or has visitors (such as grandchildren or other relatives) who get lead poisoning. And no, you cannot put a clause in the lease prohibiting the tenant from having or adopting children.

If no one has suffered lead poisoning yet, you can delay complete de-lead ing by developing an emergency lead management plan and obtaining a Letter of Interim Control from a licensed inspector. The inspector must do an inspection and determine if any urgent lead hazards are present, such as chipping and peeling lead paint; lead dust; or structural defects, such as roof or plumbing leaks or deteriorating windows. that could cause damage to lead-containing surfaces.

If these or any other urgent problems are found, you will have to abate or contain them and have a re-inspection before you can get a Letter of Interim Control. As part of your emergency lead management plan, you must provide your tenants with educational materials and notices obtainable from the Department of Public Health.

A Letter of Interim Control is valid for one year and can be renewed for one more year. After that, you must de-lead completely and obtain a full Letter of Compliance. The Letter of Interim Control can be rescinded if you fail to maintain the required standards of lead control.

If your tenant has been withhold ing rent because of lead paint violations, you can ask the court to order that the withheld rent be applied toward the de-lead ing costs. But if the tenant is

also withholding rent because of other code violations, it may be that only the portion attributable to lead violations can be applied to de-leading.

The 1994 lead law authorized new regulations which allow encapsulating lead, rather than removing it. Formerly, all lead removal had to be done by a certified de-leader, but now there are certain things that the state allows you to do yourself. The work still must be inspected by a certified lead inspector. Since these are private contractors, their quality varies, and there is danger of collusion between lead inspectors and de-leaders, so that an inspector may pass a unit which still contains unlawful levels of lead. This can result in further problems for you down the road, when an apartment you thought was lead-free turns out to need de-leading all over again. If possible, you should try to get a town or state inspector to verify the results of the final de-leading inspection. New technologies and increased sensitivity to the cost of de-leading are producing new ways to alleviate the financial burden of de-leading.

Since de-leading is never complete, and regulations keep changing, the fact that an apartment was previously de-leaded does not mean that it is still in compliance with current regulations. You need to inspect a de-leaded unit regularly, and particularly before a new rental, to see that it is still in compliance. You also should keep all records of de-leading and inspections permanently and pass on copies to the next owner.

12. Financial Aid for De-leading

You can get some help from the state with the cost of de-leading. Massachusetts provides a state income tax credit equal to the cost of de-leading or \$1500.00 per dwelling unit. There is also a credit for the costs of interim control de-leading measures in the amount of \$500.00 or one half the cost of the interim control measures, whichever is less. The amount of the credit for interim controls applies to the total limit of \$1500.00. Only residential properties qualify for the Lead Paint Credit.

The Lead Paint credit covers work done in actually de-leading contaminated areas. De-leading, for this purpose, means removal or covering of contaminated paint, plaster, or other materials that could readily be accessible to children under six years of age. Only costs incurred for legally required de-leading qualify for the credit. Costs of repainting or refinishing de-leaded surfaces are not eligible for the tax credit.

In order to take the Lead Paint Credit, you must be the owner of the premises and meet the following requirements:

- The unit must be inspected by an inspector who is registered or licensed by the Department of Public Health, Childhood Lead Poisoning Prevention Program. The inspector must establish the presence of dangerous levels of lead in the residence, in violation of the lead paint law;
- the contaminated areas must be de-lead ed or interim control measures undertaken in a manner prescribed by state regulations;
- the property must be reinspected by a registered or licensed inspector, who certifies that all materials on the premises that contained dangerous levels of lead have been properly de-lead ed and issues a Letter of Compliance or Letter of Interim Controls.

You are entitled to take the Lead Paint Credit in the taxable year in which the property was brought into full compliance or in the year in which the payment for the de-lead ing was made, whichever is later. Instructions for taking the credit can be found on the Massachusetts Department of Revenue website, www.mass.gov/dor; look for Schedule LP.

If the lead paint credit is greater than the amount you owe on your state taxes for the year, you may carry over the balance into the next year, continuing for up to seven years. In order to take advantage of the credit, you must follow certain procedures strictly. For further information, visit www.mass.gov/dor or call the Massachusetts Department of Revenue at 617.727.4545 or 800.392.6089.

The Massachusetts Housing Finance Agency administers a program called "Get the Lead Out," which provides low-interest loans to de-lead homes with one to four dwelling units. For more information, call the MHFA Office of Single Family Programs at 617.451.2766 or visit https://www.masshousing.com/portal/server.pt/community/home_owner_loans/228/get_the_lead_out.

Some cities and towns also administer grant or loan programs for de-lead ing. Call the Community Development Office or housing agency in your city or town.

13. Lead Paint Notification

You must provide all prospective tenants with an official notice outlining the hazards of lead poisoning on a form prepared by the state Department of Public Health. You must enclose a copy of the most recent lead inspection report for the unit if there has been one, a Letter of Interim Control if intermediate steps are being taken to control the lead paint, or a Letter of Compliance indicating that any necessary de-lead ing measures have been taken. Tenants must be asked to sign a statement certifying that they have received these materials. **This is required whether or not the tenants have children under the age of 6.** Tenant notification forms can be obtained free of charge from the state Department of Public Health at <http://www.mass.gov/eohhs/gov/departments/dph/programs/environmental-health/exposure-topics/lead/lead/property-transfer-lead-paint-notification.html>. The tenant notification can also be included in a written lease and has been incorporated into some standard form leases.

This notification requirement parallels the tenant notification requirements under Title X, a comprehensive federal lead poisoning prevention law signed in 1992 by President George H. W. Bush.

If you fail to comply with these provisions, you will be liable for all damages caused by the failure to comply and will be subject to a penalty of up to one thousand dollars. A violation by any person engaged in trade or commerce is also considered an unfair and deceptive act or practice under the consumer protection law, giving rise to potential liability for treble damages plus attorneys fees.

14. Rent Control

As a result of a statewide ballot question in 1994, rent control in Massachusetts ended for almost all tenants by 31 December 1996. Certain subsidized apartment complexes still have their rents regulated by HUD or by the Massachusetts Housing Finance Agency (MHFA). There are also about a dozen communities in Massachusetts that still have rent control for manufactured home parks only. There are also rent limits in various subsidy programs.

15. Nonpayment and Late Payment of Rent

When a tenant doesn't pay rent, you can begin the eviction process by giving the tenant a 14-day Notice to Quit for Nonpayment of Rent in writing. The notice doesn't actually require the tenant to move, it just allows you to bring a legal action for eviction. Only a judge can order a tenant to move.

Some people believe there is a grace period for payment of rent. Legally, there isn't. If rent is due on the first of the month, it is legally delinquent if it is not paid by the second, unless the first of the month is a Sunday or a legal holiday. This means that you can send a 14-day notice on the second of the month and start the eviction process 14 days thereafter.

A tenant with a lease who gets a 14-day notice can cure the nonpayment and reinstate the tenancy by paying to the you or to your attorney all rent then due, with interest and costs of suit, on or before the day the answer is due in the legal action for eviction (called "summary process"). A tenant at will who has not received a similar notice from you within the past twelve months can cure by paying all rent due within ten days of receiving the notice. The 14-day notice must include statutory language notifying the tenant of the right to cure within ten days. If it doesn't, the tenant's time to cure is extended to the day the answer is due in the eviction action.

If the nonpayment was caused by a failure or delay by any government agency in sending any subsistence or rental payment, the court is required to continue the hearing for at least seven days in order to furnish notice to the government agency. If all rent due with interest and costs of suit has been tendered to the landlord within that time, the court will treat the tenancy as not having been terminated.

Some leases contain specific provisions for a penalty or surcharge for late payment of rent. Those provisions are illegal unless they apply only to rent which is more than 30 days late.

16. Rent Subsidies

There are a number of rent subsidy programs in existence, but the principal program is administered under Section 8 of the United States Housing Act of 1937, and the other subsidy programs work in a similar fashion. Section 8 subsidies are administered by local housing authorities, certain private nonprofit organizations, and the Massachusetts Department of Housing and Community Development. These agencies are called "Public Housing Agencies," or

“PHAs.” The tenant goes to the PHA and, if qualified for assistance, is generally placed on a waiting list until a voucher is available.

Eligibility. Eligibility is based on the family’s total gross income. At least 75% of all vouchers issued by a PHA must be targeted to households whose total income does not exceed 30% of the area median income, as established by HUD.

PHA Jurisdiction. A Housing voucher from any PHA may be used anywhere in Massachusetts. As a result, you may find yourself dealing with a local housing authority in a community other than the one where the housing is located. Some local housing authorities attempt to require a tenant to use the subsidy in their own community, but federal court rulings have held that the entire state is within the jurisdiction of any PHA in Massachusetts.

Housing search. A tenant who receives a voucher then has up to 180 days to locate rental housing which qualifies. The tenant’s present apartment may qualify, and this may be a way to salvage the situation if you have a good tenant who has become unable to pay the rent. Once housing has been found, the voucher holder submits a “Request for Tenancy Approval” form to the PHA. The PHA then determines the eligibility of the apartment and the appropriate rent and determines the subsidy amount. If the housing fails to meet program requirements, the 180-day clock will be restarted, and the tenant resumes searching for housing that meets the requirements.

Inspection. Part of the process for qualifying an apartment includes an inspection by a representative of the PHA to determine if the apartment meets HUD’s Housing Quality Standards. The PHA will report on what repairs you must make to bring the apartment up to their standards. You must make those repairs before the voucher holder can rent the apartment. A similar inspection will occur annually so long as the subsidy continues.

Lease. Once the apartment is found to meet all Section 8 requirements, the tenant signs a lease with the landlord. You also enter into a Housing Assistance Payment (HAP) contract with the PHA. You need to review these documents and, as with all written contracts, make sure that they reflect the verbal understandings. In particular, make sure that provisions on who pays for which utility are correctly filled in.

Rent Payments. The PHA will determine what the market rent should be for the apartment, based on formulas promulgated by the United States Department of Housing and

Urban Development. The share of the rent to be paid by the tenant will be determined from time to time by the PHA based on the tenant's income. The tenant's share is usually set at 30% of the total household income. The tenant pays his/her share to you every month, and the PHA pays the rest to you directly.

You cannot charge and the tenant cannot pay more than the rent approved by the PHA. Attempting to collect more rent from the tenant under the table is considered fraud, and both you and the tenant who pays it can be prosecuted. You may request to be allowed collect rent from the tenant beyond the 30% of income set by the PHA, effectively charging a higher rent than the official "market rent," but you can charge it only if the amount is approved by the PHA. It is important to read the terms of the Housing Assistance Contract to be sure that this is permitted under your tenant's program. Even when additional charges are permitted, they must be set up at the start of the tenancy, or at the tenancy's annual renewal. You cannot demand them after the tenant has moved in expecting to pay a different rent.

Occasionally, due to cuts in funding, some PHAs have reduced the rent during the term of the lease. If you read the fine print of the lease or HAP contract, you will find that they can do this. If this happens, you will have very few legal remedies. However, landlords have sometimes been able to join with other landlords to oppose such cuts politically, often with success.

Discrimination. As a landlord, you are prohibited from discriminating against any tenant because that tenant is receiving public assistance. That includes discrimination based on program requirements, such as the requirement for a lease or the terms of the HAP contract. You may, however, refuse to rent to a tenant because the tenant, under the program, cannot to pay the rent which you can obtain on the open market.

Eviction. You can evict a subsidized tenant only for reasons stated in the lease or HAP contract. You must state the reason for the eviction in the Notice to Quit, and you must send a copy of the Notice to Quit to the PHA.

17. Satellite and Cable TV

State law provides that you cannot refuse to permit a cable TV operator access to your building to provide cable service to the tenants. You are deemed to have consented when the cable operator delivers to you a copy of the state cable TV law and a signed statement in which

they agree to be bound by its terms. You cannot prevent a cable operator from entering the building for the purpose of installing or maintaining the cable system if one or more tenants have requested cable. The cable company cannot install cable in an individual unit without permission from the tenant or interfere with a tenant's existing rights to use any existing master or individual antenna system.

The state law provides that the cable operator must install the cable TV system at no cost to you, must indemnify you for any damage arising from the installation, and must not interfere with the safety, functioning, appearance, or use of the dwelling. If the value of your property is diminished by the cable installation, you can file a legal action to recover damages.

You cannot discriminate, in rental or other charges, between tenants or occupants who subscribe to cable TV and those who don't. However, you may require reasonable compensation from the cable company in exchange for permitting the installation of the cable systems.

A regulation of the Federal Communications Commission provides that you cannot prohibit any tenant from installing a "video antenna" within the part of the building which is under the tenant's control. The regulation applies to television antennas, satellite dishes less than one meter in diameter, and wireless cable antennas. That means that you can prohibit a tenant from putting an antenna on the roof, or on the exterior of the building, but you cannot prohibit the tenant from putting one inside a window or on a porch or patio which is part of the tenant's apartment.

The FCC regulation prohibits any restriction on property within the exclusive use or control of the tenant which impairs a viewer's ability to install, maintain, or use a video antenna. A restriction impairs if it unreasonably delays or prevents the use, unreasonably increases the cost, or precludes a viewer from receiving an acceptable quality signal. The regulation does not prohibit legitimate safety restrictions or restrictions designed to preserve designated or eligible historic or prehistoric properties, provided the restriction is no more burdensome than necessary to accomplish the purpose.

18. Habitability

The State Sanitary Code contains detailed requirements for the physical condition of all residential rental units. This includes many requirements that we ordinarily would not associate

with "sanitation," such as requirements for security locks and rules about who pays for utilities. Here are some of its requirements:

- **Heat:** You must provide and maintain a heating system in good operating order. You must provide and pay for heating fuel unless the tenant is required to supply the fuel under a **written** rental agreement. From 16 September to 14 June every room must be heated to a temperature of at least 68 degrees Fahrenheit between the hours of 7:00 a.m. and 11:00 p.m. and at least 64 degrees between the hours of 11:01 p.m. and 6:59 a.m. During the heating season, the maximum heat allowable in the apartment is 78 degrees.
- **Extermination:** In a rooming house or any other dwelling of two or more dwelling units, you must maintain the units free from rodents, skunks, cockroaches, and insect infestation and are responsible for exterminating them. Upon reasonable advance notice, the tenant must give you access for extermination.
- **Kitchens:** You must provide, within the kitchen, a sink of sufficient size and capacity for washing dishes and kitchen utensils, a stove and oven in good repair, and space and proper facilities for the installation of a refrigerator. NOTE: You do not have to provide a refrigerator. However, if you do provide a refrigerator, or agree to provide one, you to are required to maintain or replace it as needed.
- **Water:** You are usually responsible for providing and paying for water. You cannot require the tenant to pay for water, except as explained in Chapter 7.
- **Hot Water:** You must provide and maintain in good operating condition the facilities capable of heating hot water to a temperature of not less than 110 degrees and not greater than 130 degrees Fahrenheit, in a quantity and pressure sufficient to satisfy the ordinary use of all plumbing fixtures. You are required to pay for the fuel for heating the water unless a **written** rental agreement provides that the occupant provides the fuel.

- **Structural Elements:** You must maintain the foundation, floors, walls, doors, windows, ceilings, roof, staircases, porches, chimneys, and other structural elements of the dwelling so that it excludes wind, rain, and snow; and it is rodent-proof, weathertight, watertight, and free from chronic dampness; in good repair, and in every way fit for the use intended.
- **Snow Removal:** You are required to keep all means of egress at all times in a safe, operable condition. You must keep exterior stairways, fire escapes, egress balconies, and bridges free of snow and ice. You can require the tenant to be responsible for snow removal only for pathways and stairways which lead only to the tenant's apartment and are not common to the exit of any other unit.
- **Garbage and Rubbish:** If you own a rooming house or any other dwelling containing three or more dwelling units, you are responsible for collection and final disposal of garbage and rubbish. If you own any parcel of land, vacant or otherwise, you are responsible for maintaining it free from garbage, rubbish, or other refuse. In any dwelling, you are responsible for maintaining common areas free of garbage, rubbish, other filth, or causes of sickness. Your tenants are responsible for maintaining in sanitary condition parts of the building which the tenants occupy or control exclusively.
- **Smoke and CO detectors:** You are required to provide and maintain all smoke and carbon monoxide detectors required by state laws and regulations.
- **Locks:** Every entry door of the building, every door of the main common entryway, every exterior door into the building, and every entry door of each apartment must be "capable of being reasonably secured against unlawful entry" and properly fitted with an operating locking device. The main entry door of a building containing more than three apartments must be equipped to close and lock automatically with a lock, including a lock with an electrically-operated striker mechanism, a self-closing door, and associated equipment. Every opening exterior window must also be capable of being reasonably secured and properly fitted with an operating locking device.

You should get a copy of these requirements before renting any unit. A copy of the Code can be found at <http://www.mass.gov/courts/docs/lawlib/104-105cmr/105cmr410.pdf>.

19. Reporting Code Violations

If your tenants believe there are violations of the Code in their apartment, they may call the local code enforcement agency and ask for an inspection. If you are getting along with your tenants, they will probably report conditions to you first, but they are not legally required to do so. The local code enforcement agency can order you to make repairs. They can also document conditions, which can be used as a defense to any court action which you may bring against them. You are also prohibited from retaliating against a tenant for reporting actual or suspected code violations to code enforcement authorities or to you in writing. For more information on retaliation, see Chapter 29.

The name of the local code enforcement agency varies from community to community. In Boston and Cambridge it is the Inspectional Services Department or Division. In Brookline, it is the Health Department. In most smaller towns, it is the Board of Health. For a heat or other serious violation, the Code requires an inspection within 24 hours.

Rent Withholding. Your tenants have the right to stop paying rent if conditions are not being corrected, provided they meet all of the following requirements:

- The conditions are serious enough to endanger or materially impair the tenant's health or safety;
- The tenant can show that you knew of the conditions before the tenant was in arrears in rent. This usually means a copy of a written complaint or e-mail to you or a notice from the local code enforcement agency. The law presumes that you knew of conditions which have existed since the tenant first moved in (or since you acquired the building, if the tenant has been there longer).
- The violations were not caused by the tenant or by anyone acting under the tenant's control;

- The violations can be repaired while the tenant continues to live in the apartment. Lead paint is an exception to this rule. You are required to provide the tenant with alternate housing while the apartment is being de-leaded.

You won't necessarily get all the withheld rent back when the repairs have been made. The tenant is usually entitled to an "abatement," a credit off the rent as compensation for having had to live with the conditions until they were repaired. However, a court can order that rent withheld because of the presence of lead paint be applied towards the cost of de-leading.

At the present time, there is no legal requirement for tenants to place withheld rent in any form of escrow account. Legislation which would require tenants to put withheld rent in escrow is often introduced in the Legislature, but so far has never gone anywhere.

Repair and Deduct. Under certain circumstances, a tenant can make the repairs and then deduct the cost from the rent. This can be done if the tenant first has a code inspection and verification that violations exist and that they may endanger the tenant's health and safety. After you have been notified by the code enforcement agency, you have 5 days to begin repairs and 14 days to substantially complete them. If you do not make the repairs within the time limit, the tenant may have the repairs made and deduct the cost from the rent. The tenant may not deduct more than 4 month's rent in any 12-month period. You can sue to recover any excess amounts deducted, but you cannot combine that claim with an eviction action.

20. Building Security

Some recent lawsuits have produced high verdicts for tenants suing their landlords for negligence in maintaining building security. The State Sanitary Code requires that a dwelling "shall be capable of being reasonably secured against unlawful entry." Every entry door of the building and of each unit and every openable exterior window must be "capable of being reasonably secured from unlawful entry" and be "fitted with an operating locking device."

In a building containing more than three units, the main entry door must be able to close and lock automatically with a lock, including a lock with an electrically-operated striker mechanism, a self-closing door, and associated equipment.

These are the minimum requirements. If a tenant sues you because they were raped, injured, or their property stolen by an intruder, your actions will not be measured by the minimum legal requirement, but by what was *reasonable*. If you regularly leave security doors open, or give plumbers, carpenters, and "handymen" keys to tenants' apartments and leave them alone there, or fail to respond promptly to requests to repair door or window locks, you are vulnerable to claims for negligent security. If you know that your property is in a high crime area, inadequate lighting or locks can cost you far more than the cost of adequate security. According to a recent court decision, you can also be held liable for crimes committed against tenants by your own employees.

21. Disputes Between Tenants

Disputes between house-mates or between tenants in neighboring apartments can be very difficult for a landlord to deal with. You may be tempted to avoid getting in the middle of these disputes, and that is often the best course. But you can't always avoid involvement. We can't tell you how to handle every dispute, but we can try to offer some guidance.

It is easier to stay out of a dispute between tenants in the same apartment. However, when the lease is up for renewal, you have the right to determine which tenants, if any, you will allow to stay under a new lease. So long as you are not engaging in unlawful discrimination or retaliation, you can enter into a new lease with some house-mates and ask others to leave. If a court action is necessary to evict the tenant that you have asked to leave, it can get complicated. You may need to bring the eviction action as co-plaintiff with the tenants with whom you have signed the new lease.

It can be harder to stay out of a dispute between tenants of neighboring apartments. Lease clauses generally obligate tenants not to disturb residents of neighboring apartments, and courts have held that these clauses give you both the right and the obligation to control such conduct. You need to proceed carefully, since it may cause you more trouble if you take action against the wrong party. You can do a lot to avoid such disputes by trying to encourage an atmosphere of quiet and cooperation among tenants.

There are mediation services available which can often be helpful in such instances. Mediation is a process whereby a neutral party tries to help the parties themselves to agree on a

solution to a dispute. It can be much less expensive than litigation and, when possible, may produce a better result. In some courts, we have seen court personnel who can be very helpful in trying to resolve a dispute by mediation.

22. Repairs

It is essential to have a regular, formal system, including regular record-keeping, for tenants to report the need for repairs and for getting necessary repairs done. When a tenant facing eviction files counterclaims for failure to make essential repairs, there is no substitute for records kept in the ordinary course of business, showing complaints received and actions taken.

It is also important to monitor the people you hire to do work for you. Some landlords try to hire unlicensed and unskilled handymen, hoping to save money on repairs. This can be false economy. Doing a job right the first time is often less expensive than having to fix a sloppy job after several failed attempts, not to mention the litigation with a tenant who has become frustrated and has begun withholding rent. A tenant can make serious legal trouble for a landlord who uses unlicensed workers and doesn't get proper permits to do work.

Another reason for monitoring tradespeople is that some may steal from tenants or damage their property. We know of one instance where a plumber left alone in an apartment made a long-distance call from the tenant's phone. And many tradespeople seem incapable of making or keeping appointments. Your tenants are required to allow access for repairs, but, except for emergencies, they are entitled to an appointment with reasonable advance notice. They will tend to blame you if they stay home from work and the painter, carpenter, or plumber never shows up. And if tradespeople show up without an appointment, the tenant may be justified in refusing to let them in.

Some tradespeople have been known to fail to show up for an appointment and then report to the landlord that the tenant wasn't home or wouldn't let them in. Then they will charge you for the service call, and you will blame the tenant, who was waiting for them all along.

These are all good reasons why you or someone you trust should accompany workers in tenant apartments whenever possible.

23. Smoking – Marijuana and Tobacco

As the health dangers of second-hand smoke have become better and more widely known, non-smoking tenants have increasingly objected to smelling tobacco smoke anywhere in their apartments or in the surrounding common areas. More and more landlords and condo associations are banning smoking in their buildings. Even prior to the legalization of marijuana in Massachusetts, we have heard of tenants breaking their lease and moving from an apartment because of the odor of marijuana. It is increasingly advisable for landlords to include provisions in written leases limiting or prohibiting smoking of any substance (including e-cigarettes if you want to ban them) in rental properties. Fortunately, the new Massachusetts marijuana law explicitly permits a property owner to ban or otherwise regulate marijuana use on the premises. There is an exception for marijuana use “by means other than smoking,” unless the failure to regulate would cause you to violate federal law. Even if you don’t personally object to marijuana use, many good tenants object to its odor and marijuana is still illegal under federal law. Getting a reputation as a marijuana-friendly building or landlord could draw the attention of federal prosecutors. We don’t yet know what actions the government may take under the current administration.

Present “no-smoking” clauses in leases may be broadly worded enough to include marijuana, and leases often contain clauses prohibiting tenants from causing any sort of nuisance in the property. But explicit lease clauses make enforcement easier. If you already have such a no-smoking clause in your leases, you would be wise to modify them in future leases to explicitly include marijuana. Even if you don’t prohibit tobacco smoking, you may wish to prohibit marijuana use. You may also want to ban or regulate the use of marijuana in vaporized form and cultivation of marijuana on the premises because of its distinctive odor. If you pay for water or electricity, you should also be aware that growing marijuana is likely to increase water and electricity usage.

You cannot change a lease during its term unless the tenant agrees, but when a lease expires, you can include new provisions in a new lease. If you want to change the lease mid-term, you may try offering some concession to the tenant, such as offering to pay the tenant’s gas or electric bill for several months in return for a lease amendment. On the other hand, you may just want to let the matter rest until the next lease.

Enforcing no-smoking prohibitions may not be easy. Tenants can complain, and there can be a smell in the hallway or in the tenant’s apartment, but it’s hard to know whether the smell is coming from next door, across the hall, or downstairs. Have workers try to note the source of

smells and evidence of drug activity when they are invited into a unit. When there's doubt, sending a notice around to all tenants to the effect that there have been complaints and reminding them that smoking is prohibited and can lead to eviction. Some tenants who may be attracted to your building because of no-smoking policies will expect enforcement (sometimes faster than you can reasonably do so) and will be upset and may withhold rent if you do not do so.

A tenant who uses marijuana for medical purposes and can document the need through a letter from a doctor may have a legal right to a reasonable accommodation under the disability laws. However, since medical marijuana is available in forms for use in ways other than smoking, you may be able to prohibit smoking while permitting such other use. If a doctor's letter says that the tenant can only be accommodated by smoking, and not some alternate form, you may need to look for ways of smoking marijuana in the apartment without forcing other tenants to endure the odor and fumes. If that can't be done, you may have grounds to argue that a reasonable accommodation cannot be made. For further information, see Chapter 9.

24. Illegal Drugs

If you are aware that a tenant is involved in illegal drug-related activities on the premises, state law requires you to "take all reasonable measures" to evict the tenant "as soon as it can be lawfully done." If you knowingly tolerate illegal drug activity on your property, you may be subject to a fine of up to \$1,000 and a prison sentence of from three to twelve months. You also run the risk of the state or federal government confiscating your property. Other tenants may move out or withhold rent because of the unsafe conditions associated with drug activities.

The law gives you some special remedies to evict a tenant quickly when illegal drugs are involved. If a tenant is involved in illegal drug activities, you can begin immediate legal action against the tenant, without waiting for the standard notice requirements. You cannot evict the person without going to court, but you can go to court in an expedited eviction proceeding.

Evicting a tenant for illegal drug activities requires proof that these activities are taking place on the premises. Without a lab analysis, a bag of white powder is only a bag of white powder. You have no right to enter the unit or to take what you believe to be illegal drugs for analysis. If you believe that illegal drug activities are taking place on your property, you should go to the police. They can assure your safety and obtain evidence lawfully.

25. Security Deposits and Last Month's Rent

This is a very common problem area for the small property owner. Because the law is very complex and the consequences of even an innocent misstep can be expensive, we generally recommend that you do not charge a security deposit, but only a last-month's rent deposit. Whatever you do, be careful to specify in writing the type of deposit you are charging and refer to it correctly and consistently.

Under the law, the security deposit provides very little protection against a tenant damaging the apartment. Almost any significant damage will cost more than the deposit. If you try to keep any part of the deposit for damages, you can be almost certain of a lawsuit from your tenant. And if the court disagrees with any part of the deduction, the tenant's award will be trebled, and you will also have to pay the tenant's attorney's fees. It's a lot cheaper and less aggravating to protect yourself by carefully screening tenants and treating your tenants well. And if damage is done, consider it a cost of doing business.

Under Mass. General Laws, ch.186, §15B, at the beginning of the tenancy, you may charge only:

- rent for the first month;
- rent for the last month, calculated at the same rate as the first month;
- a security deposit equal to the first month's rent; and
- the purchase and installation cost for a key and lock. This does **not** mean a key deposit. The law does not provide for a key deposit.

This means that you cannot charge any other fees at the outset of the tenancy, nor can you charge several months' rent in advance. The law also regulates how you can accept and hold these funds. For a security deposit, you must:

- place it in an escrow account in a **Massachusetts** bank free from the reach of your creditors;

- transfer the deposit to the new owner when you transfer the premises;
- give the tenant a receipt showing the amount of the deposit, your name, the address of the premises, and the name of the bank and the account number in which the security deposit is being held;
- give the tenant a statement of the present condition of the premises (Various landlords' associations have forms to comply with this requirement);
- if the tenant submits to you a separate list of damages, you must return a copy of the tenant's list to the tenant within fifteen days of receiving it, with either your signed agreement with the list or a clear statement of your disagreement attached;
- pay the tenant 5% interest per year on the deposit, or the amount of interest you receive from the bank each year if that is less;
- keep careful records on the security deposit and make them available to the tenant for inspection at your office during normal business hours.

You must return the deposit within 30 days after the tenant vacates, if a tenant at will, or within 30 days after the expiration of the lease. You may only deduct unpaid rent or water charges which have not been validly withheld or deducted, taxes due under an escalator clause, and the cost of damage the tenant has done to the premises (this does **not** include normal wear and tear). If you deduct for damages, you must follow the procedure in the statute **exactly**.

You must provide the tenant with an itemized list of damages, signed under penalties of perjury, itemizing in precise detail the nature of the damage and the repair necessary to fix it, with written evidence, such as estimates, bills, invoices, or receipts, indicating the actual or estimated repair cost, within 30 days of termination of the occupancy under a tenancy at will or the end of the tenancy under a lease. This must be followed exactly, or your tenant may sue for treble damages plus attorneys fees. **Be careful.** You can be hit with treble damages just because you didn't sign the list under penalties of perjury or because the account was in an out-of-state bank.

For the last month's rent, you must:

- give the tenant a receipt that states:
 - the amount of the rent,
 - the address of the premises,
 - the person receiving the rent,
 - that you must pay interest, and
 - that the tenant should provide you with a forwarding address where the interest may be sent; and

- pay the tenant 5% interest yearly or notify the tenant that the interest may be deducted from the next rental payment. You don't have to hold the last month's rent in an escrow account, but you may not deduct for damages to the unit from the last month's rent. If you do use an escrow account for last-month's rent, you may pay the tenant the amount of interest you actually receive in the account, if it is less than 5%.

If you fail to comply with any of these requirements, the law allows the tenant to sue you for damages, including return of the deposit. For some violations, damages include **three times** the interest due or **three times** the amount of the deposit, plus the tenant's attorney's fees. A violation of any of these provisions may also be a violation of Mass. General Laws, ch.93A, the Massachusetts Consumer Protection Law.

If you have already violated the law, it is generally safest to return the security deposit immediately to avoid having to pay treble damages. You may not like to do this, especially where the tenant owes rent or has severely damaged the unit. But even if it isn't clear that you have violated the law, returning the deposit will probably save you money. The Massachusetts Appeals Court has ruled that, so long as the tenant still occupies the apartment, you may avoid the treble damages by returning the security deposit immediately on demand. (*Castenholz v. Caira*, 21 Mass. App. Ct. 758, 490 N.E. 2d 494 (1986).) And now you know why we advised you not to take a security deposit!

Since the rules are different for security deposits and last months rent deposits, it is important for you to see that the documents make clear which kind of deposit you are taking. If the tenant pays by personal check, be sure the description of the payment in the "memo" section

of the check is correct. If the tenant pays in any other way, be sure to give a receipt which includes an accurate description of the payment.

The security deposit and last month's rent law does not apply to any rental for a vacation or recreational purpose of 100 days or less in duration. It also does not apply to commercial rentals.

Since you are only allowed to charge the payments listed above, there is no provision for a "pet deposit" except as part of an authorized security deposit. One Housing Court case holds that a monthly "pet fee" is prohibited, at least when the lease does not specify that it is additional rent.

26. Property Damage

Whether you have a security deposit or intend to sue tenants for damages, your claims must be carefully documented. The Greater Boston Real Estate Board/Rental Housing Association has forms for recording the condition of the premises at the outset of the tenancy. These forms are often treated too casually by both landlords and tenants. Either you personally or the property manager should hold a careful inspection of the apartment, with careful notes and pictures taken, either before the apartment is turned over to the tenant or, if possible, with the tenant present.

You should also consider a regular inspection every year or so. This is not an inspection of the tenant's housekeeping or lifestyle. It is to discover repair problems while they are still small and to update your knowledge and records of the apartment's condition.

A tenant is not responsible for ordinary wear and tear to the apartment. Exactly what constitutes reasonable wear and tear is often a matter of opinion, but a court will not look kindly on claims for every nail in the wall or every scuff-mark on the linoleum. Only serious damage is worth the trouble of a lawsuit, even in small claims court. The best protection against tenant-caused damage is careful tenant screening and treating tenants well, plus carefully-kept records of the condition of the apartment.

If you intend to sue a former tenant for damages, consider whether your former tenant has the financial resources to pay a damages judgment. Suing a low-income tenant for damages can

be a colossal waste of your time. Even if you win a judgment, you may never collect it. However, if the tenant participates in a rent-subsidy program, the program may reimburse you for damages, and then seek to recover the money from the tenant. Since this can affect a tenant's ability to continue in the program, it can form an important incentive for the tenant to care for the property.

If you do try to sue the tenant for damages, you need to be able to prove your claim. Document the damages with pictures and itemize them in detail. Get detailed bills and estimates for repairs.

27. Entering a Tenant's Apartment

It comes as a surprise to many people, but legally, even a rented home is a person's castle. Even though you are the landlord, you do not have an unlimited right of access. Once the unit is rented, it belongs to the tenant for the duration of the tenancy. You have no right to enter the tenant's private home without permission. Unless the rental agreement specifies otherwise (most do), you do not even have a right to a key.

Originally, in an agricultural society, the law expected the landlord to rent the property to the tenant and then leave the tenant alone. It gave the landlord no right of access, but also no responsibility for repairs. The modern urban tenancy, especially in a multi-unit building with many building-wide systems, has forced the law to change. You now have an obligation to make repairs, and you get a right of access in order to do so. But your right of access does not supersede the tenant's rights to privacy and to "quiet enjoyment" of the premises.

One of the most common landlord-tenant disputes involves access for making repairs. The State Sanitary Code requires the tenant to allow you, "upon reasonable notice, reasonable access, if possible by appointment" to repair code violations. What is "reasonable" is the subject of frequent disputes. You should negotiate access by appointment whenever possible. If the tenant will not allow you access to make needed repairs, either by being unreasonably difficult about making appointments or by not keeping them, you need to document the situation carefully with witnesses, written communications, and logs.

You also should make every effort to keep appointments yourself. Unfortunately, this is not always easy when you have to rely on plumbers, carpenters, painters, and other tradespeople, who sometimes seem to live in a completely different time zone. Again, document everything in

writing. And keep careful track of workers you hire. Sometimes they will not keep appointments and blame the tenant. See Chapter 22 for more detailed advice on this point.

In a genuine emergency, you may enter the tenant's apartment without prior notice in order to deal with the emergency. But this is risky, so make sure it is a true emergency. A fire, a flood, or a burst pipe is an emergency. The sudden availability of a carpenter is not. Make sure to document the emergency carefully. Unless there is a real emergency, entering a tenant's unit without permission may make you liable for three months' rent plus the tenant's attorney's fees.

Housing courts can often be helpful in mediating disputes over access. Your strategy at all times should be to be reasonable in seeking access and to comply carefully with the requirements of the law and to document your compliance with careful record-keeping. If necessary, with a particularly difficult tenant, a witness who can observe and later testify about the tenant's refusal of access, can be valuable.

You or your representative should be with repair personnel at all times in a tenant's apartment. Be careful to whom you give keys to tenants' apartments. It is not unknown for tradespeople to use a tenant's good bath towel as a cleaning rag, steal property, or make long-distance telephone calls from a tenant's phone. Courts may hold you responsible for any damage, theft, or other costs attributable to unsupervised workers in the apartment. Proper supervision will also protect you from tradespeople who don't show up, then claim that the tenant refused access and bill you for the call.

Under Massachusetts General Laws, ch.186, §15B, you may include in a rental agreement only the following rights to access:

- to inspect the premises;
- to make repairs;
- to show the premises to a prospective tenant, purchaser, mortgagee, or its agent.

You may also enter the premises in accordance with a court order or if the premises appear to have been abandoned by the tenant.

If the lease allows you to enter for any other reason, that provision is illegal and void. Your right to inspect the premises or to show them to a prospective purchaser does not mean that you can do it every day twice a day, without prior notice. Inspections should be limited to reasonable frequency. Unless the lease provides that the tenant must give you a key to the apartment, you have no right to one. The fact that a lease allows you a right to enter for certain purposes does not mean you may enter the tenant's private residence at any time without appointment.

A tenant has not necessarily abandoned the apartment just because they haven't been around for awhile, haven't paid rent, or have moved some furniture out. A tenant who is moving out has the right to full possession of the apartment until the last day of the lease or rental period. You may get impatient and go into the apartment before the end of the tenancy and remove what you think the tenant has left behind. But if the tenant intended to return for those things, you can be charged with trespassing and larceny and can be sued for conversion of property and interference with quiet enjoyment. You must be very careful before assuming that a tenant has abandoned the apartment. Try to get the tenant's moving plans in writing. If you are unsure of the tenant's plans, ask.

We once saw a case where the tenant came back from vacation and found someone else living in his apartment and his furniture stored in the cellar. He wasn't behind on the rent, but he had been away for awhile, and the landlord somehow concluded that he had abandoned the apartment. The landlord was liable for damages (a minimum of three months' rent, and potentially much more) plus the tenant's attorney's fees. And the tenant had the right to recover possession of the apartment. If we hadn't settled the matter, that landlord would have faced another lawsuit from the new tenants, who didn't expect to be considered trespassers in an apartment they were renting in good faith!

If you believe the tenant has abandoned the premises, first try to get in touch with the tenant by phone, letter, e-mail, or text message.. Notify the tenant that you will consider the apartment abandoned if you don't hear from him/her. Ask what they would like you to do with property left in the apartment. Keep careful records of all of your efforts. If you haven't been able to get any response after a reasonable time (a week or two), you may try to enter the unit and see if the tenant's furniture has been removed. What property has been left behind? Is it trash or did the tenant leave clothing, bed, TV, computer, or other things that might indicate that someone might still live there? If you conclude that the apartment has been abandoned, take a good set of pictures and videos to document the situation. At this point, if the tenant has left property in the

apartment, you may remove it, but be sure to inventory everything and store it in a safe place. Only then can you change the locks and re-rent the apartment.

If you have any doubt that the tenant has abandoned the apartment, the safest thing is to send a notice to quit and go through the eviction process. It may be slower, but it is the only sure way to avoid expensive litigation if the tenant returns.

28. Apartment Under Construction

It is an unfortunate scenario and a lawsuit waiting to happen. You rent an apartment that isn't ready yet. You're renovating, but list the unfinished apartment and rent it to a tenant. You promise that it will be ready by the tenant's scheduled move-in date. But you've been working in your spare time, or as you have the money, and by the scheduled move-in date, the apartment isn't ready yet. It isn't even close.

This creates a serious disruption to more than one person's schedule. It may cause the tenant not to vacate from his or her previous apartment. That in turn may hold up another tenant who may have been planning to move in there.

So maybe the tenant arranges to stay temporarily with a friend or with parents. And the months drag on, with the apartment promised but still not ready. And the tenant has paid first, last, and security to you and may not be able to afford to rent another apartment.

Or maybe the tenant can't make temporary arrangements anywhere else, so they move into the apartment even though it isn't ready. They pile up their things in boxes and camp out, waiting for the job to be done. And week after week, the apartment isn't finished. Workers come and go, often without warning, to complete work. Or maybe nothing happens, the work isn't getting done, and meanwhile there is no stove, the heat isn't working, and there is no completion date in sight.

The tenant may want to cancel the lease, not move in, and demand a refund. You may balk at that, but it's most likely the best solution all around. We've seen too many of these situations, where the apartment isn't ready as multiple move-in dates pass, while the tenant is either

overstaying a prior lease or staying with friends or parents. The longer this goes on, the more likely the tenant is to sue you and the more expensive the litigation may be.

By law you owe the tenant “quiet enjoyment” of the apartment (See Chapters 18 and 27). That means the ability to enjoy all the amenities that come with the apartment, including the privacy of the tenant’s home without a constant parade of workers coming in to finish work that should have been done before the tenant moved in. The best way to deal with this situation is to see it coming and avoid it altogether. You may be anxious to rent the apartment, but you’re better off not to list the apartment until it’s ready.

We once saw a situation where the landlord insisted that the tenant had to pay the rent, even though the tenant could not yet move in, so that the landlord would have the money to finish the apartment. It’s your responsibility to pay for repairs and renovations, and you are not entitled to rent for any time during which the tenant is unable to occupy the apartment because of its condition.

29. Retaliation

When your tenant has complained to the Board of Health and forced you to make some expensive repairs, it's natural to be upset. You may want to raise the tenant's rent or take away the tenant's parking space or yard privileges. Or perhaps even get rid of the tenant for being so troublesome. It may be natural, but it's illegal.

By law, you cannot try to evict a tenant, raise the rent, or change the terms of the tenancy because the tenant has complained of conditions to you in writing or to any government agency or because the tenant has organized or joined a tenants' union or engaged in certain other protected activities.

If you try to raise the rent, evict the tenant, or make any change in any of the terms of the tenancy within six months after the tenant has done any of those things, it will be **presumed** to be a retaliation. That means that in any court proceeding, the burden will be on **you** to prove that you are not retaliating against the tenant.

But what if you were going to raise the rent anyway, before the tenant did those things? To defeat a retaliation claim, you must convince the court with “clear and convincing evidence”

that you are acting out of non-retaliatory motives, took the action for reasons independent of whatever the tenant did, and that you would have taken the same action at the same time if the tenant hadn't done those things. This takes more than simply your assertion of your motives. Clear and convincing evidence requires complete records carefully kept.

But that can be risky, and the consequences of losing in court can be expensive. Sometimes, the best course may be to wait until at least six months after the tenant's actions that are protected by the retaliation law. Even then, retaliation may still be found, but during the first six months, you have the burden of proving that what you did wasn't retaliatory. After six months, it may still be retaliation, but the tenant will have the burden of proving it.

If you are found to be retaliating against a tenant, you will not be able to evict the tenant and may have to pay damages of from one to three months' rent or actual damages, whichever is greater, plus the tenant's attorney's fees.

You also cannot willfully deprive a tenant of heat, hot water, gas, electricity, lights, water, or refrigeration service. Nor can you lock a tenant out or remove the tenant from the apartment without going through the proper court procedure. If you try, the tenant can obtain a restraining order, file a criminal complaint against you, and sue you for money damages and attorneys fees.

30. Consumer Protection Law

Chapter 93A of the Massachusetts General Laws is commonly called the "Consumer Protection Law." Like the Federal Trade Commission Act on which it is based and similar "baby FTC" laws in other states, it prohibits the use of any unfair and deceptive acts and practices in the conduct of any trade or business.

Renting housing is generally considered to be a trade or business, and the Massachusetts Attorney General has issued regulations which define unfair and deceptive acts or practices in rental housing. Among the things that constitute an unfair practice is if you fail to disclose to a tenant or prospective tenant any fact the disclosure of which **may** have influenced the tenant not to enter into the transaction. Also listed as an unfair practice is any violation of any law meant to protect consumers and any act which is oppressive or otherwise unconscionable in any respect.

A copy of the consumer protection regulations is available at the State Book Store, in the State House. It is also available online at <http://www.mass.gov/courts/docs/lawlib/900-999cmr/94ocmr3.pdf> .

If you receive a letter from your tenant which says that it is a demand letter under Chapter 93A, you should have a lawyer look at it as soon as possible. Failure to respond within 30 days can make you liable for up to three times the tenant's damages, plus the tenant's attorneys fees.

If you are the owner-occupant of a two-family or three-family house and own no other rental property, you are not considered to be engaged in a trade or business and are not subject to this law.

31. Types of Tenancies

There are three types of tenancies in Massachusetts. They are a tenancy for a fixed term, a tenancy at will, and a tenancy by regulation.

Fixed Term Tenancy. A tenancy for a fixed term must be created by a written lease, signed by both the landlord and the tenant. A lease, in its simplest form, is a contract that you will rent the apartment to the tenant, and the tenant will rent it from you, for a fixed term at a fixed rent. The term is usually for one year, although any other term is possible. The lease binds you as well as the tenant, and you cannot unilaterally raise the rent or change what the rent includes during the term of the lease unless the lease itself provides for it. Nor can you evict the tenant during the lease term, except for non-payment of rent or some other substantial breach of the lease terms.

In order for a lease to be valid, it must be in writing and must indicate the date on which it ends. It should also state the amount of the rent and what the rent includes. The standard RHA lease forms contain a trap here for the unwary landlord. It provides a space for you to fill in the "term rent" and says that this "term rent" is payable in monthly installments, in an amount which you also must fill in. The "term rent" is the total rent which the tenant must pay over the initial term of the lease.

In the most common situation, a one-year lease, the "term rent" is simply twelve times the monthly rent. The problem arises when parties sign a lease for an unusual term. We once saw a case where the lease was for thirteen months, which means that the "term rent" should have been thirteen times the monthly rent. But the amount filled in as "term rent" was **twelve** times the monthly rent, and the tenant claimed, with some justification, that he was entitled to one month's free rent. If you are signing a lease for an unusual term, make sure that the "term rent" correctly reflects the monthly rent times the actual number of months in the lease term.

Self-extending Lease. Some leases are "self-extending." A self-extending lease is a term lease which automatically extends itself from year to year unless one of the parties gives notice to the other by the deadline specified in the lease, to terminate the lease at the end of its current term. It is as binding as any other lease. Unless you or your tenant give notice terminating the lease, it will keep extending itself, every year, at the same rent. For example, a self-extending lease with a term which runs from 1 September through 31 August may provide that it will extend unless you or your tenant give notice to the other by 1 July. If the notice is not actually **received** by that date, the lease will extend itself for another year. This is only an example. You may provide for a different expiration or notice date.

If you use a self-extending lease, be careful to fill in the deadlines correctly in the blank spaces and to give notice by the proper deadline if you want to raise the rent. Otherwise, the lease will self-extend for another year at the same rent. Again, a notice terminating a self-extending lease must actually be **received** by the tenant by the specified deadline.

Self-extending leases used to be very popular in the 1960s and 70s. They have since become much less popular. Their supposed advantage is that, if the tenant doesn't give you notice by the date specified, you can hold the tenant to the lease for another year. Since it is rare to collect rent from a tenant who has skipped out, and the usual tight rental market makes it relatively easy to replace a departed tenant, this advantage is minimal. In a cooler rental market, this advantage may be more meaningful, at least as leverage to keep a tenant from leaving mid-term. But since rental markets tend to rebound, the disadvantage of a self-extending lease may still outweigh the advantage.

The disadvantage of a self-extending lease is that unless you fill in the form correctly and give termination notice properly, the tenant can hold you to the lease for another year at the old rent. During the 1980s, many landlords wanted to keep their options open. Some envisioned

condo conversions or simply a rapidly growing market. Some got stuck when they didn't properly terminate a self-extending lease. This made self-extending leases less popular. For the same reasons, written tenancies at will, rather than fixed-term or self-extending leases, became much more popular than before.

Escalator Clauses. Whether and how you can raise the rent during the term of a lease depends on what the lease says. Many leases run from September through August. The lease will continue in effect until it expires according to its terms. You cannot raise the rent before the current lease expires unless the lease itself contains a special provision which allows it. Such a special provision is called an "escalator" clause. .

The most common kind of escalator clause is a tax escalator clause. A tax escalator clause assumes that you have set the initial rent with the current real estate taxes in mind. It provides that if the real estate taxes on the property increase in the future over and above the current amount, the tenant will pay some portion of the increase as additional rent. The RHA form, which is the one most commonly used in the Boston area, provides that the tenant must pay the amount when you demand it. But the tenant may not be able to afford to make a large escalator payment in one lump sum when you demand it. To keep a good tenant, it may be to your advantage to accept some reasonable payment arrangement.

If you want to use a tax escalator clause, you must be careful to fill in the clause properly in the lease form. The "base year" should be the most recent year for which you have received a tax bill. You must specify the exact percentage, in figures, of the tax increase that the tenant must pay. The percentage must represent the proportion that the tenant's unit bears to the whole property.

As a simple example, assume you have a three-floor building with three identical apartments. Each apartment is one third of the building. So, if the tenant in each unit has a tax escalator clause in the lease, it would provide that each tenant would pay one-third of the property's increase in taxes over the base year.

But what if the apartments aren't identical? Let's assume the same three-floor building, but this time it has four apartments: The first and second floors still have identical apartments which cover the entire floor. But now the third floor contains two apartments of equal size. In that building, a proper tax clause in the leases would require each of the tenants of the first and second

floor apartments to pay one-third of the increase in taxes over the base year. The third floor units would each be required to pay one-sixth the tax increase.

In larger buildings with apartments of differing sizes, this can get much more complicated. In a tax escalator clause, the **exact percentage** of the taxes to be paid by the tenant must be filled in. Don't just fill in the word "proportionate." The tax clause is invalid if the exact percentage is not filled in.

Since the law requires the exact percentage to correspond with that apartment's proportion of the whole building, you cannot require a tenant whose apartment is one-third of the building to pay one-half the tax increase. Nor can you make one tenant pay more because another tenant doesn't have a lease with a tax clause. If a tax escalator clause is not filled in and implemented correctly a court may find it to be invalid.

The tax clause must also provide that if you get a tax abatement, you will pass that abatement on to the tenant according to the same percentage. Lease forms meant to be used in Massachusetts should comply with this requirement.

Another kind of escalator clause is a fuel escalator clause, which permits you to recoup increases in the cost of heating fuel. These clauses first began to appear during the energy crisis of the 1970s, then fell into disuse when that crisis ended. They have since reappeared in times of increased fuel costs and disappeared again when fuel costs have moderated.

One more escalator clause that used to be common in residential leases was the "rent control escalator." Although some old lease forms still contain a rent control escalator clause, the abolition of rent control in the 1990s made this clause obsolete, except in certain kinds of subsidized housing where rents are still regulated by the subsidy program.

The RHA form lease contains a space in the margin where the tenant is asked to initial the rent clauses signifying that the tenant understands and accepts them. If you are using escalator clauses of any kind, you should make sure that the tenant does this. If this is not done, the lease will be ambiguous as to whether both parties accepted the escalator clauses as part of the contract. The tenant could argue (and a court might agree) that the escalator clauses were not part of the contract.

This is a special case of a more general rule of construing documents. Whenever a document is ambiguous, the courts will resolve the ambiguity against the interests of the person who prepared the document. Since you or your agent prepares the lease, you must be careful to fill in all blanks correctly and cross out any language which does not apply. Any ambiguity created by your lack of care will be construed against your interests.

The law requires that you must give the tenant a copy of the lease, signed by you, within 30 days after the tenant signs it. The same goes for a written tenancy at will agreement. If you fail to return the lease within the time specified, the tenant may be considered a tenant at will. The law also provides a criminal fine of \$300.00, though this is hardly ever enforced. Failure to return a signed copy of a lease may also constitute a violation of the Consumer Protection Law.

Tenancy at Will. A tenancy at will in Massachusetts is what, in other states, is called a month-to-month tenancy. A tenancy at will may be in writing, but it is often an oral agreement. If you want to have tenancies at will, we recommend that you use a written agreement. See Chapter 3 for our reasons. The RHA written tenancy at will form is a good example of a tenancy at will agreement that will protect your rights.

With a tenancy at will, either party may terminate the tenancy by giving the other a notice one rental period or 30 days in advance, whichever is longer. A notice to terminate a tenancy at will must be written in a certain way, or it is not effective. It must specify the date on which the tenancy terminates, and it must state that date correctly. A notice to terminate a tenancy at will is often called a "30-day notice," but this is a misnomer. It would be clearer if we called it a "rent-period notice," since it isn't just any 30 days. The notice must terminate the tenancy **on a rent day**. It is not effective unless it states the date when the tenancy is to terminate and states it correctly.

For example, if the rent is payable on the first of the month, the notice must terminate the tenancy on the first. You cannot send the tenant, and the tenant cannot send you, a letter on the 15th of this month terminating the tenancy on the 15th of next month. You can only terminate the tenancy on the **first** of the month. On the other hand, if the rent is payable on the 15th of each month, then you must send a notice terminating the tenancy on the 15th.

The notice must be **received** one full rental period and at least 30 days in advance in order to be effective. This means that tenants who pay rent by the week are entitled to at least 30 days notice of termination. **Note:** Since February does not have 30 days, a notice intended to terminate

a tenancy at the end of February is not valid unless it is received several days before the end of January.

A common form of termination notice reads something like "I hereby terminate your tenancy as of the end of that month of your tenancy which begins next after you receive this notice." This legal formula usually covers most of the complications of these rules.

To raise the rent for a tenant at will, you must give a proper notice terminating the tenancy. You may then offer to enter into a new tenancy at a new amount. The offer may be in the same notice as the termination. If the tenant agrees, that will form a new contract at the new rent.

Landlords who don't know the legal requirements often try to raise a tenant's rent with a notice which is not legally sufficient. A notice in the form "As of 1 October 2017, your new rent will be \$xxx" is not sufficient.

If you send a notice like that, the old tenancy continues in effect, and the tenant is legally entitled to continue paying the old rent. If you try to evict the tenant for non-payment of rent, and the tenant contests it in court, you will most likely lose.

Now suppose the rent is due every month on the 15th, and you send a notice which says, "Your tenancy is hereby terminated as of the first of January. If you desire to remain a tenant, your new rent will be \$1000." Since a notice terminating a tenancy at will must expire on a rent day, if the rent is due on the 15th of each month, you can only give the tenant a notice which terminates the tenancy on the 15th. To be valid, the tenant must **receive** the notice no later than the 15th of the previous month. Since the rent is not due on the first, a notice which claims to terminate the tenancy on the first does not terminate the tenancy at all.

Here is an example of a valid notice which you may send to terminate a tenancy at will and ask for a rent increase. Assume that the rent is due on the first of the month and the tenant actually received the following notice from the landlord on 30 November 2017:

I am terminating your tenancy as of the end of that month of your tenancy which begins next after your receipt of this notice. If you wish to remain in the apartment, I hereby offer you a new tenancy at a monthly rent of \$1000 per month, under the same terms and conditions as before, starting 1 January 2018.

This is a valid notice to terminate the tenancy on 1 January 2018. But the tenant may not have to pay the new rent starting that month. This is because even if it isn't in writing, a tenancy at will is a contract. You cannot unilaterally dictate new terms to a contract. It becomes a binding contract, and the tenant becomes obligated to pay the new rent, if the tenant accepts it, which the tenant can do by paying the new rent on 1 January.

Raising the rent for a tenant at will is complicated, and many landlords don't do it right. See the Chapter 34 for further information.

Tenancy by Regulation. When a lease expires, the tenant often stays on as a tenant at will. A tenant who has a Section 8 or similar subsidy instead becomes a "tenant by regulation" when the lease expires and remains subject to the terms of the subsidy program.

License. A license differs from a tenancy in that a licensee does not have an exclusive right of possession. Depending on the nature of the agreement, a housemate may be a licensee. A caretaker occupying a unit as part of his or her duties is usually considered a licensee. A licensee is also usually free to leave at a moment's notice and often pays rent on a day-by-day basis as in the case of a hotel guest.

Rooming Houses. At one time rooming house tenants hardly ever had written rental agreements. Now written agreements have become more common. If there is one, the parties have the rights stated in the agreement. If not, a tenant who has lived in the rooming house for three months or more has all the rights of a tenant at will. Although a notice of one rent period is necessary to terminate a tenancy at will, the law also requires a minimum notice period of 30 days. A notice on 17 December cannot terminate a tenancy on 31 December, even if the tenant pays rent weekly.

A tenant who has lived in a rooming house for 30 days or more is entitled to at least 7 days notice to vacate. If the tenant has been there for less than 30 days, there is no specific notice requirement. The other rights of the parties are less clear. The tenant probably has the right to a court hearing before eviction, at least if s/he has been there for 30 days. The best thing is probably to assume that the tenant can successfully assert the right to a court hearing and go to court if the tenant will not leave voluntarily.

32. Breaking Leases

A lease is a contract which binds you to rent the apartment to the tenant and the tenant to rent the apartment from you for the term specified. But circumstances change, and when this happens, tenants try to break leases.

If there are serious code violations or other breaches on your part, the tenant may be legally entitled to break the lease. If that is the case, your best course may be to acquiesce. If there are no such problems, the tenant is responsible for the rent for the balance of the lease term, but this responsibility is qualified by a number of considerations, both legal and practical.

First of all, you cannot sit with an empty apartment for the rest of the lease term and look to the departed tenant to pay. You must make reasonable efforts to find a substitute tenant. The legal term for this is "mitigating damages." If you find a substitute tenant or try to find one and fail, you are entitled to sue the departed tenant for your losses. If, in a down market, you tried but couldn't get as much rent as the departed tenant was paying, you can sue the departed tenant for the difference for the balance of the lease. If the apartment was vacant for a month or two before a new tenant took over, you can sue for the lost rent from the departed tenant. You can also sue for the cost of re-renting, such as a real estate broker's fee or the cost of advertising.

Some landlords try to charge a fee called an "Administrative Fee" or a "Substitution Fee" or some other name for substituting a tenant. If it is designed to compensate for your actual costs of substituting a tenant, it is probably legal, but if it is an arbitrary amount, higher than any reasonable costs, a court may find it to be a "fee for no services" and illegal.

Often, a tenant who wants to break the lease will try to find a substitute tenant. If the lease so provides, you are entitled to screen tenants and determine to whom you will rent. But if you unreasonably turn down someone found by your departing tenant, a court may find that you have failed to mitigate damages.

In an inflationary rental market, you may want to try to re-rent the apartment for a higher rent than the departing tenant was paying. If you can get a higher rent, you are entitled to do so. But if you over-estimated the market and can't rent the apartment at the higher asking rent, the departed tenant may not have to pay the lost rent for the months the apartment was vacant because you "got greedy." Should you succeed in re-renting the apartment at a higher rent, the

additional rent you receive, for the remaining months of the old lease, will offset any losses that you might otherwise claim from the departed tenant.

You are not entitled to collect double rent for the apartment. If, say, the departed tenant has paid rent through the end of March, and you re-rent the apartment for the first of March, you must refund the March rent to the departed tenant.

A practical consideration is that it is often not worth the effort to sue a tenant who has moved out. This is especially so if the tenant has moved to another state. But even if the tenant has remained nearby, unless you know of assets that can be used to satisfy a judgment, the time and effort of trying to collect money from a departed tenant is often wasted.

33. Domestic Violence

If a tenant or another member of the tenant's household is a victim of domestic violence, they can get out of the lease and move. They must send you a notice that they are terminating their tenancy because a member of the household is a victim of domestic violence, rape, sexual assault, or stalking, including the name of the perpetrator, if they know it. They may then move out within three months of giving the notice. If they wait more than three months, the notice will be void.

If they are breaking a lease because of recent or ongoing domestic violence, rape, sexual assault, or stalking, you may request that they provide proof to show that a protective order or third-party verification is in effect or was obtained within the prior three months, or that they are reasonably in fear of imminent serious physical harm. You are required to keep the documentation and the information contained in it confidential and not provide or allow access to the documentation in any way to any other person or agency, unless the victim provides written authorization for release of the information, or unless required by court order, government regulation, or government audit requirements.

If a person leaves belongings behind when they move out, they must indicate to you in writing what is to be done with their belongings, otherwise you may treat the belongings as abandoned and dispose of them.

If one or more persons move out and other housemates stay, your rights with respect to those who stay are unaffected.

If the threat of domestic violence, rape, sexual assault, or stalking is posed by a person who is a tenant, co-tenant, or household member, you may change the locks and deny the alleged perpetrator a key, upon receiving a request to do so. The request must be accompanied by the documentation referred to above. If you fail to change locks within two business days after receiving a request, the tenant may change the locks without your permission. If the rental agreement requires that you retain a key to the premises and if the tenant changes the locks, they must make a good faith effort to provide a new key to you within two business days of the lock change.

You cannot refuse to enter into a rental agreement, and a housing subsidy provider cannot deny assistance, based on a tenant's having terminated a rental agreement or based upon an applicant's having requested a lock change under this law.

For further details, see our document "Tenants and Domestic Violence" on our website.

34. Rent Increases

Most landlords and tenants think that a landlord can raise the rent any time by decree. But a tenancy is a contract. Changing the rent requires the agreement of both parties. How that happens depends on whether or not there is a lease. Many notices sent by landlords attempting to raise the rent are legally invalid.

If, after having reviewed expenses and market conditions, you decide on a rent increase, you should implement it with care. Pay attention both to the legal requirements and to good tenant relations. If the apartment is covered by some form of rent regulation, be sure to comply with whatever rules are in effect.

Notice requirements depend on the type of tenancy, and you must give the notice required by the type of tenancy you have with the tenant. If you have a term lease, you cannot raise the rent until the current term of the lease expires, except to invoke a valid escalator clause. In order to invoke an escalator clause, you must give notice to the tenant in the time and manner required by the lease clause.

If you have a fixed-term lease which is expiring, you are not legally required to give the tenant any notice. But since most leases are renewed annually, and most tenants expect that to be the case, it is a good idea to give one or two months' advance notice to the tenant if you intend to raise the rent or if you otherwise don't want to renew the lease. To do otherwise invites a fight with a tenant which you might have avoided and makes it very likely that the tenant won't be able to move by the end of the lease term. Then you will have to go to court, and the court will likely give the tenant more time to move.

While you don't legally have to give a tenant a notice of a fixed-term lease expiring, unless the lease provides otherwise, the tenant doesn't have to give you notice either. If you ignore the situation until a day or two before the lease is due to expire -- or even after the expiration date -- you may find that the tenant is planning to move out at the end of the lease, or has already left, and you didn't know it. Or, as we discuss elsewhere, you may think the tenant has gone, clean up the apartment, and throw out things that the tenant intended to return for. Discussing an expiring lease in advance with the tenant may not be the law, but failure to do so can certainly create legal complications.

If you are using a self-extending lease, be sure to give notice in accordance with the lease provisions. Otherwise, the lease will extend itself for another year at the old rent.

When the lease expires, the tenant is technically a "tenant at sufferance." That is the legal term for a tenant who holds over after the tenancy has ended. If the tenant pays rent after the lease has expired, and you accept the rent, he or she will then be a tenant at will, at the rent that you accepted. This means if you intend to raise the rent when a lease expires, and the tenant pays the old amount, you must be careful about what you do with the rent. We will discuss how to do this properly in a moment.

Before giving any required legal notice, you may wish to communicate less formally with the tenant to discuss the need for an increase. A tenant who first learns of a rent increase from a legal notice is more likely to resent the increase and be a problem tenant.

But since some tenants may respond to an impending rent increase by calling for a code inspection, you should give some form of written notice, even an informal notice, as quickly as possible after an oral notice. If you meet with the tenant personally, you can hand the tenant the written notice in a friendly manner. By giving the written notice quickly, you protect yourself

against a tenant reporting minor code violations upon receiving oral notice, and then claiming that the rent increase was a retaliation for the tenant's having reported code violations.

Having given the required legal notice, beware of accepting a lesser amount. Courts have held that accepting rent, without reserving rights in the correct way, may constitute a waiver of the increase. In a moment we'll explain how to reserve your rights correctly.

To raise the rent for a tenant at will, you must give a proper notice terminating the tenancy. You may then offer to enter into a new tenancy at a new amount. The offer may be in the same notice as the termination. If the tenant agrees to pay the new rent, that will form a new contract at the new rent. For further information about this, see the section on Tenancies at Will in Chapter 31.

A tenant who receives a notice of a rent increase from a landlord has several options:

First, if it is a legally invalid notice, the tenant can ignore it.

Or, the tenant may try to negotiate with you. As we've said, rent is established by contract, not decree. The extent to which you want to negotiate with your tenant is for you to decide. The tenant may be content with a few minor improvements in the apartment. Or, there may be serious sanitary code violations, and your attempt to raise the rent may trigger a housing code complaint and a bitter battle.

Perhaps the tenant simply cannot afford to pay the increase. Tenants in that position may use housing code complaints to buy time while they look for a place to move. On the other hand, the code complaint may reflect a tenant's willingness to pay a higher rent if certain things are fixed that they were willing to tolerate when the rent was lower.

Be careful about bringing an eviction action against a tenant who has made a housing code complaint. You could be liable not only for the code violations, but also for retaliation damages and for the tenant's attorney's fees.

Still another option for the tenant is to stay put and keep paying the old rent. The tenant is not legally obligated to pay the new rent unless they agree to pay it. You cannot evict the tenant for non-payment of rent, but you can evict the tenant for not moving out when the lease or

tenancy at will terminated. In order to do that, you must be very careful about how you accept rent from the tenant.

Since a tenancy at will often is not in writing, the terms of the agreement can be implied from the conduct of the parties. It is quite possible, after a lease is expired, for a new tenancy at will to be created if the parties act as if that has happened. It is also possible for you to waive the termination of a tenancy at will and create a new tenancy at the old rent, if you and the tenant act as if that is the case. So, after a lease expires or you terminate a tenancy at will, you cannot act as if the tenancy still exists, or the courts may find that it does.

One of the things that leads courts to find that you have established a new tenancy at the old rent is if you accept the old rent without objection. If the tenant continues to pay the old rent, the correct way to accept it is as follows:

- Hold the check until the end of the month for which it is paid. Accepting rent in advance is an indication of a tenancy. At the end of the month, you may accept the money, not as rent but as payment for "use and occupation" of the premises. If the occupant has moved out during the month, you may only accept money for the period that he or she actually occupied the premises. You must return the balance.
- When you receive the check, send the tenant a letter immediately stating that you will hold it until the end of the month and then accept it for use and occupation of the premises. State also that if the tenant vacates during the month, you will refund the balance. Some landlords make up a form letter and do this every month until either the tenant moves out or they agree to enter into a new tenancy. Do not do this on the back of the tenant's rent check. See below.
- If you are worried about whether the check will be good by the end of the month, you may take it to the bank on which it is drawn and have it certified. That is not a waiver of the termination notice.

- If the tenant has paid you in cash, put the cash aside until the end of the month and send the tenant the letter described above. Don't spend the money until the end of the month.

Some landlords, and even some lawyers, think that it is sufficient to write your reservation of rights on the back of the tenant's rent check. The Massachusetts Supreme Judicial Court ruled in 1946 that it is not. At that time banks didn't return checks until about a month later, and the tenant would not see the notice until then, and the Court considered that insufficient notice. Nowadays many banks don't return cancelled checks to their customers at all. If you want to accept rent while reserving your rights under a notice to quit, you cannot rely on putting the notice on the back of the check. Send the tenant a letter, and send it every month.

When you go to court to evict a tenant who has refused to pay a rent increase but has continued to pay the old rent, it is not an eviction for non-payment. You usually cannot get a judgment against the tenant for the increased rent. When an eviction is based on a termination of tenancy which is not for non-payment of rent and is not otherwise the tenant's fault, the court can give the tenant time to find another apartment. See Chapter 37 for more information.

35. Condominium Units

There are special problems in renting a condominium unit. As a landlord, the law makes you responsible for providing heat, hot water, and other services to the tenant. But in a condominium, these services may be controlled by the unit owners association. The association has to deal with you as the unit owner, but they also must deal with the tenant as the person who occupies the premises.

Some condo associations, in times of high fuel costs, have been known to keep the heat below the legal temperature limits in order to save money. As an owner, you may favor such measures to reduce your condo fees. But as a landlord, you are still responsible to provide your tenant sufficient heat as defined by law, and your tenant can withhold rent if the heat is insufficient.

If the local code enforcement agency issues an order to you to correct conditions which are the responsibility of the association, you should notify the association as soon as possible. You

should also notify the code enforcement agency and ask them to cite the association. Although they should do so, some local code enforcement agencies may not do so without pressure.

Although the tenant is entitled to withhold rent if services are lacking, the courts have held that you have no right, as a unit owner, to withhold condo fees from the association. This is because the association is not a for-profit business, and they cannot maintain the building without the contributions of all unit owners. Your remedy is either to sue the association or to seek the election of different trustees.

If you don't pay your condo fees, the condo association can legally require your tenant to pay rent directly to the association, to be applied toward your condo fees. The law prohibits you from taking any reprisal against the tenant for doing so. The law also gives the association a lien on your unit, by which your unit can be foreclosed on and sold to collect condo fees. You are also responsible for the association's attorneys fees in collecting from you.

Most condominiums have rules which apply to all residents, including tenants. Make sure to give the tenant a copy of those rules and require, in the rental agreement, that the tenant abide by them.

36. Condominium Conversions

The rights of tenants in a building undergoing a conversion to condominiums or cooperatives are governed by special legislation called Chapter 527 of the Acts of 1983. It applies to nearly all residential condominium and cooperative conversions. It does not apply to buildings containing fewer than four residential units unless the building is part of a housing development with two or more adjacent, adjoining, or contiguous buildings under common ownership, used in whole or in part for residential purposes, and containing four or more units.

Notice. When you are going to convert a property, you must give to each tenant a notice of your intent to convert. The notice must state in clear and conspicuous language:

- that you have filed a master deed at a registry of deeds whose location is stated in the notice or have filed cooperative articles of organization with the State Secretary's office;

- that any tenant residing there on the date the notice of intent is given shall have a period of time stated in the notice, counted from the date the tenant receives the notice, before the tenant will have to vacate;
- that any tenant residing there on the date the notice is given shall have a period of time stated in the notice to purchase the unit on terms and conditions which are substantially the same as or more favorable than those which you extend to the public generally for 90 days following the expiration of the tenant's right to purchase;
- a statement of the other rights and obligations described below.

If you intend to sell or offer for sale units in only part of the development within the first year after you have formed the intent to convert, you must give to each tenant in any unit which you don't intend to sell or offer for sale within the year, a notice informing the tenant of the date when you reasonably expect to offer or sell the unit. Thereafter, you must give the notice of intent to convert as above.

Eviction Restrictions. You cannot bring any action seeking a "condominium or cooperative eviction" during the "notice period," which is one year after the tenant receives the notice. If the housing unit is occupied in whole or in part by a handicapped tenant or is occupied by a tenant who is 62 years of age or older or a low or moderate income tenant, the notice period is two years. The tenant has the burden of proving his or her entitlement to the extended notice period. If there is a rental agreement in force, the notice period does not expire before the rental agreement expires under its own terms.

A "condominium or cooperative eviction" is defined as an eviction by you or by a purchaser or prospective purchaser in order to facilitate the sale of the unit as a condominium or cooperative unit. An eviction is presumed to be a "condominium or cooperative eviction" if you have formed the intent to convert. The law contains extensive provisions for determining when you have "formed the intent to convert." An eviction for non-payment of rent or other violation of a rental agreement is not a "condominium or cooperative eviction," and you can still evict a tenant for those reasons.

A "low or moderate income tenant" is defined as a person or group of persons residing in the same unit where the total income of all residents for the twelve months immediately preceding the date of the notice is less than 80% of the median income for the area as promulgated by the U. S. Department of Housing and Urban Development.

Rent Increase Limits. During the notice period, you cannot increase the rent more than the percentage increase of the Cost of Living Index, and in any event no more than 10% per year, except that you may collect payments under a valid tax escalator clause. You must extend the rental agreement until the end of the notice period or the 90-day right to purchase period, whichever is later. Except for a permitted rent increase, you cannot change the terms of the rental agreement during the notice period.

Right to Purchase. With the notice of intent to convert, you must give the tenant the right to purchase the unit on terms and conditions which are substantially the same as or more favorable than those which you will extend to the public generally for the 90 days after the expiration of the tenant's right to purchase. The tenant may exercise the right to purchase by executing a purchase and sale agreement within 90 days after the date the tenant has received a copy of the purchase and sale agreement properly executed by you.

Relocation Benefits. You must pay to any tenant who does not purchase the unit or another unit in the same development the actual documented cost of moving, up to \$750.00 per housing unit. If the unit is occupied by a tenant who is entitled to an extended notice period, the maximum benefit is \$1000.00 per housing unit. The payment is due within ten days after the tenant vacates the unit. To be eligible for these benefits, the tenant must have paid all rent and must voluntarily vacate the unit on or before the last day of the notice period.

Relocation Assistance. You must assist elderly, handicapped, and low or moderate income tenants in finding comparable rental housing within the same city or town, which rents for no more than the rent which the tenant was paying when s/he received the notice of intent to convert. If you fail to find such substitute housing for the tenant, the notice period is extended until you find such comparable rental housing, or two additional years, whichever comes first.

Subsequent Tenants. If the tenant who is entitled to notice of intent to convert vacates before the first sale and transfer of the unit, and you seek to re-rent the unit, you must give to each prospective tenant a written notice, prior to the inception of the tenancy, informing them that the

unit is a condominium unit and, if applicable, that it is currently being offered for sale or will be offered for sale within ninety days of the inception of the tenancy.

Violations. Violations of the act or any local ordinance or bylaw adopted under its authority are punishable by a fine of not less than \$1000.00 or by imprisonment of not less than 60 days. Each unit converted in violation of the act constitutes a separate offense. A violation does not affect the validity of a conveyance to a purchaser for value who has no knowledge of the violation. The District, Superior, and Housing Courts may issue orders to restrain violations.

Local Legislation. A city or town may adopt provisions different from these by a 2/3 vote of the local legislative body and, in a city, the approval of the mayor. If you are contemplating a conversion, you should check with the city or town clerk to see if there is any local legislation governing condo conversions.

37. Evictions

The first thing you need to know about evictions is that you cannot lock a tenant out of the apartment, or even set foot in it without the tenant's permission. If you try, you may be subject to criminal prosecution, a judicial restraining order, and a suit for money damages. **Only a judge can order a tenant to move.** Until then, the tenant has the right to remain in the apartment, almost always continuing to pay the same rent. If the eviction is not legally the tenant's fault, the court can give the tenant time to find another place and move.

While you cannot retaliate against a tenant (see Chapter 29), you may otherwise evict a tenant at will or a tenant whose lease has expired for any reason whatever or for no reason at all, so long as it isn't for an illegal reason. Examples of an illegal reason are retaliation or discrimination.

Before you can go to court, you usually have to send a written Notice to Quit. This is the official way of terminating a tenancy. Depending on the type of notice, it may order the tenant to "quit and deliver up" the apartment in seven, fourteen, or thirty days or some other period. The tenant does not really have to move in the time stated in the notice, but you must wait until that time has run out before you can start court proceedings.

Non-Payment of Rent. If the eviction is for non-payment, the notice must tell the tenant to vacate in at least 14 days. For a tenant at will, the notice should also contain the required statutory language that if the tenant hasn't received a notice to quit for nonpayment of rent within the past twelve months, they may avoid eviction by paying all rent due within ten days. If the notice does not say that, then the tenant may reinstate the tenancy by paying all rent due up until the day the answer is due in a court action for eviction. If there is a lease, the tenant always has the right to reinstate the tenancy by paying all rent due, with interest and costs of suit, up until the answer is due in a court action for eviction. If you refuses the tenant's tender of rent, the tenant may still win if they can show that they tried to pay it.

Some landlords routinely include on all 14-day notices the notice meant for tenants at will. But this could mislead lease tenants into thinking that they can no longer reinstate the tenancy after 10 days. For that reason, sending such a notice could be held to be a deceptive practice (see Chapter 30). It is best to keep track of which of your tenants are under lease and which are tenants at will, so that you can send each tenant the kind of notice that is proper for their kind of tenancy.

Other Kinds of Eviction. If the eviction is for some reason other than non-payment of rent, a tenant at will is entitled to a Notice to Quit at least one full rental payment period in advance, or 30 days, whichever is greater. For example, if the rent is due every Saturday, the tenant must terminate the tenancy on a Saturday on which rent is due and must be received by the tenant at least 30 days before that Saturday. If the rent is due on the first of every month, the tenant must receive the notice by the first of the previous month, except for February. Since there are fewer than 30 days in February, the tenant must receive that notice in late January, 30 days before the first of March. A Notice to Quit is not effective until it is **received**. See the Chapter 31 for more information about what a Notice to Quit must contain.

If you sent a proper termination notice in order to raise the rent, that notice may be sufficient if the tenant hasn't paid the new rent and you have reserved your rights as described in Chapter 34.

If the tenant had a lease which has just expired, the tenancy is already terminated, and no other notice is legally necessary unless the lease provides otherwise. But if you have accepted rent from the tenant since the lease expired, without reserving your rights, you have probably created a new tenancy at will. If you are evicting a tenant for violating some provision in the lease, the

lease will state how much notice you must give. Most leases in the Boston area provide for a seven-day notice for violation of the lease.

Court Action. In Massachusetts, a legal action to evict is called a "summary process" action. After the time specified in the Notice to Quit has expired, you or your lawyer will serve on the tenant a Summary Process Summons from the District Court or Housing Court (the action may also be brought in Superior Court, but this is rarely done). It will state the date of the trial and the date by which the tenant may serve a written answer. If the tenant files "discovery," the trial will automatically be postponed for two weeks.

If the eviction action is brought for non-payment of rent or for any reason which is not the tenant's fault, the tenant may bring counterclaims against you seeking damages for any claims which arise out of the property or rental. It is common for tenants to bring claims for code violations, quiet enjoyment, retaliation, consumer protection violations, and the like. Before bringing an eviction action, you should evaluate realistically whether the tenant will have any legitimate counterclaims. If so, making a deal with the tenant may be the most economical way to resolve the situation.

The tenant may also file "discovery" by the same deadline stated above. This will automatically postpone the trial date by two weeks. Discovery is a legal request for information about your case. It can take the form of written questions ("interrogatories"), requests for you to produce documents, or requests for you to admit certain facts. You must respond to the tenant's discovery within ten days of the day you receive it. You must be especially careful to respond promptly to Requests for Admissions. Any facts which you do not deny within the ten days, under penalties of perjury, may be deemed admitted for purposes of this lawsuit. Court rules also allow you to send discovery to the tenant.

Jury trials are available in Housing Court, Superior Court, all District Courts, and all Boston Municipal Court divisions. If you want a jury trial, you can claim it when you bring the action. Your tenant must claim a jury trial, if s/he wants one, no later than the date the answer is due. Otherwise, the trial will be before a judge sitting without a jury. It is no longer possible (as it once was) to appeal a summary process case after judgment from District Court or Boston Municipal Court to Superior Court for a new trial.

At trial, you must prove your case with hard evidence. Your tenant must do likewise with their counterclaims. This is done with documents, records, and witnesses. That's why we keep talking about keeping a paper trail. But documents can only go so far. Our system of justice requires the testimony of live witnesses. A written statement from a witness is not admissible in court – not even if it's notarized. The other side must have the opportunity to cross-examine the witness, and the court must be able to observe the witness in order to assess the witness's credibility. This cannot be done with a written statement. E-mails and text messages are often admissible, but they must be printed out to be useful. Since the court keeps evidence, they won't want to keep someone's cellphone with text messages.

After trial, the judge will usually take the matter under advisement. That means that you or your attorney will receive the decision in the mail. This can take anywhere from a few days to many months, depending on the complexity of the case. If the eviction is for non-payment of rent or for some other reason which is the tenant's fault (violation of lease provisions, unsanitary conditions, noise, etc.), a physical eviction can take place as soon as twelve days after the Court makes its decision.

Unless the tenant lives in a rooming house and has lived there for less than three months, or the eviction is for non-payment of rent or for some other reason which is the tenant's fault, the court can give the tenant time to move. If the tenant has not agreed to pay a rent increase, but has continued to pay rent at the old rate, the eviction is **not** for non-payment. And the fact that the tenant has not agreed to pay a rent increase does **not** make the eviction the tenant's fault.

Ordinarily, the court can give a tenant up to six months to find another apartment. If the tenant is 60 years of age or older or is handicapped, the court can give up to twelve months. This is in the discretion of the judge. Many judges prefer to give a couple of months at a time, so that the tenant won't wait until the last month to look for a new place. So long as the six months or twelve months hasn't been used up yet, the tenant can go back to court and ask for more time. If the tenant has children in school, the court may give a stay until the end of the school year. Since most apartments are available in September, some judges, when within striking distance, will give until the first of September.

Settlement. Negotiating with your tenant can save you the expense and stress of a trial and a forcible eviction. In Housing Court, there are Housing Specialists on staff, and in District Courts, there are often mediators from various agencies to meet with parties and help them reach

settlement. It never hurts to talk with people, but remember that you always have the right to break off mediation and have your case heard by a judge.

In a tight housing market, a tenant may genuinely need several months to find another apartment, and knowing this, the court will usually not force the tenant to leave more quickly. For low-income tenants, the cost of moving can be as great an obstacle as finding an apartment. Since you will have to pay more for a forcible eviction, it may be to your advantage to pay for the tenant's moving costs. If the tenant has made counterclaims, consider the risk of a judgment against you and whether it may be cheaper to offer other financial concessions. Since a judgment for unpaid rent can almost never be collected, it costs you little to agree to forgive unpaid rent, and it may make a tenant more cooperative on some other point. Make sure that any settlement agreement is in writing and filed with the court.

If a tenant wants to appeal and fight the eviction, the process can be very lengthy. It is therefore advantageous to get the tenant to move by a deadline. It is very difficult for a tenant to get an extension of time beyond a date that the tenant has agreed to in a document filed with the court. For this reason, you can expect tenants to insist on a time period that is more than adequate. A move-out date with the possibility of an extension, and a higher monthly payment, may be one way to solve the problem by negotiation.

Since court dockets are now available on line, tenants often worry that an eviction judgment will become known to prospective future landlords and may impede their ability to find another apartment, now or in the future. For this reason, it is increasingly common for a settlement agreement to provide that the case will be dismissed and any eviction judgment will be vacated after the tenant has moved out.

The Execution. After you have received a judgment for possession, the appeal period and any stays allowed the tenant have expired, the court issues a document called an "execution for possession." You give the execution to a constable or deputy sheriff, who comes with a mover to move the tenant out. The constable or deputy sheriff must give forty-eight hours notice in advance of the day they will come to move the tenant out. Many courts say that the forty-eight hours cannot be Friday to Monday, but must be over two business days.

The notice will tell the tenant the name, address, and telephone number of the officer and the name, address, and telephone number of the warehouse to be used and other information

concerning the warehouse where the tenant's possessions will be stored. The officer will select the warehouse, which must be a licensed public warehouse. The tenant has the right to notify the officer of a warehouse or other storage facility of his/her own choosing in writing at or before the time the property is removed from the apartment, and the officer is required to take the property to the facility of the tenant's choice. This can include the tenant's new apartment or the home of a friend or relative.

The actual moveout cannot take place after 5 PM or before 9 AM or on Saturday, Sunday, or a legal holiday. Sometimes, the tenant will go to court during that time to try to get more time. The officer is required to file with the court and provide to the tenant a receipt containing a description of the goods removed. At least seven days after the property has been removed, the tenant is entitled to a warehouse receipt listing the possessions in storage and informing the tenant of their rights.

When the move finally does take place, the tenant's possessions will be stored in a warehouse unless the tenant has made other arrangements. The tenant is entitled to access their stored property once, without charge or payment of storage fees, to inspect the property or to remove items having primarily personal or sentimental value, including such things as photographs, passports, documents, and funeral urns. The tenant may reclaim the property at any time upon payment of all storage fees owed. After six months, the storage company may sell the possessions to pay for the storage fees. The constable or deputy sheriff will probably ask for \$1000 or more in advance for a physical move-out, depending on the size of the apartment. You are entitled to seek reimbursement from the tenant for the costs and fees of removal of the tenant's property to storage, but if the tenant has little or no assets, this can be difficult to collect.

If the tenant brings the rent up-to-date by paying you the amount of the money judgment in full, plus any additional payments for use and occupancy that have accrued since the judgment, the tenant again becomes a lawful tenant. In that case, you cannot use the execution for possession and must return it to the court. If the tenant brings the rent current before the execution issues, you must notify the court, so that no execution will issue.

In short, you cannot continue to evict the tenant if you accept full payment of the rent. If you want to evict the tenant, you should refuse to accept full payment of the back rent. If you refuse to accept full payment, you may still try to enforce the judgment through collection

process. In practice, however, it is rare for any landlord to collect unpaid rent from a tenant who has moved out.

38. Housing Courts

In the early 1970s, Massachusetts began to recognize that landlord-tenant law was a specialized area which required a specialized court. The Boston Housing Court was established in 1972, followed the next year by the Hampden County Housing Court. Other housing courts have been created since then for other parts of the state, and the Hampden County Housing Court has been expanded to cover all four counties of Western Massachusetts. Expansion of housing courts, effective 1 July 2017, has now been enacted as part of the fiscal 2018 state budget.

The Boston Housing Court, which previously covered only the city of Boston, is now the Eastern Housing Court and covers all of Suffolk County and Arlington, Belmont, Brookline, Cambridge, Medford, Newton, and Somerville. The Northeast Housing Court covers all of Essex County and most of the rest of Middlesex County. The Southeast Housing Court covers the Cape and Islands, all of Bristol County and most of Plymouth County. The Worcester County Housing Court is now the Central Housing Court and covers all of Worcester County and most of the Metro West area in Middlesex County. The Western Massachusetts Housing Court still covers all of Hampden, Hampshire, Franklin, and Berkshire Counties. A new Metro South Housing Court will cover Brockton area cities and towns in Plymouth County and all of Norfolk County except Brookline.

It is not yet clear how things will work in the area covered by the new Metro South Housing Court until the court is actually set up, or how the existing Housing Courts will handle their expanded jurisdictions while they are waiting for new judges to be appointed and other additional staff to be hired. Best advice is to call the court that you want to file in and find out how they are handling things. As of this writing, very little information appears on the Housing Court's website.

Superior and District Courts still have concurrent jurisdiction over housing cases, but if you bring an action for eviction in any other court, your tenant can transfer the action to Housing Court by filing a simple form which is available from the Housing Court. This results in further delay. It is generally to your advantage to bring the action in Housing Court to start with.

For further information on housing court expansion, see <http://www.housingcourt4all.org/>

39. Resources

You can obtain standard form leases in many stationery stores, but these leases are often not well-drafted for use in Massachusetts. The Greater Boston Real Estate Board / Rental Housing Association (www.gbreb.com) has far better lease and tenancy-at-will forms, which have been drafted to comply with current Massachusetts landlord-tenant law. They also have rental application forms and forms for compliance with the security deposit and last months' rent deposit laws. Their forms can be obtained online at www.formsforrealestate.com. Their address is:

One Center Plaza, Mezzanine Floor
Boston, MA 02108
617.423.8700

Some Other Resources:

Boston Inspectional Services:	617.635.5322
http://www.cityofboston.gov/isd/	
City of Boston Rental Registration Form	
http://documents.boston.gov/images_documents/updated%20rental%20app_tcm3-44896.pdf	
Brookline Health Department:	617.730.2306
http://brooklinema.gov/446/Health-Department	
Cambridge Inspectional Services:	617.349.6100
http://www.cambridgema.gov/inspection	
Somerville Health Department:	617.625.6600
http://somervillema.gov/departments/health	
Boston Consumer Affairs Division	617.635-3834
http://www.cityofboston.gov/consumeraffairs/consumeraffairs.asp	
Boston Rental Housing Center	617.635.4200
www.cityofboston.gov/rentalhousing	
Mass. Commission Against Discrimination	617.994.6000
www.mass.gov/mcad	
Mass. Consumer Protection Division	617.727.8400
http://www.mass.gov/ago/bureaus/public-protection-and-advocacy/the-consumer-protection-division/	

State Sanitary Code

<http://www.mass.gov/courts/docs/lawlib/104-105cmr/105cmr410.pdf>

Childhood Lead Poisoning Prevention Program

<http://www.mass.gov/dph/clppp>

Metropolitan Boston Housing Partnership 617-859-0400 or 800-272-0990

www.mbhp.org

Massachusetts Housing Discrimination Information

<http://www.mass.gov/ago/consumer-resources/your-rights/civil-rights/housing/housing-discrimination.html>

Fair Housing Rights of Individuals with Disabilities

<http://www.mass.gov/ago/consumer-resources/your-rights/civil-rights/disability-rights/fair-housing.html>

Information on Assistance Animals

<http://blog.mass.gov/mod/reasonable-accommodation/service-emotional-support-and-assistance-animals-rights-under-fair-housing-laws/>

US Department of Justice information about Service Animals

https://www.ada.gov/service_animals_2010.htm

HUD Advisory on Assistance Animals

http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf

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