



State of Wisconsin
Governor Scott Walker

Department of Agriculture, Trade and Consumer Protection
Ben Brancel, Secretary

DATE: February 5, 2015

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FROM: Ben Brancel, Secretary
Department of Agriculture, Trade and Consumer Protection

SUBJECT: Residential Rental Practices, ch. ATPC 134; Final Draft Rule (Clearinghouse Rule #14-038)

Introduction

The Department of Agriculture, Trade and Consumer Protection (“DATCP”) is transmitting this rule for legislative committee review, as provided in s. 227.19 (2) and (3), Stats. DATCP will publish notice of this referral in the Wisconsin Administrative Register, as provided in s. 227.19 (2), Stats. This rule makes revisions to ch. ATPC 134, Wis. Adm. Code, that are necessary to conform the rule to provisions of ch. 704, Stats., as amended in 2011 Wisconsin Act 143 and 2013 Wisconsin Act 76.

Background

DATCP has broad general authority, under s. 93.07 (1), Stats., to interpret laws under its jurisdiction. DATCP has authority under s. 100.20 (2) (a), Stats., to promulgate administrative rules prohibiting trade practices determined by the department to be unfair, and prescribing trade practices determined by the department to be fair.

The department determined, when the rule was first promulgated in 1981, that the trade practices prohibited by ch. ATPC 134, Wis. Adm. Code, were unfair pursuant to s. 100.20, Stats.

Section 704.95, Stats. (created by 2011 Wisconsin Act 143 and amended by 2013 Wisconsin Act 76), provides that a violation of s. 704.28 or 704.44, Stats., may also be an unfair trade practice under s. 100.20. Section

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704.95, Stats., also confirms that the department may issue an order or promulgate a rule under s. 100.20 that does not conflict with a right or duty arising under ch. 704, Stats.

This rule only makes changes to existing rules that do not conflict with rights and duties arising under ch. 704, Stats., as it has been amended by 2011 Wisconsin Act 143 and 2013 Wisconsin Act 76.

Related Statutes and Rules

Chapter 704, Stats., regulates transactions between landlords and both residential and non-residential tenants. The department does not administer ch. 704, Stats. (except for s. 704.90, Stats., relating to self-service storage facilities).

Chapter ATPC 125, Wis. Adm. Code, regulates rental transactions for sites upon which the tenant places a manufactured home owned by the tenant.

2011 Wisconsin Act 143 and 2013 Wisconsin Act 76 also created s. 66.0104, Stats., which limits a municipality's authority to restrict certain rights and duties of landlords and specifically states that an ordinance that is "inconsistent" with the protected rights and duties of a landlord "does not apply and may not be enforced."

Plain Language Analysis

Background

The department enacted ch. ATPC 134, Wis. Adm. Code, in 1980 and the rule was revised in 1998. The existing rule regulates rental transactions between landlords and residential tenants as follows:

- Requires the landlord to provide to the tenant before entering into the rental agreement copies of the rental agreement and a receipt for any earnest money or security deposits that the tenant has paid to the landlord.
- Requires the landlord to disclose to the tenant before entering into the rental agreement the names and addresses of the owners and managers, code violations and other conditions affecting habitability, and any utility charges that the tenant may be required to pay.
- Prescribes procedures for accepting and withholding earnest money fees and credit check fees.
- Prescribes procedures for handling security deposits.
- Prescribes procedures for promises to repair.
- Prohibits a landlord from including in rental agreements provisions that do the following:
 - Authorize unlawful eviction.
 - Accelerate rent payments in event of tenant default.
 - Require the tenant to pay attorney's fees.
 - Authorize the landlord to enter a plea in a court action on behalf of the tenant in which the tenant agrees to accept a judgment against the tenant.

- Relieve the landlord from liability for property damage or personal injury caused by the landlord.
- Impose liability on the tenant for property damage or personal injury not caused by the tenant.
- Waive statutory or legal obligations of the landlord.
- Prohibits a landlord from:
 - Advertising or renting condemned premises.
 - Unauthorized entries.
 - Automatically renewing a lease without notice.
 - Unlawfully confiscating personal property.
 - Engaging in retaliatory or self-help eviction.
 - Charging late rental fees and other penalties not set out in the lease.
 - Misrepresenting the dwelling units offered or the amount of all rent and non-rent charges.
 - Failing to disclose all non-rent charges in connection with the representation of any rent amount.

Rule Content

This rule makes revisions to ch. ATCP 134 that are necessary to conform the rule to provisions of ch. 704, Stats. (as amended in 2011 Wisconsin Act 143 and 2013 Wisconsin Act 76), and to ensure that enforcement of the rule will not change a right or duty provided by ch. 704, Stats. (as amended).

Definitions

The proposed rule makes a minor, technical revision to the existing rule definition of “dwelling unit” to conform to recent changes in ch. ATCP 125, Wis. Adm. Code.

The proposed rule revises existing rule definitions of “premises” and “rental agreement” to conform them to the most recent version of ch. 704, Stats.

Disclosures required before entering into a rental agreement

The current rule requires a landlord to make certain disclosures to the prospective tenant before entering into a rental agreement or accepting any earnest money or security deposit. These disclosures relate to various conditions affecting habitability, including uncorrected building code violations.

2011 Act 143 created s. 704.07 (2) (bm), Stats., which requires disclosures relating to building code violations that are generally similar to the disclosures prescribed by the current rule.

This rule repeals and recreates the building code violation disclosure requirement to conform it to the disclosure required by the statute.

Returning security deposits

The current rule establishes a deadline for return of security deposits to the tenant. In most cases, the landlord

must return the security deposit with 21 days of the tenant vacating the property.

2011 Act 143 created, and 2013 Act 76 amended, s. 704.28 (4), Stats., which incorporates similar security deposit return requirements. Under the new statutory requirements, if the tenant vacates the property before the end of the rental agreement, and the landlord does not re-rent the property, the landlord must return the security deposit within 21 days of the last day of the rental agreement.

This rule amends the requirement to a return a security deposit to conform to the statutory provision.

Withholding security deposits

Under the current rule, a landlord may withhold a tenant's security deposit only for specific reasons listed in the rule such as damage to the premises; unpaid rent; unpaid utilities or assessments for which the landlord is liable; or other reasons specifically listed in the rental agreement as "nonstandard rental provisions."

Act 143 created s. 704.28 (1), Stats., which incorporates very similar (but not identical) provisions into the statute.

This rule makes minor changes to the provisions relating to withholding a tenant's security deposit to conform to the statute, but does not substantially change the requirements from the current rule. It also makes slight changes related to "nonstandard rental provisions" to conform to s. 704.28 (2), Stats., as created by 2011 Act 143 and amended by 2013 Act 76.

Prohibited rental agreement provisions

The current rule describes provisions that a landlord is prohibited from placing in a rental agreement, such as:

- Authorizing eviction by other than judicial procedure.
- Acceleration of rent payments if tenant breaches obligations.
- Requiring the tenant to pay landlord's attorney's fees in the event of a dispute.
- Authorizing landlord to confess judgment against the tenant.
- Relieving the landlord from liability for damage or injury caused by negligent acts or omissions of the landlord.
- Imposing liability on the tenant for personal injury arising from causes clearly beyond the tenant's control.
- Waiving the obligation of the landlord to deliver and maintain the premises in fit or habitable condition.

2011 Act 143 created and 2013 Act 76 revised portions of s. 704.44, Stats., which identify prohibited rental agreement provisions that are similar, but not identical, to provisions in the current rule. In addition, 2011 Act 143 created two new prohibited rental agreement provisions – allowing the landlord to do certain things because a tenant contacted law enforcement, health, or safety services; or allowing the landlord to terminate the tenancy

if a crime is committed on the rental property. 2013 Act 76 refined this particular prohibition to clarify that it applies to a termination of tenancy based solely on the commission of a crime. 2013 Act 76 also adds an additional prohibition against rental provisions that allow termination for a crime committed in relation to the rental property.

Further, Act 143 states that the entire rental agreement is void and unenforceable if it contains any of the prohibited provisions. The current rule does not have such a provision, but instead relies on a test established by the courts to determine whether the entire rental agreement is void based on the inclusion of a prohibited provision.

This rule revises the prohibition on certain rental agreement provisions so that the rule is identical to the new statute. This rule also incorporates the provision in s. 704.44, Stats., that declares the entire rental agreement is void and unenforceable if it contains any of the prohibited rental agreement provisions.

Confiscating personal property left behind by the tenant

The current rule prohibits the landlord from confiscating the tenant's personal property except as authorized by law or in accordance with a written lien agreement. The current rule also prescribes the form and manner in which the landlord and tenant may execute the lien agreement.

2011 Act 143 and 2013 Act 76 revised s. 704.05 (5), Stats., to give a landlord the discretion to dispose of personal property left behind by the tenant without a written lien agreement, as long as certain conditions are met. For example, there must not be a written agreement to the contrary, and the landlord must provide notice to the tenant of his or her intent not to store the property before the tenant enters into or renews a rental agreement.

This rule amends the current rule to more closely align it with s. 704.05 (5), Stats. It replaces references to a "written lien agreement" with a more general "written agreement" and imposes conditions on an agreement that allows a landlord to seize or hold a tenant's personal property

Public Hearing

DATCP held one public hearing on this rule on July 9, 2014 in Madison. There were four attendees at the hearing. None of the attendees provided testimony or registered in support or opposition to the hearing draft rule. Following the public hearing, the hearing record remained open until July 23, 2014 for additional comments. DATCP received two written comments on this rule.

Neighborhood Law Clinic at the University of Wisconsin Law School opposed changes to ATCP 134 relating to security deposits. The comments state that our current rule is not in conflict with the statute and is allowed under s. 100.20, Stats. The department feels its interpretation of its statutory authority is correct and did not make any changes to the final draft rule in response to these comments.

Cornerstone Real Estate Management suggested several changes and clarifications to the rule not included in the scope statement or the hearing draft rule. Because the scope statement limited this rule change to harmonizing the rule with the statute, the department cannot address the proposed changes at this time.

Rule Changes Following Public Hearing

There are no substantive policy changes from the hearing draft. DATCP did incorporate the technical corrections and clarification of statutory authority suggested by the Rules Clearinghouse.

Small Business Regulatory Review Report

The Small Business Regulatory Review Board did not issue a report on this rule.

Fiscal Impact

As stated in the attached *Fiscal Estimate*, there is no fiscal effect as a result of implementation of this rule.

Business Impact

DATCP anticipates that this rule will not have an economic impact on business. This rule makes changes to the current rule to align the rule with recent statutory changes to ch. 704, Stats. Accordingly, there are no changes in the rights or duties prescribed by current law.

Federal and Surrounding State Laws

Federal law does not generally regulate landlord and tenant relationships or residential rental practices. The Federal Fair Housing Act of 1968 makes it illegal for a landlord to discriminate against a potential tenant because of a person's race, sex, national origin, or religion, and it prohibits certain discriminatory conduct.

Illinois, Iowa, Michigan, and Minnesota all have statutes or administrative rules governing residential rental practices. These laws address common topics such as rental agreements, security deposits, and other duties of landlords and tenants.