

Clearinghouse Rule 14-038

DATCP Docket No. 14-R-01
Rules Clearinghouse No. XX-XXX

Proposed Hearing Draft Rule
April 30, 2014

**PROPOSED ORDER
OF THE WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION
ADOPTING RULES**

1 The Wisconsin department of agriculture, trade and consumer protection proposes the following
2 rule *to amend* ATCP 134.02 (2) (9), and (10), 134.06 (3) (a) (intro) and 1., 3., 4., 5., and 6., (b)
3 and (c), and 134.09 (4) (b); *to repeal and recreate* ATCP 134.04 (2) (a), 134.06 (2), 134.08 and
4 134.09 (4) (a); and *to create* ATCP 134.06 (3) (a) (title), (b) (title), and (c) (title), *relating to*
5 Residential Rental Practices.

**Analysis Prepared by the Department
of Agriculture, Trade and Consumer Protection**

Statutes Interpreted

Statutes Interpreted: ss. 100.20 (1), 704.05 (5) (bf), 704.07 (2) (bm), 704.11, 704.28 (1),
(2) and (4) (b), and 704.44, Stats.

Statutory Authority

Statutory Authority: ss. 93.07 (1), 100.20 (2)(a), and 704.95, Stats.

Explanation of Statutory Authority

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.

Section 704.95, Stats. (created by 2011 Wisconsin Act 143 and amended by 2013 Wisconsin Act 76) provides that a violation of ch. 704, Stats., may also be a violation of ch. ATCP 134, Wis. Adm. Code. But this section also states that the department may not enforce a violation of ch. ATCP 134, Wis. Adm. Code, in a way that changes a right or duty provided in ch. 704, Stats.

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

Plain Language Analysis

Background

DATCP enacted ch. ATCP 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

2011 Wisconsin Act 143 was enacted on March 21, 2012. Act 143 made changes to ch. 704, Stats., that affect some of the provisions of the current rule relating to:

- Disclosures required before entering into a rental agreement.
- Returning security deposits.
- Withholding security deposits.
- Prohibiting certain rental agreement provisions.
- Disposing of personal property left behind by a tenant.
- Violations of Landlord Tenant law may constitute a violation of Unfair Trade Practices Law.

2013 Wisconsin Act 76 was enacted on December 12, 2013. Act 76, among other things, made additional changes to landlord tenant requirements in ch. 704, Stats., including:

- Disposing of personal property left behind by a tenant.
- Damage to premises due to action or inaction of the tenant.
- Check-in sheets.
- Requiring notice of domestic abuse protections.
- Prohibition on rental agreement terms that allows landlord to terminate tenancy if a crime is committed in or on the rental property.

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

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.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations

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.

Comparison with Rules in Adjacent States

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.

Summary of Factual Data and Analytical Methodologies

This rule modifies the current rule only to conform it to recent changes to the Wisconsin statutes. DATCP did not conduct any factual or data analysis.

Analysis and Supporting Documents used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

DATCP has carefully reviewed the provisions of ch. 704, Stats. (as amended by 2011 Wisconsin Act 143 and 2013 Wisconsin Act 76) to ensure that changes to the rule align with the provisions of ch. 704. DATCP will also review the public comments on this rule before preparing a final analysis.

Effect on Small Business

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.

DATCP Contact

Questions and comments related to this rule may be directed to:

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Madison, WI 53708-8911
Telephone (608) 224-5164
E-Mail: jennifer.heatonamrhein@wisconsin.gov

Place where comments are to be submitted and deadline for submission

Questions and comments related to this rule may be directed to:

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The deadline for submitting hearing draft comments will be determined at a later date.

1 **SECTION 1.** ATCP 134.02 (2) is amended to read:

2 ATCP 134.02 (2) “Dwelling unit” means a structure or that part of a structure that is
3 primarily used as a home, residence, or place of abode. The term includes a manufactured home
4 as defined in s. ATCP 125.01 (1s) or ~~manufactured home~~ site as defined in s. ATCP 125.01 (1s)
5 ~~and~~ (7).

6 **SECTION 2.** ATCP 134.02 (9) and (10) are amended to read:

7 ATCP 134.02 (9) “Premises” means ~~a dwelling unit and the structure of which it is a part~~
8 ~~and all appurtenances, grounds, areas, furnishings and facilities held out for the use or enjoyment~~
9 ~~of the tenant or tenants generally~~ the property covered by the lease, including not only the realty
10 and fixtures, but also any personal property furnished with the realty.

11 (10) “Rental agreement” means an oral or written agreement between a landlord and
12 tenant, for the rental or lease of a specific dwelling unit or premises, in which the landlord and
13 tenant agree on the essential terms of the tenancy, such as rent. “Rental agreement” includes a
14 lease. “Rental agreement” does not include an agreement to enter into a rental agreement in the
15 future.

16 **SECTION 3.** ATCP 134.04 (2) (a) is repealed and recreated to read:

17 ATCP 134.04 (2) (a) Any building code or housing code violation to which all of the
18 following apply:

- 19 1. The landlord has actual knowledge of the violation.
- 20 2. The violation affects the dwelling unit that is the subject of the prospective rental
21 agreement or a common area of the premises.
- 22 3. The violation presents a significant threat to the prospective tenant’s health or safety.
- 23 4. The violation has not been corrected.

1 **SECTION 4.** ATCP 134.06 (2) is repealed and recreated to read:

2 ATCP 134.06 (2) RETURNING SECURITY DEPOSITS. A landlord shall deliver or mail to a
3 tenant the full amount of any security deposit paid by the tenant, less any amounts that may be
4 withheld under sub. (3), within 21 days after the any of the following:

5 (a) If the tenant vacates the premises on the termination date of the rental agreement, the
6 date on which the rental agreement terminates.

7 (b) If the tenant vacates the premises or is evicted before termination date of the rental
8 agreement, the date on which the tenant’s rental agreement terminates or, if the landlord re-rents
9 the premises before the tenant’s rental agreement terminates, the date on which the new tenant’s
10 tenancy begins.

11 (c) If the tenant vacates the premises or is evicted after the termination date of the rental
12 agreement, the date on which the landlord learns that the tenant has vacated the premises or has
13 been removed from the premises under s. 799.45 (2), stats.

14 **Note:** A rent payment in excess of one month’s prepaid rent is considered a “security
15 deposit” as defined under s. ATCP 134.02 (11). This chapter does not prevent a landlord from
16 collecting more than one month’s prepaid rent. However, if the landlord holds any rent
17 prepayment in excess of one month’s prepaid rent when the tenant surrenders the premises, the
18 landlord must treat that excess as a “security deposit” under sub. (2).

19 **Note:** See Pierce v. Norwick, 202 Wis. 2d 588 (1996), regarding the award of damage
20 claims for failure to comply with provisions of this chapter related to security deposits and
21 earnest money deposits.

22 **SECTION 5.** ATCP 134.06 (3) (a) (title) is created to read:

23 ATCP 134.06 (3) (a) *Standard withholding provisions.*

1 **SECTION 6.** ATCP 134.06 (3) (a) (intro) and 1., 3., 4., 5., and 6. are amended to read:

2 ATCP 134.06 (3) (a) A When a landlord returns a security deposit to a tenant after the
3 tenant vacates the premises, the landlord may withhold from a tenant's the full amount of the
4 security deposit only amounts reasonably necessary to pay for any of the following:

5 1. ~~Tenant~~ Except as provided in par. (c), tenant damage, waste or neglect of the premises.

6 3. Payment ~~which~~ that the tenant owes under the rental agreement for utility service
7 provided by the landlord but not included in the rent.

8 4. Payment ~~which~~ that the tenant owes for direct utility service provided by a
9 government-owned utility, to the extent that the landlord becomes liable for the tenant's
10 nonpayment.

11 5. Unpaid ~~mobile home parking fees which a local unit of government has~~ monthly
12 municipal permit fees assessed against the tenant by a local unit of government under s. 66.0435
13 (3), Stats., to the extent that the landlord becomes liable for the tenant's nonpayment.

14 6. ~~Other reasons authorized~~ Any other payment for a reason provided in the a
15 nonstandard rental agreement according to provision document described in par. (b).

16 **SECTION 7.** ATCP 134.06 (3) (b) (title) is created to read:

17 ATCP 134.06 (3) (b) *Nonstandard rental provisions.*

18 **SECTION 8.** ATCP 134.06 (3) (b) is amended to read:

19 ATCP 134.06 (3) (b) A Except as provided in par. (c), a rental agreement may include
20 one or more nonstandard rental provisions which that authorize a the landlord to withhold
21 amounts from a the tenant's security deposit for reasons not identified under specified in par. (a)
22 1. to 5. The landlord shall include the Any such nonstandard rental provisions, if any, shall be
23 provided to the tenant in a separate written document entitled **“NONSTANDARD RENTAL**

1 **PROVISIONS.”** ~~which the landlord provides to the tenant.~~ The landlord shall specifically
2 identify ~~and discuss~~ each nonstandard rental provision with the tenant before the tenant enters
3 into ~~any~~ a rental agreement with the landlord. If the tenant signs his or her name, or writes his or
4 her initials, by a nonstandard rental provision, it is rebuttably presumed that the landlord has
5 specifically identified ~~and discussed that~~ the nonstandard rental provision with the tenant, and
6 that the tenant has agreed to it.

7 **SECTION 9.** ATCP 134.06 (3) (c) (title) is created to read:

8 ATCP 134.06 (3) (c) *Normal wear and tear.*

9 **SECTION 10.** ATCP 134.06 (3) (c) is amended to read:

10 ATCP 134.06 (3) (c) This subsection does not authorize a landlord to withhold any
11 amount from a security deposit for normal wear and tear, or for other damages or losses for
12 which the tenant cannot reasonably be held responsible under applicable law.

13 **SECTION 11.** ATCP 134.08 is repealed and recreated to read:

14 **ATCP 134.08 Prohibited rental agreement provisions – rental agreement that**
15 **contains certain provisions is void.** Notwithstanding s. 704.02, Stats., a rental agreement is
16 void and unenforceable if it does any of the following:

17 (1) Allows a landlord to do any of the following because a tenant has contacted an entity
18 for law enforcement services, health services, or safety services:

19 (a) Increase rent.

20 (b) Decrease services.

21 (c) Bring an action for possession of the premises.

22 (d) Refuse to renew a rental agreement

23 (e) Threaten to take any action under pars. (a) to (d).

1 (2) Authorizes the eviction or exclusion of a tenant from the premises, other than by
2 judicial eviction procedures as provided under ch. 799, Stats.

3 (3) Provides for an acceleration of rent payments in the event of tenant default or breach
4 of obligations under the rental agreement, or otherwise waives the landlord's obligation to
5 mitigate damages as provided under s. 704.29, Stats.

6 (3) Requires payment by the tenant of attorney fees or costs incurred by the landlord in
7 any legal action or dispute arising under the rental agreement. This subsection does not prevent
8 a landlord or tenant from recovering costs or attorney fees under a court order under chs. 799 or
9 814, Stats.

10 (4) Authorizes the landlord or an agent of the landlord to confess judgment against the
11 tenant in any action arising under the rental agreement.

12 (5) States that the landlord is not liable for property damage or personal injury caused by
13 negligent acts or omissions of the landlord. This subsection does not affect ordinary
14 maintenance obligations of a tenant under s. 704.07, Stats., or assumed by a tenant under a rental
15 agreement or other written agreement between the landlord and the tenant.

16 (6) Imposes liability on a tenant for any of the following:

17 (a) Personal injury arising from causes clearly beyond the tenant's control.

18 (b) Property damage caused by natural disasters, or by persons other than the tenant or
19 the tenant's guests or invitees. This paragraph does not affect ordinary maintenance obligations
20 assumed by a tenant under ~~the~~ s. 704.07, Stats., or assumed by a tenant under a rental agreement,
21 or other written agreement between the landlord and the tenant.

22 (7) Waives any statutory or other legal obligation on the part of the landlord to deliver the
23 premises in a fit or habitable condition, or to maintain the premises during the tenant's tenancy.

1 (8) Allows the landlord to terminate the tenancy of a tenant based solely on the
2 commission of a crime in or on the rental property if the tenant, or someone who lawfully resides
3 with the tenant is a victim, as defined in s. 950.02 (4), stats., of that crime.

4 (9) Allows the landlord to terminate the tenancy of a tenant for a crime committed in
5 relation to the rental property and the rental agreement does not include the notice required under
6 s. 704.14, stats.

7 **Note:** A provision requiring the tenant to pay for professional carpet cleaning, in the
8 absence of negligence or improper use by the tenant, does not render a rental agreement void
9 under sub. (7). Because routine carpet cleaning is not a statutorily-imposed obligation of a
10 landlord, assigning this responsibility to a tenant through a contractual provision does not
11 render a rental agreement void. OAG 4-13.

12 **SECTION 12.** ATCP 134.09 (4) (a) is repealed and recreated to read:

13 ATCP 134.09 (4) CONFISCATING PERSONAL PROPERTY. (a) Except as provided in ss.
14 704.05 (5), 704.11, 779.43, or by express agreement of the parties, a landlord has no right to a
15 lien and is prohibited from seizing or holding a tenant's property.

16 **SECTION 13.** ATCP 134.09 (4) (b) is amended to read.

17 (b) ~~A lien~~ An express agreement under par. (a), if any, shall be executed in writing at the
18 time of the initial rental agreement. The landlord shall include the ~~lien~~ agreement in a separate
19 written document entitled "**NONSTANDARD RENTAL PROVISION**" which the landlord
20 provides to the tenant. The landlord shall specifically identify and discuss the ~~lien~~ agreement
21 with the tenant before the tenant enters into any rental agreement with the landlord. The ~~lien~~
22 agreement is not effective unless signed or initialed by the tenant.

1 **SECTION 14. EFFECTIVE DATE:** This rule takes effect on the first day of the third month
2 following publication in the Wisconsin administrative register, as provided in
3 s. 227.22(2)(intro.), Stats.

Dated this _____ day of _____, _____.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Ben Brancel
Secretary