

DATCP Docket No. 19-R-02
Final Draft Rule
Rules Clearinghouse No. 20-033
November 19, 2020

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

The Wisconsin department of agriculture, trade and consumer protection proposes the following rule *to amend* ATCP 134.05 (4) (a) *relating to* residential rental practices.

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

This rule harmonizes Wis. Admin. Code s. ATCP 134.05 (4) (a), a rule related to landlord/tenant law, with Wis. Stat. s. 704.085 (1) (a).

Statutes Interpreted

Statutes Interpreted: Wis. Stat. ss. 93.07 (1) and 100.20 (2) (a). *See also* Wis. Stat. s. 704.95.

Statutory Authority

Wis. Stat. s. 93.07 Department duties. It shall be the duty of the department:

(1) REGULATIONS. To make and enforce such regulations, not inconsistent with law, as it may deem necessary for the exercise and discharge of all the powers and duties of the department, and to adopt such measures and make such regulations as are necessary and proper for the enforcement by the state of chs. 93 to 100, which regulations shall have the force of law.

Wis. Stat. s. 100.20 (2) (a)

The department [of Agriculture, Trade, and Consumer Protection], after public hearing, may issue general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair. The department, after public hearing, may issue general orders prescribing methods of competition in business or trade practices in business which are determined by the department to be fair.

Wis. Stat. s. 704.95 Practices regulated by the department of agriculture, trade and consumer protection

Practices in violation of s. 704.28 or 704.44 may also constitute unfair methods of competition or unfair trade practices under s. 100.20. However, the department of agriculture, trade and consumer protection may not issue an order or promulgate a rule under s. 100.20 that changes any right or duty arising under this chapter.

Related Statutes and Rules

2017 Wisconsin Act 317, s. 41.

Plain Language Analysis

Background

This proposed rule would modify a current rule related to residential rental practices. Existing ch. ATCP 134 (Residential Rental Practices) and existing ch. 704, Stats. (Landlord and Tenant) both regulate dealings involving residential renters and their landlords. However, because of an addition to ch. 704, Stats., by 2017 Wis. Act 317, s. 41, there is now a specific matter – namely, the maximum actual cost amount that a landlord may require a prospective tenant to pay for a consumer credit report – where ch. ATCP 134 is inconsistent with ch. 704, Stats. This rulemaking will eliminate that inconsistency.

In April 2018, then-Governor Walker signed AB 771 into law as 2017 Wisconsin Act 317. Section 41 of the new law, which created Wis. Stat. s. 704.085 and took effect on April 18, 2018, reads (emphasis added):

704.085 Credit and background checks. (1) (a) Except as provided under par. (b), a landlord may require a prospective tenant to pay the landlord's actual cost, *up to \$25*, to obtain a consumer credit report on the prospective tenant from a consumer credit reporting agency that compiles and maintains files on consumers on a nationwide basis. The landlord shall notify the prospective tenant of the charge before requesting the consumer credit report, and shall provide the prospective tenant with a copy of the report.

(b) A landlord may not require a prospective tenant to pay for a consumer credit report under par. (a) if, before the landlord requests a consumer credit report, the prospective tenant provides the landlord with a consumer credit report, from a consumer credit reporting agency that compiles and maintains files on consumers on a nationwide basis, that is less than 30 days old.

(2) A landlord may require a prospective tenant who is not a resident of this state to pay the landlord's actual cost, *up to \$25*, to obtain a background check on the prospective tenant. The landlord shall notify the prospective tenant of the charge before requesting the background check and shall provide the prospective tenant with a copy of the report.

This new statute conflicts with ATCP 134.05 (4) (a), which states (emphasis added):

(4) CREDIT CHECK FEE

(a) Except as provided under par. (b), a landlord may require a prospective tenant to pay the landlord's actual cost, *up to \$20*, to obtain a consumer credit report on the prospective tenant from a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis. The landlord shall notify the prospective tenant of the charge before requesting the consumer credit report, and shall provide the prospective tenant with a copy of the report.

Because the Administrative Code is inconsistent with the new statute, the Department must engage in rulemaking to harmonize the two. Failure to do so would lead to continued inconsistency between Wis. Admin. Code s. ATCP 134.05 (4) (a) and Wis. Stat. s. 704.085 (1) (a).

Rule Content

General

This rule changes the maximum amount that a landlord may charge a prospective tenant for a consumer credit report from \$20 to the amount specified by statute.

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

Federal Programs

No existing or proposed federal regulations have an impact on this rule.

Surrounding State Programs

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

DATCP received comments from the Wisconsin Legislative Council Rules Clearinghouse and considered them. It adopted the suggestion to change ATCP 134.05 (4) (a) from "... to pay the landlord's actual cost, up to \$20 \$25..." to read "... to pay the landlord's actual cost, ~~up to \$20~~ the amount specified in s. 704.085 (1) (a), Stats.,..." The Clearinghouse suggested the change to reduce the need to conduct rulemaking in the future should the Legislature change the amount again.

DATCP held a Web Ex public hearing on September 17, 2020, and no one attended.

After the hearing, DATCP accepted formal written comments until September 25, 2020. DATCP received no comments. An internal committee approved the Clearinghouse recommendation.

Analysis and Supporting Documents used to Determine Effect on Small Business

No analysis has been conducted. The statute mandates the change to the rules. Therefore, the rule will not have any effects that the existing law would not already impose.

Effect on Small Business

Many of the landlords affected by this rule are “small businesses.” However, because the change permits landlords to charge, at present, prospective tenants \$5 more for credit reports, the rule change will not adversely affect landlords. In addition, the change is mandated by statute, so the rule must be changed.

A complete regulatory flexibility analysis is attached.

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Where Comments May Be Submitted

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1 **SECTION 1.** ATCP 134.05 (4) (a) is amended to read:

2 ATCP 134.05 (4) (a) Except as provided under par. (b), a landlord may require a prospective
3 tenant to pay the landlord's actual cost, ~~up to \$20~~ the amount specified in s. 704.085 (1) (a),
4 Stats., to obtain a consumer credit report on the prospective tenant from a consumer reporting
5 agency that compiles and maintains files on consumers on a nationwide basis. The landlord shall
6 notify the prospective tenant of the charge before requesting the consumer credit report, and shall
7 provide the prospective tenant with a copy of the report.

1 **SECTION 2. EFFECTIVE DATE:** This rule takes effect on the first day of the month
2 following publication as provided in Wis. Stat. s. 227.22 (2).

Dated this _____ day of November, 2020.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION