

# LANDLORD-TENANT PRACTICES

## *Unfair Rental Practices*

The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) regulates unfair and deceptive business practices. DATCP has adopted a rule to protect residential tenants against unfair rental practices by landlords. This rule is found in Wisconsin Administrative Code chapter ATCP 134. Rule violators may be prosecuted, and there is a private remedy for tenants.

### **Coverage**

ATCP 134 applies to nearly all of the 600,000 residential rental units in the state. However, it does *not* apply to:

- Hospitals, institutions and similar care institutions.
- Hotels, motels and similar facilities occupied on a transient basis.
- Government-owned and operated facilities.
- A dwelling unit operated by a fraternal or social organization solely for its members.
- A dwelling unit furnished free of charge.
- A dwelling unit occupied, under a real estate sales contract, by the purchaser of the dwelling unit.
- A dwelling unit occupied by a tenant engaged in commercial agricultural activities on the premises.

### **Rental Agreements**

- ATCP 134 does not *require* a written rental agreement. But if there *is* a written rental agreement, the landlord must give the tenant a copy.
- A rental agreement may *not* do any of the following:
  - Authorize the landlord to evict a tenant, except by the eviction procedure prescribed under Wisconsin Statutes chapter 799.
  - Accelerate rent payment obligations when a tenant fails to pay rent, or waive the landlord's obligation to mitigate damages by re-renting.

- Require a tenant to pay the landlord's attorney fees.
- Relieve the landlord from liability for the landlord's negligent acts or omissions, or impose liability on a tenant for damages outside the tenant's control.
- Waive the landlord's maintenance obligations under Wisconsin Statutes chapter 704, or under other applicable law.

## **Nonstandard Rental Provisions**

- The following provisions, if included in a rental agreement, must be contained in a separate written document entitled NONSTANDARD RENTAL PROVISIONS:
  - Any agreement expanding the landlord's normal rights of entry to the dwelling unit.
  - Any agreement expanding the normal reasons for which the landlord may deduct from the tenant's security deposit (see below).
  - Any agreement giving the landlord a lien on the tenant's personal property.
- The landlord must specifically discuss these nonstandard rental provisions with the tenant. If the tenant signs or initials them, it is presumed that the landlord has discussed them and the tenant has agreed.

## **Disclosure to Tenants**

Before the parties enter into a rental agreement, the landlord must disclose:

- The name and address of the landlord or the landlord's authorized agent.
- Uncorrected building code or housing code violations.
- Specified defects related to water supply, plumbing, heating or electricity.
- Structural or other conditions that pose a substantial hazard to tenant health or safety.

## **Earnest Money Deposits**

- A landlord may demand an "earnest money" deposit in return for considering a rental application or holding a dwelling unit for a prospective tenant. Before accepting an "earnest money" deposit, the landlord must identify the specific dwelling unit being "held."
- A landlord must refund an earnest money deposit if any of the following occurs:
  - The landlord rejects the rental application.
  - The applicant withdraws the application before the landlord approves it.
  - The landlord fails to accept the application within 3 business days after accepting the deposit, or within a longer period (not more than 21 days) agreed in writing.

- If the parties enter into a rental agreement, the landlord must do one of the following with the earnest money deposit:
  - Return it to the tenant.
  - Apply it as rent or as a security deposit.
- If a prospective tenant fails to enter into a rental agreement after being approved for tenancy, the landlord may withhold from the earnest money deposit.
  - The landlord may withhold the actual costs and damages that the landlord incurred because the prospective tenant failed to enter into a rental agreement.
  - The landlord may not withhold for lost rents unless the landlord makes a reasonable effort to minimize the losses by re-renting the premises.

### **Credit Check Fees**

A landlord may require a prospective tenant to pay a “credit check” fee to cover the landlord’s actual cost to obtain a credit report on the prospective tenant.

- The landlord may charge the fee only for a credit report obtained from a national consumer credit reporting agency.
- The fee may not exceed \$20 or the landlord’s actual cost, whichever is less.
- The landlord may not charge the fee if the prospective tenant gives the landlord a credit report, from a national consumer credit reporting agency, that is not more than 30 days old.
- The fee is *not* considered an “earnest money” deposit.

### **Security Deposits**

If a landlord requires a tenant to make a “security deposit” (including any rent payment in excess of one month’s prepaid rent), the following requirements apply:

- The landlord must give the tenant notice and an opportunity to document pre-existing damages.
- The landlord must offer to give the tenant, upon request, a list of damages charged to the previous tenant’s security deposit. The landlord need not disclose the identity of the

preceding tenant, or the amount deducted from that tenant's security deposit.

- Within 21 days after the tenant "surrenders" the premises, the landlord must return the security deposit or account for all amounts deducted. ATCP 134 clarifies when "surrender" occurs, and thus when the 21-day period starts.
- The landlord may deduct only for *damages to the premises, or for unpaid rent or utilities*. The rental agreement may authorize other deductions (see *Nonstandard Rental Provisions* above).

## Repair Promises

- If a landlord promises to make specific repairs or improvements, the landlord must specify intended completion date or time period.
- Repair promises made before the rental agreement must be in writing.
- The landlord must complete repairs on time, or explain any unavoidable delays.

## Cash Receipts

**A landlord must give a tenant a receipt for any earnest money deposit, security deposit or rent payment that the tenant gives in cash. A landlord need not give a receipt for a payment made by check, unless the tenant requests a receipt.**

## Unauthorized Entry

A landlord has a *limited* right of entry to a tenant's dwelling unit. A landlord must *always* announce before entering. With certain exceptions:

- The landlord may enter only to inspect, make repairs or show the premises.
- The landlord must give at least 12 hours prior notice.

Exceptions apply if:

- The tenant requests or agrees to the entry.
- There is a health or safety emergency.
- The tenant is absent, and the landlord reasonably believes that entry is necessary to protect the premises from damage.
- The rental agreement contains different entry provisions (see *Nonstandard Rental Provisions*

above).

## **Prohibited Practices**

A landlord may not:

- Advertise or rent condemned premises.
- Enforce an automatic lease renewal unless the landlord reminds the tenant 15-40 days prior to the renewal date.
- Use “self-help” eviction. A landlord may not exclude, forcibly evict or constructively evict a tenant other than by an eviction procedure specified in Wisconsin Statutes chapter 799.
- Confiscate or prevent access to a tenant's personal property.
- Evict a tenant because the tenant has reported a rule or housing code violation, joined a tenant association, or asserted any right specifically guaranteed to tenants by law.
- Fail to deliver possession to a new tenant, except for reasons beyond the landlord's control.

## **Relationship to Local Housing Codes**

ATCP 134 is not a housing code. But ATCP 134 reinforces local housing codes in the following ways:

- It prohibits landlords from renting condemned premises.
- It requires landlords to disclose uncorrected housing code violations and other conditions that threaten tenant health or safety.
- It prohibits landlords from evicting tenants in retaliation for reporting housing code violations.
- It prohibits rental provisions that purport to waive the landlord's maintenance obligations.

## **ATCP 134 does *not*....**

ATCP 134 does *not* do any of the following:

- Regulate rent levels.
- Establish required standards of maintenance (ATCP 134 is not a statewide housing code).
- Reallocate maintenance responsibilities.

- Authorize tenants to withhold rent or “repair and deduct.” However, Wisconsin Statutes section 704.07 gives tenants a qualified right to move out or partially withhold rent for conditions affecting habitability.
- Require written rental agreements.

## **Rule Background**

ATCP 134 is a general order (rule) adopted under Wisconsin’s Unfair Business Practices Law, Wisconsin Statutes section 100.20.

- DATCP conducted a major landlord-tenant study at the request of the Legislature. DATCP published its findings in a *Landlord-Tenant Report* dated December 1, 1978. DATCP later adopted ATCP 134 based on that report.
- DATCP adopted ATCP 134 effective May 1, 1980 (DATCP Administrative Docket No. 1408).
- DATCP amended ATCP 134 effective January 1, 1999 (DATCP Administrative Docket No. 97-R-3).

## **Rule Enforcement**

### **Private Remedy**

A tenant who suffers a monetary loss because of a landlord’s violation of ATCP 134 may sue the landlord under Wisconsin Statutes section 100.20(5), and may recover twice the amount of the loss, together with costs and attorneys fees.

### **Injunction and Restitution**

DATCP may seek a court order under Wisconsin Statutes section 100.20(6), enjoining violations of ATCP 134 and ordering the landlord to pay restitution to tenants. The Department of Justice or a district attorney may represent DATCP in court.

### **Civil Forfeiture**

Under Wisconsin Statutes section 100.26(6), DATCP or any district attorney may commence a

civil forfeiture action against a landlord who violates ATCP 134. The court may impose civil forfeitures of up to \$10,000 per violation. The Department of Justice or a district attorney may represent DATCP in court.

## Criminal

Under Wisconsin Statutes section 100.26(3), a landlord who violates ATCP 134 may be fined up to \$5,000 or sentenced to as much as a year in jail, or both. DATCP may ask a district attorney to initiate a criminal prosecution.

## Selected Court Cases

*Baierl d/b/a Supreme Builders v. McTaggart*, Wis. Supreme Court, Case #98-3329 (2001).

- Because a lease contained a provision specifically prohibited by ATCP 134, the landlord could not enforce the lease against the tenant. The court declined to sever the illegal provision and enforce the rest of the lease, because that would undermine the policy behind ATCP 134.

*Armour v. Klecker*, 169 Wis. 2d 692 (Wis. Court of Appeals, 1992).

- A landlord may withhold a security deposit only if the withholding is justified under ATCP 134. If the withholding is not justified under ATCP 134, it is no defense that the landlord thought it was justified.
- If a court determines that landlord violated ATCP 134 by improperly withholding a security deposit, the court must award double damages (twice the amount improperly withheld), plus costs and attorneys fees.

*Moonlight v. Boyce*, 125 Wis. 2d 298 (Wis. Court of Appeals, 1985).

- Under ATCP 134, landlord was required to return tenant's security deposit (or a statement of claims against the deposit) within 21 days after tenant vacated premises, even though tenant failed to leave forwarding address as required by lease. (ATCP 134 requires landlord to send deposit to tenant's last known address.)
- If a landlord fails to return a security deposit in compliance with ch. ATCP 134, the tenant is entitled to recover twice the amount of the deposit pursuant to Wisconsin Statutes section 100.20(5), regardless of the amount of damages the landlord may recover on a counterclaim.
- Attorneys fees awarded under Wisconsin Statutes section 100.20(5) include fees incurred in proving claim under ATCP 134, as well as fees incurred in litigating appeal of trial court decision on that claim. However, they do not include fees incurred in litigating landlord's separate counterclaim for damages.

***Paulik v. Coombs***, 120 Wis. 2d 431 (Wis. Court of Appeals, 1984).

- A tenant who prevails on a claim under ATCP 134 is entitled to double damages and reasonable attorneys fees related to that claim, pursuant to Wisconsin Statutes section 100.20(5), even if the tenant does not prevail on counterclaims for damages brought by the landlord.
- The fact that a tenant prevails on a claim against a landlord under ATCP 134 does not prevent the landlord from asserting a counterclaim against the tenant.

***Shands v. Castrovinci***, 115 Wis. 2d 352 (Wis. Supreme Court, 1983).

- Wisconsin Statutes section 100.20(5), which provides for double damages and attorneys fees, is intended to encourage attorneys to pursue tenant claims under ATCP 134 where monetary recovery would not otherwise justify legal action. In addition to enforcing individual rights, private actions deter impermissible conduct by landlords and augment limited state enforcement resources.
- Attorneys fees under Wisconsin Statutes section 100.20(5) include fees for appellate court litigation as well as trial court litigation.
- Tenants are entitled to attorneys fees under Wisconsin Statutes section 100.20(5), even if they are represented at no charge by legal services organization. Legal services attorneys should be compensated at the same rate as private attorneys.

***Cacchione v. DATCP***, Dane County Circuit Court, Case No. 81-CV-2467 (1981).

- Wisconsin Statutes section 100.20 is not an unconstitutional delegation of legislative authority.
- DATCP had authority, under Wisconsin Statutes section 100.20, to adopt ATCP 134.

***Three & One Co. v. Geilfuss***, 178 Wis. 2d 400 (Ct. App. 1993).

- Tenants whose pets habitually urinated and defecated on carpet committed waste, regardless of whether the tenants intentionally permitted their pets to do so. Unreasonable conduct, not intent, is the standard for waste.
- Landlord was entitled to double damages for waste, pursuant to Wisconsin Statutes section 814.19(2). But double damages remedy applies only to waste, not unpaid rent or late payment charges.

- Landlord failed to provide notice of security deposit deductions within 21 days, as required by ATCP 134. Under Wisconsin Statutes section 100.20(5), the tenant was therefore entitled to recover twice the amount of the deposit even though the deductions exceeded the amount of the deposit. The landlord's counterclaims for damages were offset against the tenant's double damages award.