

**Subletting and Assignment: a Basic Primer
on Dealing with a Difficult Problem
By Scott Freedman, Attorney at Law**

For San Francisco landlords, a tenant subletting a rental unit often presents difficult problems. Not only is the basic state law often difficult to understand, but we have added complexities from the S.F. Rent Control Ordinance and the Rent Board's rules and regulations.

Most rental agreements provide that tenants may not assign or sublease their rental units without the prior approval of the landlord. If the agreement contains no such language, the tenant may assign or sublease without the landlord's consent. This is state law. Any landlord in this situation should seek legal assistance to determine whether such a requirement can be added as a new condition of the tenancy.

If a Tenant Asks For Approval

More often than not, tenants comply with their rental agreement and advise their landlords in advance that they wish to have someone move in with them, or that a co-tenant is moving out and they would like to select a new roommate.

Although beyond the scope of this article, if a tenant requires the assistance of a caretaker, legal advice is necessary and a proper written agreement should be prepared to protect against a claim that the caretaker is a tenant. In addition, if you decide you want a resident manager for your building, you also need to get legal advice before that person moves in or before you make an arrangement with an existing tenant.

Putting those concerns aside, when a tenant requests permission to sublease, it is very important that you do two things: First, it is critical to know who is living in your building. Persons with behavior problems should be screened out, and special attention paid to those with problematic credit histories. Professional property managers always want to know who is living in their buildings. It is very risky to bury your head in the sand and pretend you don't know that a subtenant has moved in! As a property owner, your potential liability is not limited to the actions of those you actually know to live there. [AOA members can download

Remember, you have one opportunity to get the information you need. If the tenant makes the request orally, ask that it be put in writing. Rent Control Ordinance protections begin once a tenant has made a written request.

When you have a written request, you should then immediately ask that the new person complete your standard rental application (which you should enclose with your response), pay you the permitted amount for a credit check, and indicate that no one should move into the unit until after you have had an opportunity to review the application, credit report and contact references. The Rent Board Rules and Regulations give you five business days from the date you receive the information to review it and respond to the applicant and existing tenant.

Second, once you've approved the new person, it is strongly suggested that the new occupant sign a subleasing agreement—also available for download on the SPOSFI website. [AOA members can download the Roommate Addendum from www.aoausa.com]. If you do ultimately approve the new subtenant, it is imperative that you never accept rent from that subtenant! Doing so may create a direct tenancy relationship, with all the associated rights.

If your time to approve or reject the proposed occupant has lapsed, if the tenant and subtenant fail to sign a subleasing agreement, or your requests for an application are ignored or refused, serve a 6.14 Notice (also available on www.smallprop.org). It can't hurt, and it just might help. And if you don't know the name or the full name of the new occupant list them by any name you know (Mary) or describe the person (i.e., a tall blond who drives red sports car).

If you choose not to approve the proposed new occupant, you'd better have a very good reason. The Rent Ordinance stipulates that a landlord's approval not be "unreasonably withheld." Contacting prior landlords, while at times difficult, is often the best way to find out if you may encounter a behavior problem. Serious behavior patterns can support a refusal to allow occupancy. Credit issues are more difficult. If the proposed new occupant is not creditworthy, your response may depend on whether he/she is a one-for-one replacement or a relative (i.e. sibling, domestic partner, etc.). You may be able to refuse to approve a non-creditworthy replacement tenant, but you should seek legal counsel to determine whether there are other alternatives before doing so. This is because you may be forced to accept a non-creditworthy relative if "that person will not be legally obligated to pay some or all of the rent to the landlord." (Rent Ordinance Section 37.9(a)(2)(B)).

If A New Person Moves In Without Your Consent

There are a variety of possible responses to the situation where a person has moved in despite your request for an application, or has just moved in without anybody informing you at all, and you learn of the new occupancy on your own.

When you first learn that there may be a new person living in the unit, you must act quickly. You have a decision to make. What you do—or don't do—will govern what you will be able to do in the future.

If you do nothing, you run these risks: 1) the new tenant may claim that you have waived any right you may have to raise the rent when the last original tenant moves out; 2) you may be deemed to have approved of the occupancy with the same rights and obligations as your existing tenant; or 3) you will be stuck with this tenant and no rental agreement, which is not a good situation.

So you should do something. At a minimum, serve a proper 6.14 notice. This form puts the new person on notice that he/she does not have the same protections and status as the original tenants. The service of the 6.14 notice may prevent or blunt any arguments that you have waived your right to raise the rent when the last original tenant moves out or, potentially, to evict. The Costa Hawkins Rental Housing Act and the Rent Control Ordinance both give you the right to raise rents to market value when the last original tenant has vacated your unit or no longer permanently resides in the unit. However, these rights can be waived, or compromised, if you fail to take proper action upon notice of a new occupant.

You also have the right—if you have a rental agreement that requires your consent to any assignment or subletting—to assert that your rental agreement has been breached by the new person moving in prior to your consent being given. To do this you should obtain legal counsel to advise you and prepare any needed notices. You may have the right to evict, or to require that the new person move out until a rental application is submitted and you've had an opportunity to review the application (and preferably, get a subleasing agreement signed). If you've been diligent, careful, and have acted promptly, an eviction action following non-compliance with the three day notice is more likely to be successful.

What course you choose may ultimately turn on how much money you want to spend on lawyers, and how much risk you're willing to accept. An attorney should be consulted with respect to these choices. However, it takes very little time or money to make a written record and to serve the 6.14 notice. There is no liability for serving the notice, so you needn't worry about serving someone who says "oh, I'm only visiting." Make sure you keep a record of the date and a description of the person you've served. With these actions, and a watchful eye, you'll be better prepared for any new occupants coming your way.

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