LANDLORDS & THE LAW

"New Laws and Other 2010 Updates"

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Medicinal marijuana, Megan's Law, bedbugs, firearms and the new management requirement by the California Franchise Tax Board. (The requirement of the 7% tax withholding is for non-California residents only - owners who live in California are exempt from this requirement.) In addition, a higher percentage is withheld for corporations, limited liability companies, and partnerships.
Read below to see how these new laws will affect you.

Unlawful Detainer:
Controlled Substances and Firearms
Existing law establishes when a tenant is guilty of an unlawful detainer and includes illegal drug possession and/or possession or use of illegal weapons. In these cases, a city prosecutor may file an unlawful detainer on the owner's behalf against any person who is performing any of the illegal actions listed above. This law has been a pilot program in specified cities and counties. ***A word of advice: Do not let the city attorney handle your unlawful detainer.*** You need to take action way before they get involved.

60-Day Termination Notice
This law deletes the January 1, 2010 sunset date and thereby extends the 60-day termination notice requirement indefinitely. The 60-day notice continues to be in effect only in those cases where the tenant has been in possession for a year or longer. One new change is that if a new roommate moves in, the clock starts again for counting the one-year requirement. To make sure on this, have the new roommate, if approved actually sign an addendum to the existing rental agreement, or create a new agreement with the remaining tenant and the new tenant.

Property Management
Tax Withholding
California, through the California Franchise Tax Board (FTB), has come up with the idea of levying a tax on rental income from non-California-resident rental property owners. Further, property managers have to, in effect, "collect" the taxes. California's rationale for this new law is quite clear: basically, if you live outside of the state but derive income from your California rental property, then California will impose a tax on that activity – even though you live elsewhere.

This is another layer of bureaucracy and additional work imposed upon property managers to act as a quasi-collection agency on behalf of the non-California-resident owner and to submit the correct sum to the FTB.

The property manager is required to withhold a percentage of the gross income after management fees and other charges are taken into consideration. The tax begins on

rental property income in excess of $1,500 per year, i.e., on almost all rental property in California, and breaks down as follows: individual non-residential owners – 7%; corporations, partnerships, LLCs, trusts, and banks – 10.84%.

The property management company must comply with this new rule. If it does not, the agent will be liable for penalties and interest. Not timely submitting the required forms subjects the non-resident owner and the property manager to additional fees and penalties.

Property managers need to determine their clients' actual residency. A post office box located in California is not going to work. At least two software programs are available to break down rental properties as owned by non-California-residents: (a) non-exempt non-resident with no waivers; (b) non-exempt non-resident with expense waivers (Form 589). The good news is that most owners of San Diego County residential rental properties are residents of California. As a result, they are entitled to file an exemption (Form 590) from the requirement to withhold the required taxes. As soon as the exemption form is filed with the FTB the owner will be exempt from the withholding, and that will not change unless circumstances change, e.g., the owner moves to another state.

If the owner does not qualify for the exemption, it behooves the property manager to withhold the correct amount and deposit it on at least a quarterly basis. The quarterly periods are January 15, April 15, June 15, and September 15. The FTB does, however, allow monthly deposits. Property managers are encouraged to modify their software to compute the withholding based on the gross income and calendar the quarterly due dates set forth above.

The California Franchise Tax Board has numerous forms with instructions on this new tax, which took effect January 2010. All property managers are urged to go to www.ftb.ca.gov to download the appropriate forms and instructions.

This is largely a tax issue and you are urged to consult with your tax professional with respect to compliance. The property manager may want to establish a new trust account for just this purpose, or at least carefully segregate the gross income, allowable expenses, and the net amount to be forwarded to the FTB monthly or quarterly with Form 952.

In addition, the California Department of Real Estate has created the following sample addendum to a standard management agreement, designed for the protection of the property manager: *"_____ ("Principal") authorizes _____ ("Property Manager") to remit trust funds of the Principal – which funds may consist in whole or part of rent or rents and other taxable income collected for the Principal by the Property Manager – to the California Franchise Tax Board as and for withholding taxes, when the Principal is subject to the Non-Resident Withholding Requirement under the statutory mandate of California Revenue and Taxation Code sections 18662, 18664, 19666, 18668, and 17951."*

Megan's Law: Sex Offenders
In Your Apartment Community

As a property owner or manager, you are probably all too familiar with the unintended effects that the Megan's Law web site, which makes available the home address of registered sex offenders, has had on the rental housing industry. Residents turn to you, their landlord, seeking protection from registered sex offenders living on your property, only to discover that your hands are tied. While it is your desire to protect your tenants (and a legal requirement to protect persons "at risk"), you are forbidden to use the Megan's Law information for any purposes relating to housing.

Denying housing for a sex offender or evicting one from an occupied unit would be a violation of federal discrimination laws, putting the property owner or manager at risk of being sued and/or fined a minimum of $25,000.

May the resident vacate upon discovery of the sex offender next door? No. But show a concern for the resident and ask them to let you know if there is any abnormal, unusual or threatening behavior by the sex offender. The fact that you may not discriminate against a sex offender in residential housing does not mean he has free rein to do what got him convicted in the first place, and that is, a sex crime requiring registration.

Bedbugs

Bedbugs have been discovered in one of the units of your property. What, if any, are your and the tenant's rights and responsibilities?

Answer: Pests, including bedbugs, are a habitability issue. Accordingly, the owner or manager needs to deal with it promptly. A qualified pest control operator may be able to offer an opinion as to the source of the bedbugs. If fault can be determined, the owner may want to recover some costs from the responsible resident. However, even if it is a particular resident's fault, if it spreads to other units through the lack of prompt action by the owner, the owner may be liable to his other residents.

Use a bedbug addendum to make it easier to prove the tenant's liability if the tenant has not complied with the duties listed in the bedbug addendum.

Medicinal Marijuana and Pot Clinics

In the mid-1990's, California passed a law that legalized the use of marijuana for medicinal purposes. The requirements include a doctor's note (they come in a standard form), and the "patient" needs to make sure they keep the amount in their possession within the quantity set forth in the doctor's prescription.

However, a conflict has arisen between California aw and federal law enforced by the Drug Enforcement Administration (DAEA). State law to the contrary notwithstanding, the federal government may seize property in response to activities conducted therein which the federal law deems illegal.

The 2005 Federal Supreme Court case of Gonzalez v. Raich made it clear that the feds have the authority under the Commerce Clause to enforce federal drug laws. Still, the pot clinics are taking the position they are complying with California law, which is set forth in their lease agreement. The lease omits the word compliance with "federal" law and pot clinics are seizing this as an opportunity to circumvent the DEA's position.

To be sure, the status of the medicinal marijuana law first enacted in 1996 remains at risk. While clinics are subject to conflicting laws, their future remains uncertain. So long as the DEA is going after the dispensaries as well as people that have pot in their units, the matter will eventually end up in federal court for a resolution of the conflict between California and federal law.

For over 25 years, Smith & Associates has exclusively represented San Diego County's owners, property management companies, and apartment managers in the unlawful detainer process. With a history of thousands of successful unlawful detainers, we speak with experience on every facet of the legal procedure. See why San Diego County's experienced property managers prefer Smith & Associates. Call Ted Smith for a free consultation. Smith & Associates, P.O. Box 80306, San Diego, CA 92138, Telephone: (619) 299-1761; Fax: (619) 297-9724 or ted@outyougo.com.