

2012 New Year's Resolution: Sign a Manager's Agreement **By Dale Alberstone, Esq.**

Most everyone hopes that 2012 will bring about world peace, a strong economy, more jobs and other important things like that.

As the legal writer for the Apartment Owners Association of California, my wish and 2012 New Year's Resolution for AOA members is more modest, but nevertheless important: ***Prepare and sign a written employment agreement with each of your resident managers.***

In fact, this year it is even more important to have a signed agreement than it was in prior years. Here is why: In 2010, Governor Schwarzenegger (fortunately) vetoed a bill authored by State Assemblyman Bill Monning which would have assessed a penalty against employers (such as owners and management companies hiring resident managers) for twice any minimum wages which were not paid. This month, January 2012, Assemblyman Monning will submit a similar bill (AB 197) to the more liberal Governor Jerry Brown for the Governor's approval.

Existing law only allows for a penalty of one times the unpaid wages, whereas the new bill doubles the penalty as liquidated damages. If Governor Brown does not veto the bill, it will automatically become law, as it has already been approved by the California State Legislature. Thus, under the bill, if a manager can prove that he/she is entitled to back wages of say, \$50,000 (not an uncommon claim), the owner or management company who failed to pay the minimum wage would owe an astonishing \$150,000.

Overview of Manager Law

Readers of this column know from my past articles that the regulations of the California Industrial Welfare Commission (IWC) authorize substantial sanctions to be imposed on an owner who does not have a properly drafted, signed employment contract with his or her manager. Of those, ***one of the most oppressive penalties is that if the owner does not obtain the manager's signature on the agreement, the reduced or free rent the owner or management company gave the manager may not be credited (i.e., offset) against the wages the manager earned, but the owner did not pay, during the preceding three or four years.*** Thus, the employer will then have to write a check to the manager for what may amount to tens of thousands of dollars for back wages, plus penalties.

Based on numerous telephone calls I receive from AOA members who are brought before the Labor Commissioner or Superior Court each year, it marvels me as to how many owners still neglect having their managers sign written agreements.

Throughout 2012, the minimum wage for all employees in the State of California, including resident managers, will be \$8.00 per hour. The allowable rental offset against wages, as discussed hereafter, is \$451.89 per month for a single manager, and \$668.46 per month where a couple is employed. The maximum allowable rent which may be charged to a manager whose residence in the apartment complex is a required condition of employment is \$451.89 per month for a single manager, and \$668.46 per month for a couple.

Incidentally, resident managers are employees, not independent contractors, of the management company or the owner.

The General Rules

Here are the General Rules: All resident managers are governed by so-called minimum wage and hour laws which require that they be paid at least \$8.00 per hour for each hour worked. Managers who work more than 40 hours per week, 8 hours per day, or more than 6 consecutive days, are entitled to receive "time and one-half" at \$12.00 for each excess hour. Double time payment may also be required in some circumstances.

In addition, if one or more managers are required to live at the property as a condition of employment, their rent may not exceed \$451.84 or \$668.46 per month, depending if one or two managers are hired.

Minimum Wage Offsets

There are limited exceptions to the general rule that a manager must actually be paid wages for the hours he or she works and cannot be charged more than the stated rent.

The exceptions involve a reduction in the compensation owed in exchange for the owner providing free or reduced rent living quarters to the manager.

Much of the remainder of this article will explain those exceptions, but **bear in mind that the exceptions generally will not apply unless a properly drafted employment agreement is signed by both the manager and the owner or the owner's management company.**

16 UNITS OR MORE

If an apartment building consists of 16 rental units or more, the owner is required to have a "responsible person" residing on the premises. Usually that person is a manager, but he or she could also be a caretaker or resident janitor. Unless an exception applies, the owner must compensate the individual in accordance with the minimum wage General Rule set forth above.

Exception No. 1: Wage Reduction

An owner may reduce the wages owed by the lesser of (1) two thirds the ordinary rental value of the unit, or (2) \$451.89 per month if one manager is employed, or \$668.46 per month if a couple is employed, such as a husband and wife management team. An owner may not offset more than \$451.89 per month or \$668.46 per month, respectively, from the manager's minimum wages even though the rental value of the apartment unit might be substantially more.

For example, if the rental value for the unit is \$1,500 per month (but the manager is not charged any rent), and the manager is employed to work 60 hours each month, he is entitled to receive \$28.11 a month from the owner. This is computed as follows: 60 hours at \$8.00 per hour = \$480, which is the minimum wage due. A rent reduction of \$451.89 is proper as the lesser of \$451.89 and two-thirds the ordinary rental value of the unit (which would be \$1,000). Deducting \$451.89 from \$480 leaves a balance due of \$28.11 per month.

The law is similar where a couple is employed to manage the complex. In that case, the maximum wage offset is the lesser of \$668.46 per month and two-thirds the rental value of the unit. Thus, if the ordinary rental value of the unit is \$1,500 per month (but no rent is paid) and the husband and wife managers collectively work 60 hours a month, the owner need not pay the couple any wages. This is determined as follows: 60 hours at \$8.00 per hour = \$480, which is the minimum wage due. A wage reduction therefrom of up to \$668.46 is proper as the lesser of \$668.46 and two-thirds the value of the unit.

This Wage Reduction exception does not apply absent a signed and legally sound agreement which is signed by the manager.

Maximum Rent: The maximum rent that an owner may charge a manager for a unit is actually a corollary to Exception No. 1, rather than an independent exception. But because the two are so similar, I combine their discussion here.

No matter how much of the minimum wage the owner pays the manager of a 16 or more unit building (even if the owner pays the full minimum wage), the owner may not charge the manager(s) more than \$451.89 or \$668.46 per month, respectively, for the manager's unit. The reason for these restrictions is that the IWC and State Legislature have decided that if a manager is required to live at the premises, he or she has given up some personal freedom. In exchange for this confinement, the owner is limited as to the amount that he can charge the manager for the unit.

Typically, an owner will offer the manager a reduction in his or her monthly rent in exchange for managerial services. While a rent reduction is proper, the maximum rent (as stated above) which may be charged for the manager's unit is the lesser of \$451.89 or \$668.46 a month, or two-thirds the ordinary rental value of the unit being lived in.

There is one qualification to the "Maximum Rent" rule, which I call the "Check Exchange" qualification.

Check Exchange: Under the Labor Code, an owner may charge up to two-thirds of the ordinary rental value of the unit without regard to the \$451.89 and \$668.46 limitations, provided that separate checks for the minimum wage payment and the rent are exchanged between the owner and the manager. In order to take advantage of this exception, the owner must pay the manager the full minimum wage (\$8.00 per hour for all hours worked) by one check and the manager must pay the owner an amount not exceeding two-thirds the rental value by a separate check. Under this arrangement, the owner is not permitted to offset the minimum wage he owes by the rent due from the manager. The theory is that payments for labor are absolutely required regardless of whether the manager pays the agreed rent.

UNDER 16 UNITS

If the apartment building has under 16 units and the manager's employment agreement is properly prepared so that the manager is not required to live on the premises as a condition of his employment, then the \$451.89 and \$668.46 maximum rent limitations discussed previously are not applicable. In such an event, the owner may charge the manager the full amount for the unit, provided that the owner separately pays to the manager the full minimum wage which the manager earns based on the number of hours worked.

For example, if the value of the unit is \$1,500 and the manager works 60 hours a month, the owner may charge \$1,500 as rent provided that he also pays the manager \$480 for services rendered during the month.

However, if the manager is required to live in the "under 16 unit" building as a condition of employment, then the \$451.89 and \$668.46 wage and rent limitations discussed in the Maximum Rent section do apply just as though the building contained 16 or more units.

The \$2,772 Manager

Managers who receive a salary of at least \$2,772 per month are not regulated by the wage and hour laws if (but only if) the manager is required to exercise discretion and independent judgment in performing his duties and meet other specified criteria as promulgated by the IWC.

Such highly compensated managers (who usually reside in very large apartment complexes) are excluded from the protection of the basic wage laws. In practice, the \$2,772 manager exception rarely applies.

“On-Call” Claims

After being terminated, disgruntled managers often seek compensation from their former employer under a theory that since they were available 24 hours a day on an “On-Call” basis, they should receive compensation for all of that time, even though they were not actually performing services throughout the period.

Recently, the California Court of Appeal disposed of that contention in Isner v. Falkerberg (160 Cal.App. 4th 1393), by holding that the owner or management company need only pay the manager for the “time spent carrying out assigned duties.” Thus, hours spent sleeping, cooking, eating, talking on the telephone, watching television, playing computer games and engaging in other personal activities are not compensable even though the manager may be “waiting” for a repairman to arrive or to exhibit a vacant unit to a prospective tenant.

Raising a Manager’s Rent In a Rent Controlled Building

A discussion of the rules and limitations concerning rental increases of apartment managers residing in rent controlled units (revised July 2011) is beyond the scope of this month’s article. Owners wishing information on that topic may review the City of Los Angeles’ “Resident Managers as Tenants” publication which may be found at the web site: www.lahd.lacity.org. Type in “Resident Managers as Tenants” in the “Search” box, and then press your “Enter” key. Then click on “RSO Publications and Forms.” Then scroll down the page and click on “Resident Managers as Tenants.”

Recommendations

California's labor laws are exacting. The failure of an owner (or management company) to comply will expose him or her to tens of thousands of dollars as back compensation to the manager, as well as substantial civil penalties and potential criminal sanctions. In order to stay within the bounds of the various laws, I recommend the following:

- 1) Sign an Employment Agreement:** It is absolutely essential that every owner (and management company) who employs a resident manager enter into a written signed employment contract with that person. The specific provisions to include in the contract are highly technical, but the general requirements concerning the wage and hour laws are contained in this article. Incidentally, resident managers are employees, not independent contractors.
- 2) Review Your Existing Agreement:** If you already have an employment agreement, review it for consistency with the wage and hour laws for 2012. Many existing agreements need to be modified.
- 3) Post Manager's Name and Address:** Post the name and the address of the manager in charge of the apartment building. Also post the hours and days that the manager will be available for assistance if the manager has a fixed work schedule.
- 4) Keep Records:** Keep accurate records of all matters pertaining to the hiring days and hours

worked and firing of all managers.

5) Management Certification: Require the manager to record all hours that he or she works during any given month. Also require the manager to submit a written certification to the owner at the beginning of each following month setting forth the total number of hours that the manager worked that preceding month. That is the key to deterring an angry manager from later claiming that he/she worked more time than they actually did. (Such claims could expose the owner to a demand well over \$50,000 per year at \$8.00 per hour. The figure would be even higher if overtime pay and penalties were taken into account.) The law requires the owner/management company to maintain time records. It is important to do so.

6) Obtain a Copy of Minimum Wage Order MW-2007. The current wage and hour regulations for apartment managers can be obtained by calling the Department of Industrial Relations at 415-703-5070. Ask for MW-2007. (MW-2007 contains the abbreviated laws for 2012.) For a copy of the complete wage and hour publication affecting resident managers, ask for: "Public Housekeeping Industry Order No. 5-2001, effective July 1, 2003, as amended." The regulations may also be found on the Internet Website of www.dir.ca.gov/iwc. Click on "IWC Wage Orders" and then on "MW-2007" for the short version, or "#5-2001" for the full version.

Concluding Remarks

The key to complying with the wage and hour laws when employing a manager is that the owner obtains a signed written employment agreement and monthly certifications setting forth the number of hours that the manager worked. By doing so, an owner can avoid thousands of dollars of potential liability to the manager under the wage regulations. Better still, the contract will deter litigation. The manager's attorney is not likely to sue if he does not expect to win the case in any substantial way.

A handy "cut out" summary of the relevant 2012 wage and hour laws pertaining to resident managers appears on the next page of this magazine.

Breaking News Re: Laundry Leases

Just before this article went to press, a Los Angeles Superior Court judge sustained a demurrer (which is similar to a motion to dismiss) to a laundry owner's Complaint against Dadson Washer Service, Inc., thereby upholding the automatic renewal clause in Dadson's lease. I will discuss this matter in depth in the February 2012 issue of AOA Magazine.

Have a healthy and prosperous New Year!

Dale Alberstone is a prominent litigation and transactional real estate attorney who has specialized in real property law for the past 35 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.

Mr. Alberstone has been awarded an AV rating from Martindale-Hubbell, which is a registered certification of Reed Elsevier Properties, Inc. An AV rating reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity. His firm is rated A+ by the Better Business Bureau.

The foregoing article was written on December 1, 2011, and is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

Address correspondence to Dale S. Alberstone, Esq., ALBERSTONE & ALBERSTONE, 1801 Avenue of the Stars, Suite 600, Los Angeles, California 90067. Phone: (310) 277-7300.