

## **Returning a Security Deposit**

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This must be a particularly active time for relocating, since the past few weeks have brought a number of questions about security deposits. Specifically, callers want to know when they can withhold sums from a security deposit, and if the security deposit is exhausted by damage to the unit, when they can bring small claims actions. These are usually situations where the tenant is leaving voluntarily—another article will cover eviction situations.

Let me preface the general answer with a warning. About half the time this question is asked, the questioner has a "hidden" agenda. There are quotes around "hidden," because I can see it immediately and I suspect everyone else involved can too. So let me communicate a gentle warning: If your purpose in withholding from the security deposit is to punish the tenant for something unrelated to the condition of the unit, to recoup some expense incurred years before, or to take one last swipe at an unpleasant tenant on the way out the door, DON'T. The risks you take by violating the law and your rental agreement are not worth the momentary satisfaction you may enjoy from even this tiny expression of power. That is how the courts and juries see it—the powerful landlord holding the tenant's money, who requires the tenant to sue the landlord to recover what is rightfully the tenant's. So if you are thinking of withholding simply because you can—don't.

How do I know when the security deposit question is not legitimate? Usually when it is coupled with a laundry list of other wrongs—the tenant always paid late, his kids were disruptive, she left her wash in the laundry room for days, they complained about the condition of the unit a lot and annoyed the landlord. Sometimes the complaints are more specific—she sued me in Small Claims Court last year and won, they have filed a complaint (obviously unsubstantiated) with the Department of Fair Employment and Housing, they claimed my handyman took things from their unit, etc. These last are particularly dangerous because they mean that there is or has been a specific dispute between the landlord and tenant, and there is a specific motivation by the landlord to retaliate. Even if that is not the landlord's true motivation, it will be hard to convince a judge or a jury otherwise. In all of these situations, ask yourself whether the recovery from a withholding of the security deposit is worth even the threat of litigation and continuing disputes with the tenant. If you think it may be, then ask a landlord who has paid a few thousand dollars in legal fees and see what he or she says.

So, if you are tempted to withhold all or part of the security deposit and you are certain that it is not related to any other dispute you may have with the tenant, how do you know when and how much to withhold? The law, and almost every rental agreement I have ever seen that provides for a security deposit, limits withholding to any default in performance of the lease. That usually means damage to the unit beyond normal wear and tear. Callers usually want a pithy definition for what is normal wear and tear and what is not. I usually respond that it is like the Supreme Court and pornography—hard to define, but I know it when I see it. If the unit is in a condition that displays normal, everyday living, even what I call "hard living," it is not "damaged." If the walls are smudged or scratched or have nail holes for picture frames, the door jambs worn, towel racks loose, floors water stained, carpet wine-stained, even sinks chipped, this is probably not "damage beyond normal wear and tear." People mark walls in every day living, they hang pictures, they swing around doors and towel racks, they allow water to puddle in bathrooms, and they chip sinks with the odd pot or pan. But if there are hundreds of nail holes in the walls, door jambs knocked out of the walls, towel racks ripped from the walls stripping the screws, floors buckled after repeated flooding, gasoline stains in the carpet, sinks cracked through—all of which have happened to my rental property in the care of my tenants—we're talking damage beyond normal wear and tear. (In fact, we may even be talking about vandalism, which may be covered by landlord insurance.) Ask yourself if this is damage that could not happen in ordinary living, and you will come close to the right answer.

Remember that a security deposit is intended to cover any default in performance of the tenancy. If the tenant has left owing rent, or as a result of an eviction, you probably want to apply the security deposit first to damage to the unit, then any remaining to unpaid rent—the unpaid rent

is a lot easier to prove than the damage. You probably also want to keep photos and repair cost records for every unit for four years—until the statute of limitations expires—to be able to prove that you properly handled the security deposit.

At the time of vacancy, the landlord has three weeks to provide the tenant with an accounting, which must include receipts of work performed, or written estimates of work yet to be performed, of the amount required to repair damage beyond normal wear and tear, and a refund of any portion of the deposit that exceeds that amount. But beware! This reflects a fairly recent change in the law, and if your rental agreement predates that change, it probably provides for estimates and refunds within only two weeks—another reason to review your rental agreement yearly, and adopt more current forms if necessary.

What should you, the landlord, do if you are unable to complete the estimate process by the time the three weeks expires. Answer: send the tenant as much information as you have to justify the withholding of a sum that you believe will cover the damage. Include a refund of any excess. Explain that if the work costs less than you have estimated, it will be returned.

The next most popular question is where to send the refund. Believe it or not, many landlords seem to feel that if the tenant does not provide a forwarding address, the landlord does not have to refund the deposit! Wrong! Simply mail the items to the address of the unit—the tenant has forwarded his mail and will receive it in good time. If he doesn't, the reimbursement will be returned to you and you will keep it, sealed, until someone asks for it or we can safely determine that the tenant has no interest in recovering it. You have the postal-canceled sealed envelope to show that you sent it in good time.

What type of mail delivery is best? First class mail, no frills, unless the tenant has been a problem or is particularly difficult. In that case, first class is still adequate, but get a certificate of mailing from the post office to prove that you sent it within the three weeks.

So if the tenant was a problem and your history has tempted you to withhold the security deposit for the wrong reasons, return it happily with the full knowledge that you are free of the tenant forever, and he will continue to be a problem child for the rest of his life!

*The information contained in this article is not intended as legal advice. Always consult an attorney if you have a particular problem or question.*