

Kimball, Tirey & St. John LLP

Legal Alert

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Megan's Law Update (regarding sex offenders in rental property)

The recent death of teenager Chelsea King of Poway, California, is alleged to have been caused by a man who is on the state's "Megan's Law" sex offender registry. As a result, there is public outcry for legislators to do something to put in place better protections against such crimes. Many residential rental housing occupants are complaining to their landlords that landlord's must take action to screen out applicants who have a sex offense history and to evict residents whose names are listed on the registry.

Our offices have recently received numerous calls from concerned clients who wonder what to do. At Kimball, Tirey & St. John LLP we pride ourselves on being proactive by sending legal alerts on hot topics. Although we have sent legal alerts on Megan's law in the past and have archived information on our website, we felt it would be helpful to update information at this time. We are tracking proposed legislative changes regarding sex offenders and will send an additional alert if there is a statutory modification.

If you would like to read the current law (Penal Code section 290.4 and the sections following it), you may link to a California legislative information site through the Kimball, Tirey and St. John LLP web site at www.kts-law.com.

When the original Megan's law went into effect, four legal issues emerged: 1) does the landlord have a duty to determine whether or not an applicant is registered as a convicted sex offender; 2) can a landlord deny the application of a convicted sex offender; 3) can a landlord evict a resident for being a convicted sex offender once discovered; and 4) does the landlord have a duty to disclose to other residents the location of the convicted sex offender? The California legislature clarified the landlord's duty to determine whether or not an applicant is a registered sex offender when they passed Civil Code section 2079.10(a). It provided that all residential leases and rental agreements entered into on or after July 1, 1999, must contain a paragraph in 8-point type which informs the resident that he or she can access sex offender information. It specifically indicated that a Lessor is not required to provide information "beyond that contained in the notice" regarding the proximity of sex offenders. Thus, there is no indication in the law that a landlord must check on status or disclose information from the registry. The statutory duty is to inform the resident that the he or she can access the information. (Note that as of April 1, 2006, the required "Megan's Law" language in leases must contain a reference to the DOJ website rather than the previously required "900" number.)

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As far as the duty to deny an applicant because of a sex offense conviction or evict a current resident who is now discovered to be a convicted sex offender, the law is less clear. On the one hand, Megan's law states that the information on the registry may be used "only to protect a person at risk." It prohibits use of registry information for the purpose of denying housing. Violation of the code provides for damages, including a fine of up to \$25,000. On the other hand, a landlord has a duty under common law negligence principles to protect residents from known risks or risks that management should have recognized under the circumstances. Some landlords contend that they focus on the behavior of the registrant, rather than the fact that his name was on the registry, in order to assess risk. Others take the position that if the information on the sex offender did not come directly from the registry (e.g., the applicant disclosed it, the information came from a criminal background check that did not use the registry as a source, etc.), then the prohibition against use of the registry for the purpose of denying housing would not have been violated. Unfortunately, as of the most current update of this Legal Alert, we are not aware of any court in California having made a determination on this issue. (See a recent legal alert on our website about sex offenders and Jessica's law for a related case discussion.)

In any event, if a landlord chooses to take the risk of establishing a policy to deny housing to sex offender applicants, the argument that such a policy is reasonable should be supported by specific, detailed guidelines on the subject in the rental application, screening criteria and house rules. Although sex offenders are not considered to be a protected class under fair housing laws, all policies of any type should be applied consistently to all applicants and residents from the date of implementation of a new policy.

Whether there is a policy to deny sex offenders or not, if the rental application asks about a conviction and the registrant misrepresents his status, a landlord might consider arguing that the misrepresentation was a "material" breach of the contract as a basis for eviction or may decide to attempt to void the contract entirely – again establishing a possible basis for eviction. This argument should also be supported by an explicit statement of policy in the landlord's documentation. Note, however, that even if there is a legal argument and contractual support for the argument, it may be difficult to find a judge who will order an eviction when presented with these facts. Although KTS will vigorously represent our clients in any case which can be supported legally, ethically and factually, you can expect that our unlawful detainer intake department will caution you about the possibility of losing a case proposed to be filed on this basis.

What about the duty to disclose the presence of a convicted sex offender once he is identified? Some advocates may argue that knowledge of a resident's status gives rise to a duty to investigate further to determine the nature of the offense, how long ago it occurred, whether the person has re-offended, etc. In order to reasonably take action based on such distinctions, a landlord should again establish a written policy that addresses this issue in detail. Law enforcement agencies sometimes notify local residents when a "high risk" sex offender moves into a neighborhood. A landlord should consider whether law enforcement notification would make a difference in his or her policy. Note that there is also a provision in Megan's law that prevents harassment. Individual residents could be sued for interfering with a sex offender's rights under that clause.

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Clearly, each landlord needs to make a risk management decision regarding screening and eviction as they relate to Megan's law and sex offenders.

On another subject, if the sex offender is an employee, management should seek legal advice regarding the relevant rights and responsibilities of the parties. Megan's law prohibits denial not only of housing but of employment. Yet, the risk to residents is arguably higher from an employee who has access to units than from another resident. There may be a stronger argument for employee screening and termination based on sex offender status, but one must take care regarding potential "wrongful termination." Attorney Karl Schlecht in our Irvine office can assist with employment matters. He can be reached at (800) 564-6611.

Conclusion

The bottom line is that Megan's Law appears to have been written in such a way as to protect sex offenders from on-going punishment in the form of the denial of housing after they have been legally released from custody. Whether there is room for argument about the applicability of that protection to all sex offenders or all rental housing communities is a subject for careful consideration by residential landlords. Note that project-based, federally-subsidized housing is operated under unique program requirements that may be in conflict with California law.

Kimball, Tirey & St. John can provide consultation and detailed opinion letters to assist in the analysis of these issues. Please contact our Fair Housing Training and Defense Department in the San Diego office at (800) 338-6039.

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