

Kimball, Tirey & St. John LLP

2010 Legal Update: Legislation and Case Law That Will Effect Rental Property Owners and Managers

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As 2010 gets under way, it is important for property managers and owners to be aware of new legislation, case law and legal trends that will significantly impact our industry. Below is an overview of the most significant laws and trends for this year.

New Legislation

Lead-Based Paint Renovation Law:

Effective April 22, 2010, all individuals (including your maintenance staff), who will be performing renovation work that could potentially disturb lead-based paint in homes, child care facilities or schools (pre-1978 properties), will need to take an EPA-approved training class and become certified. The new certification requirement applies to renovation, repair, or painting activities where six or more square feet of lead-based paint is disturbed inside the premises, or 20 square feet on the exterior of the premises. In addition, landlords are required to provide residents with the new EPA brochure entitled "Renovate Right" prior to commencing any such renovation or repairs. The text of the new rule, as well as links to available training and the "Renovate Right" brochure are available at www.epa.gov/lead/pubs/renovation.htm.

Water Conservation Bill (SB407):

Effective January 1, 2014, all pre-1994 residential, multi-family and commercial properties must replace non-compliant plumbing fixtures (including toilets, faucets, and shower heads) with water-conserving fixtures when making certain improvements or alterations to a building. Final inspection/certificates of occupancy will not be issued until these plumbing fixtures are compliant. By 2017, all single family homes must replace non-compliant plumbing fixtures, and by 2019, all multifamily and commercial buildings must have compliant water-conserving plumbing fixtures in place.

Public Swimming Pools: Anti-Entrapment Devices and Systems (AB2010):

By now, you are probably very familiar with the Federal Virginia Graeme Baker Pool and Spa Safety Act that took effect on December 19, 2008. With the passage of AB2010, California has incorporated the Federal Act into state law. If your pool is already deemed in compliance with the Act, you will also be in compliance with AB2010. The intent of AB2010 is to standardize enforcement. This law prevents local health departments from adopting new or additional safety standards relating to public swimming pools. In addition, it limits the fees that local and state agencies can charge to determine compliance with AB2010.

Meth Lab Remediation (AB1489): In 2005, the legislature passed SB536 setting forth very stringent remediation standards that had to be met before a home previously used as a meth lab could be rented out again. AB1489 changes these existing methamphetamine remediation standards. The law raises the acceptable level of residual contamination from the previous

standard of 0.1 micrograms to 1.5 micrograms per 100 square centimeters on any indoor surface area. This change is intended to make it easier (and less costly) for a property manager or owner to remediate a rental unit previously used as a meth lab.

Controlled Substances and Firearms (AB530):

In several cities, including Los Angeles, city prosecutors can file an unlawful detainer against a tenant on behalf of the owner when the tenant has committed a crime involving illegal weapons or drugs. AB530 extends this pilot program to additional cities throughout California, including San Diego, Sacramento, Long Beach and Oakland.

Utility Services at Foreclosed Properties (SB120):

If the foreclosed owner previously paid for utilities, this new law allows a tenant residing at a foreclosed property to make the utility payment in place of the new owner and deduct the amount of the payment from the rent. The tenant must provide a copy of the payment receipt when making the rent payment to prove that the utilities were paid.

60-Day Notice Requirement (SB290):

This law makes permanent the requirement that the owner serve a 60-Day Notice to terminate a month-to-month tenancy when the occupants have resided in the unit for more than one year. Whenever a new tenant (such as a new roommate) moves into the unit, the clock resets again. This means that a 30-Day Notice can be used until all occupants of the unit have lived there for one year or longer.

New Tax Withholding Requirement:

Effective January 1, 2010, property management companies are required to withhold approximately 7% of gross rent receipts each month if the owner of the property is not a California resident. A corporation, LLC or LP which is registered with the California Secretary of State, or which has a permanent place of business in California is considered a resident owner. The management company must forward the funds to the Franchise Tax Board. This is a new withholding requirement, not a new tax. Property managers should keep in mind that the penalty for non-compliance becomes the obligation of the property management company, not the owner of the property. The CAA website has detailed information regarding this withholding requirement, along with forms.

Court Furlough Days:

Beginning in September of 2009 and continuing through at least June of 2010, California's courts will be closed the third Wednesday of each month. Property managers should be aware that any notices served on a resident (such as a 3-Day Notice to Pay Rent or Quit, a 3-Day Notice to Perform Covenant or Quit or a 30 or 60-Day Notice of Termination) cannot expire on a court furlough day. The resident must be given through the next business day to comply with the notice.

Screening Fee Amounts for 2010:

The maximum amount landlords can charge as a screening or application fee for 2010 is down from last year to \$41.72. The reason for the lower amount is that the CPI for 2009 dropped, and the increased or decreased amount is based on the CPI. More information is provided in CAA's Issue Insight at

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http://www.caanet.org/AM/Template.cfm?Section=Operational_FAQ&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=20477

Note that the \$41.72 is the *highest* amount that can be charged. By law, landlords must be able to justify whatever amount they charge, including both hard and soft costs.

DRE License Number Disclosure:

Effective July 1, 2010, California real estate agents and brokers must disclose their DRE license number on all “solicitation materials intended to be the first point of contact with consumers” and on real property purchase agreements when acting as an agent in those transactions. An article with more detailed information is available on our website www.kts-law.com.

Significant Case Law

Landlord Liability for Criminal Acts: In a case where a resident was injured during a carjacking in an open parking lot of an apartment complex, an appeals court ruled that three prior violent attacks by strangers in the common areas were sufficiently similar to the most recent carjacking to be considered foreseeable and therefore to impose a duty on the landlord to act reasonably under the circumstances. The case was remanded (returned) to the trial court to determine whether the landlord had a duty to install a security gate and fence around the open parking lot to reduce possible future criminal attacks.

Fair Housing: Accommodating Residents with Motorized Scooters:

In August of 2009, the Department of Justice announced a settlement to resolve a housing discrimination lawsuit regarding motorized scooters in apartment communities. The alleged violation was that the landlord violated the Fair Housing Act by prohibiting the use of motorized wheelchairs and scooters in residents’ apartments and in the common dining area of the property. The settlement required the landlord to pay approximately \$250,000 in fines and penalties. Disability continues to be the most common basis for discrimination complaints and the cases are costly, even if you win. It is crucial that every employee who works directly with residents and applicants has fair housing training. KTS now offers Fair Housing training online for your convenience. Information on our online classes can be found on our website www.kts-law.com.

Potential Landlord Liability for Second-Hand Smoke:

In recent years, we have seen several lawsuits filed by residents against landlords regarding exposure to second-hand smoke on the rental property. Most of these lawsuits claim the landlord failed to abate a nuisance on the property or breached the implied warranty of habitability by allowing residents to smoke on the premises. In Birke v. Oakwood Worldwide, an apartment complex owner allowed smoking in all common areas. An appellate court ruled that a lawsuit could proceed based on nuisance claims against the owner for failing to eliminate second-hand smoke in common areas. This case involves a minor with asthma and other breathing difficulties. The child’s father claims that the property’s failure to prohibit smoking in the common areas exacerbated his child’s condition. The court has not yet ruled on ultimate liability in this case.

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Section 8 Vouchers:

There are two cases making their way through the courts that involve participation in the federal government's Section 8 Housing Choice Voucher Program. In the first case, residents are arguing that if a landlord is not willing to accept vouchers, he is violating a resident's right to be free of source of income discrimination. In the second case, a resident is claiming that the landlord must accept a voucher as a reasonable accommodation based on disability. Both cases are being litigated at the appellate level, but there is no final ruling as yet.

Trends for 2010:

Local Smoking Ordinances:

In addition to the lawsuits mentioned above, many cities (including Belmont, Burbank, Calabasas, Dublin, El Cajon, Glendale, Loma Linda, Novato, Pasadena, San Mateo, and Temecula) have passed anti-smoking laws. Some of these laws require the landlord to set aside a certain percentage of units as "smoke-free." Other laws call for an outright ban on smoking anywhere on the premises (including the inside of residents' units) or a limit on where residents and guests can smoke on the premises. A database of California smoke free laws is available at <http://ccap.etr.org/index.cfm?fuseaction=policydb.home>. This website is updated monthly. Property managers should take care to monitor any local anti-smoking laws that pass in their cities as the landlord may be required to enforce them.

Medical Marijuana:

Last but certainly not least, the use of "medical marijuana" by residents continues to create problems for landlords. In 1996, California voters passed the Compassionate Use Act which legalized the cultivation, possession, and use of marijuana for medicinal purposes in the state. This has led to some residents claiming they have a right to smoke medical marijuana in their units as a "reasonable accommodation" for disability. Although "medical marijuana" is legal under California Law, it is still a violation of Federal Law. Property managers are put in a difficult situation as they try to comply with both fair housing disability laws and their duty of care to other residents who may be complaining about the use of marijuana by a neighboring resident. If your community is a project-based HUD subsidized property, you should be able to prohibit the use of marijuana on the premises, even if your resident is using it for medicinal purposes. For those communities that are not project-based HUD subsidized, the question of whether a landlord would be required to allow a resident to use medical marijuana as a reasonable accommodation under California Law is not clear. If such a request is made and the resident can provide verification that he or she needs to use marijuana because of a disability, contact our fair housing department at (800) 338-6039 for legal advice on how best to handle the situation and the potential risks involved with each potential course of action.

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