WarrenAllen LLP
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CARRIE A. MAJORS-STAAB

850 N.E. 122ND AVENUE
PORTLAND, OREGON
97230-2096
(503) 255-8795
FAX (503) 255-8836
WEBSITE: www.warrenallen.com

CARLTON D. WARREN
(Retired)

° Also Member of Washington Bar

Frequently Asked Questions Regarding Portland's Emergency Relocation Ordinance

By Jeffrey S. Bennett, Attorney at Law

Last Updated: February 27, 2017

Question 1: Are we obligated to rescind any 90 Day No Cause Notices of Termination served prior to the passage of the Ordinance and which expire after February 2, 2017?

Answer: No. However, you must pay the Relocation Assistance, if you don't rescind the Notice of Termination.

Question 2: I served a 90 Day No Cause Notice of Termination upon my tenant and it expires on February 10, 2017 (four days from today). The new Ordinance says that I have 30 days within which to rescind the Notice, in order to avoid paying the Relocation Assistance, but the termination date is just four days away. What should I do now?

Answer: The Ordinance doesn't cover your situation. In order to be safe, serve your Rescission Notice, today.

Question 3: My lease expires on February 28, 2017 and does not contain a rollover provision (to a month-to-month tenancy). I've not served a No Cause Notice of Termination, because I'm not required to do so. However, if the tenant is still in the premises on March 1, 2017, I intend to file an eviction action. Do I have to pay the Relocation Assistance, and if "yes," then "when?"

Answer: Aside from robbing landowners of the freedom of contract (and ignoring the logic underlying the Oregon Court of Appeal's decision in *Pendergrass v. Fagan*), the Ordinance wholly fails to discuss the timing of the payment obligation, in this scenario. (Since no Notice of Termination has been served, no timeline for payment is specified.)

Question 4: I served a Notice of Rent Increase upon a tenant, prior to February 2, 2017, and it takes effect on March 1, 2017. If my tenant sends me the 14-day notice, indicating the "tenant is terminating the rental agreement" and I respond within 14-days that I'm rescinding the Notice of Rent Increase, what effect does that have on the *tenant's* notice of termination? Couldn't I rescind my Notice of Rent Increase, yet enforce the tenant's Notice of Termination to me?

Answer: If the Ordinance is strictly construed, then the answer should be, "yes you can." However, a pro-tenant judge may give the Ordinance the effect that the judge believes the City intended, as opposed to what the Ordinance states.

Question 5: I served a Notice of Rent Increase upon a tenant, prior to February 2, 2017, and it takes effect on March 1, 2017. My tenant timely sent me the 14-day notice, indicating the "tenant is terminating the rental agreement," but he didn't set forth a termination date. Am I still required to pay the Relocation Assistance?

Answer: The Ordinance doesn't require the tenant to say *when* the termination is to occur. Therefore, no one really knows the answer to this question.

Question 6: My lease contains an automatic rent rate increase provision, which increases the rent $200.00 per month, starting on the first day after the lease expires. Is this the same as a Notice of Rent Increase?

Answer: My opinion is the that lease provision and the Notice of Rent Increase are quite different. Therefore, the lease provision controls, and the Ordinance is irrelevant. However, this point is being hotly debated and legal minds may differ on this opinion.

Question 7: What is the effect on Rent Increase Notices that were issued prior to passing?

Answer: If the landlord served a Notice of Rent Increase (or of Associated Housing Costs) upon a tenant, on or before February 2, 2017, and that Notice otherwise triggered the obligation to pay Relocation Assistance, then the following rules kick in:

- The tenant has until February 16, 2017 (i.e., within 14 days of the effective date of the new Ordinance), to notify the Landlord that the Tenant is terminating the Rental Agreement, and

- The Landlord has 14 days thereafter within which to give written notice to the Tenant either that the Landlord has…

    - Rescinded the increase or has reduced it below the level that triggers the obligation to pay Relocation Assistance, or, in the alternative…
    - To pay the Relocation Assistance.

Question 8: Typically, we send increases out with multiple lease terms (six months, nine months, one year, or month-to-month) accompanied by various rent rates (depending upon the length

of the term). Will we have to make the cap on all rent increases 9.999%, in order to avoid falling into this Ordinance?

Answer: The portions of the Ordinance that pertain to Notices of Rent Increase, and said Notice of Rent Increase's triggering effect upon Relocation Assistance payment obligations, only apply to a Notice of Rent Increase indicating a rent increase of 10 percent or more within a 12 month period.

Question 9: Does the Relocation Assistance Ordinance apply to manufacture home parks?

Answer: The Ordinance contains no exceptions for manufacture home parks. Further the definition of "Dwelling Unit" includes manufactured homes. Therefore, the only safe answer is, "yes." However, No Cause Notices cannot be served upon manufactured home park tenants who own and reside in their own home, and merely rent the space upon which the home is located from the landlord.

Question 10: When considering the amount of the rent increase, in order to determine if it meets or exceeds the 10% increase threshold, does "rent" include the following items: (a) the month-to-month rent increase that we charge for maintaining a month-to-month tenancy; (b) increases in utility costs; (c) increases in other rents, such as those for the carport, garage or storage units?

Answer: Although the Ordinance is unclear, I "think" that the 10% increase threshold does include your listed items, since they could be deemed "Associated Housing Costs" by the court.

Question 11: I served 90 Day No Cause Notices upon tenants, prior to the enactment of the new Ordinance. Those Notices contain February 28, 2017 termination dates. Can I serve Rescission Notices on the affected tenants on February 27, 2017?

Answer: Yes, you can. The Ordinance gives landlords until March 4, 2017 (i.e., 30 days after the effective date of these provisions) to give the tenant written notice that the landlord has rescinded the Notice of Termination. However, a judge would likely read into the Ordinance a requirement that the Rescission Notice be served prior to the termination date. (Otherwise, the rescission would make no sense.) If you do serve your Rescission Notice on February 27, 2017, make sure you serve it personally or by posting and mailing. If you just mail the Rescission Notice, the tenant receives it after the February 28, 2017 vacate date, and the tenant moves out before he/she receives the Rescission Notice, a judge may conclude that the landlord must pay the Relocation Assistance. Rather than take a chances on such a judicial ruling, serve the Rescission Notice as many days prior to the termination date as possible.

Question 12: I have two tenants residing in a single family home, and I served them with a No Cause Notice of Termination. Do I have to pay each tenant the Relocation Assistance?

Answer: I would contend that the room number formula set forth in section B of Exhibit A (which differentiates between a studio/single room, two-bedroom, and three-bedroom or larger dwelling unit) impliedly bases the payment formula upon the number of rooms, and not the number

of tenants. Otherwise, the ordinance would have set forth the tiered payment obligations based upon the number of tenants, as opposed to the number of rooms. However, your question does reveal yet another glaring ambiguity in the ordinance.

Question 13: If I have a fixed-term lease, with no conversion clause (automatically converting the lease to a month-to-month tenancy), can't I simply "non-renew," without triggering the Relocation Assistance payment obligation associated with No Cause Notices of Termination?

Answer: The current answer is: No. You'd still have to pay the Relocation Assistance. However, the legality of the Ordinance's non-renewal language is one of the issues raised in a lawsuit currently pending in an Oregon court.

Question 14: I have the same question as posed in question 13, above. However, I'd like to know what the duration of the renewal fixed-term tenancy must be, assuming that the Ordinance requires the new term to be on "…substantially the same terms except for the amount of Rent or Associated Housing Costs…?"

Answer: No one is quite sure. A judge might construe the new language as requiring you to enter into a new lease of the same duration as the fixed-term lease that is expiring, or just expired. However, ask yourself: Is a nine-month lease "substantially the same terms," if the prior lease was twelve months long, and nothing else changed except for the term of the lease? Again, no one knows the answer.

Question 15: If I have a fixed-term lease that *does* contain a conversion clause (automatically converting the lease to a month-to-month tenancy, unless the parties otherwise terminate the lease), can't I simply "non-renew" via a No Cause Notice of Termination (that coincides with the natural lease expiration date), without triggering the Relocation Assistance payment obligation associated with No Cause Notices of Termination?

Answer: The current answer is: No. You'd still have to pay the Relocation Assistance. However, the legality of the Ordinance's non-renewal language is one of the issues raised in a lawsuit currently pending in an Oregon court.

Question 16: If I have to renew a lease on "…substantially the same terms except for the amount of Rent or Associated Housing Costs…," and I want to convert the premises (dwelling unit) from smoking to non-smoking, can I do so?

Answer: No one is quite sure. A smoker may feel that the conversion to non-smoking rules constitutes a substantial change in terms. I would contend that it does not, but a judge may have the final say.

Question 17: Let's say that you serve a No Cause Notice of Termination upon a tenant whom you know is buying a home and moving into that home. Let's also say that the tenant "knows that you know." Do you still have to pay the Relocation Assistance, even though the tenant was moving into his new home anyway?

Answer: As currently written, the Ordinance does require you to pay the Relocation Assistance, despite the absurdity of having to do so.

Question 18: There are some pretty savvy (read: "professional") tenants out there. When we offer lease renewals, we offer twelve month, nine month, and six month lease terms, as well as the usual conversions to month-to-month tenancies. Couldn't a savvy, money-hungry, tenant agree to execute a six month lease, await your future offer of a new lease term, contend that your new lease (which may be on a newer form, with newly update terms and conditions) substantially alter the terms found in the preexisting six month lease, and set you up to have to pay the Relocation Assistance?

Answer: Savvy, professional tenants, are going to play every trick in the book. Yes, they could set up the scenario you described, and profit from such a strategy. I'd put this in the same category as the tenant who pesters you and other tenants just enough to cause you to serve a No Cause, because the pestering was either (a) insufficient for you to win an FED based upon a For Cause or Repeat Violation Notice, or (b) so disconcerting that key witnesses are scared to testify.

Question 19: I'm a licensed property manager, who manages many houses on behalf of a variety of owners. Some of my clients own, and have me manage, just one house. Are those clients who own and rent out just one house within the City of Portland subject to the exception for "…a Landlord who rents out only one Dwelling Unit in the City of Portland….?"

Answer: ORS 90.100 (23) defines "Landlord" as follows: "'Landlord' means the owner, lessor or sublessor of the dwelling unit or the building or premises of which it is a part. "Landlord" includes a person who is authorized by the owner, lessor or sublessor to manage the premises or to enter into a rental agreement." That means that the licensed property manager, acting on behalf of the owner of one rental house, is a "Landlord." While I think that a judge would conclude that the owner of one rental house is excepted from the new Ordinance, the technical definitions could trigger the opposite outcome.

Question 20: How long did it take, from the passage of the new ordinance, before your clients started informing you that they (and their clients) are going to start selling their rentals?

Answer: Less than 24 hours… and the "gonna' sell" e-mails are still coming in. In fact, I haven't had this many "gonna' sell" phone calls in my 27 years as an attorney!

Question 21: I served a No Cause Notice of Termination upon my tenants, setting forth a May 31, 2017 termination date (which coincides with the natural lease expiration date). The tenants prematurely moved out on February 10, 2017 and are demanding payment of the relocation assistance. Do I still have to pay that, even though they moved out prematurely?

Answer: Since you make no mention of a valid revocation of your Notice of Termination, (a) I'm assuming that no revocation occurred, and (b) the only safe answer is "yes, you do." However, you may still have a claim against the tenants for unpaid rent.

Prior to enactment of the new Ordinance, if a fixed term lessee moved out well in advance of the lease expiration date, you had the right to either (a) charge an early termination fee (if your lease and the surrounding facts so allowed), or (b) charge the lessees rent through the earlier of (i) the lease expiration date, or (ii) the end of the day prior to the date upon which a new tenant moves into the premises. (Note: There are some exceptions to the foregoing statements, which are oversimplified, and should be run past your attorney, especially if your fixed term lease contains language converting the same to a month-to-month tenancy.) Your right to pursue a damage claim for unpaid rent arguably remains in place, but the obligation to pay the Relocation Assistance isn't reduced or eliminated by your residual rights.

Question 22: Can we create one year (twelve month) leases that contain automatic renewal clauses which, in turn, auto-renew the lease with succeeding a one year (twelve month) terms?

Answer: My gut tells me that you cannot do that. Here's why: If you look at the ORLTA's definition(s) of the various terms for different tenancies, it sets forth things like a fixed term of a MTM tenancy. (ORS 90.100(17) states, ""Fixed term tenancy" means a tenancy that has a fixed term of existence, continuing to a specific ending date and terminating on that date without requiring further notice to effect the termination." ORS 90.100(38) states, "A rental agreement shall be either a week-to-week tenancy, month-to-month tenancy or fixed term tenancy.")

If you go looking for the statute that allows landlords to include conversion language, converting leases to MTM tenancies, you'll only find ORS 90.427 (the statute that discusses 30 day notices). Therein, we find the following language: " *** (4) If the tenancy is for a fixed term of at least one year and by its terms becomes a month-to-month tenancy after the fixed term: ...." However, you won't find any statute that clearly allows landlords to include conversion clauses.

If you loosely combine the foregoing comments, you could conclude that there's no prohibition against fixed term lease-to-lease renewals. However, (a) I have something to hang my hat on, in trying to favorably argue the legality of fixed term lease to MTM tenancy conversions, but (b) I can't point to any law supporting the same argument for lease-to-lease renewals.

Question 23: Building upon the foregoing question and answer, If we are unable to include an auto-renew provision in our one year leases, then can we compel tenants to sign a new one year lease? Alternatively, would we just file an FED, the day after the initial lease term expires, and evict for holdover?

Answer: If you have a fixed term lease with no conversion clause, then (a) you can file an FED, based upon the holdover, the day after the lease expires (assuming that the tenancy didn't continue), but (b) you may have to pay the Relocation Assistance, since your termination may be treated akin to a nonrenewal. Still, please note that the ordinance's renewal clause states, "For purposes of this Subsection, a Landlord that declines to renew or replace an expiring fixed-term lease on substantially the same terms except for the amount of Rent or Associated Housing Costs terminates the Rental Agreement and is subject to the provisions of this Subsection." No one knows what "declines to renew" means, but it may mean "doesn't renew."

Question 24: I operate an LIHTC property, which requires compliance with federal laws. What does the Ordinance say regarding the interplay between local, state and federal laws?

Answer: Nothing! Portland failed to take into account the existence of extensive federal law(s) governing landlord/tenant relationships, including the effects of federal law(s) upon rent increases and renewals.

Question 25: The attorney fee clause does not appear to be reciprocal and does not appear to require the filing of any lawsuit. Doesn't that mean that tenants can assert borderline frivolous claims and/or file borderling frivolous law suits and procure attorney's fees?

Answer: If the landlord defeats those claims and/or lawsuits, then "theoretically," the answer would be, "no." However, the lack of reciprocity means that landlords can't recover the attorney's fees the landlord incurs in fending off baseless claims and law suits. That may force landlords to suffer losses in the form of settlements, in order to avoid the larger expenses.

Question 25: Isn't the multitude of glaring deficiencies in the Ordinance little more than a recipe for years of litigation?

Answer: Potentially "yes." Tenants' attorneys are proliferating and will have a field day seeking judicial interpretations of Portland's marginally intelligible ordinance. Then, even if the tenants are wrong… the landlords can't even recover the attorney's fees they incurred in defeating those lawsuits!

Question 26: What is the cure to this madness?

Answer: The Ordinance was not written by attorneys specializing in landlord/tenant law. In fact, any experienced landlord/tenant attorney could point out the above described defects. The Oregon State Legislature is now working on HB 2004, which is a somewhat similar – and similarly deficient – law. To the best of my knowledge, the state's premier landlord/tenant attorneys have not been involved in the creation of HB 2004, which creates a recipe for perpetual legal problems. The cure to this madness is to restore the creation of landlord/tenant laws to the coalition that successfully created amendments to the ORLTA for many years. The coalition participants understood the ORLTA, the variations from one locality to the next, and the ebb and flow of economies, political winds and other relevant matters.

About the Author

Jeffrey S. Bennett is a partner in the Portland law firm of Warren Allen LLP. Licensed in Oregon and Washington, he has specialized in landlord- tenant, business and real estate law for the past two decades. Mr. Bennett's clients include many of the region's premier residential and commercial property management companies, and he assists clients with everything from business formations and complex transactions to litigation based matters.