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THE INDIANA SECURITY DEPOSIT STATUTE

Virtually every residential lease requires the tenant to pay a security deposit upon tenant's taking possession of the premises. The security deposit protects the landlord in the event of nonpayment of rent by the tenant, or damage done by the tenant to the premises. Requiring payment of a security deposit is sound business practice, and frequently saves our clients money. Indiana law, however, imposes guidelines regarding security deposits which heavily favor the tenant as a consumer, and inflict severe penalties on landlords who fail to comply.

The Indiana Security Deposit Statute is rarely raised by tenants, most likely because most landlords comply with its provisions in their ordinary business practice, and tenants are unaware of the statute's existence. However, the following discussion sets out some of the pitfalls in dealing with security deposits paid by tenants, and contains several recommendations which, if followed, will save the landlord money.

WHAT IS THE SECURITY DEPOSIT STATUTE ?

The Security Deposit Statute provides that upon termination of a residential lease, the landlord must provide the tenant with an itemized statement regarding the ultimate disposition of the tenant's deposit, whether returned in full or withheld in whole or part. If all or part of the deposit is withheld for back rent and/or damages, this statement must indicate how much of the deposit is being withheld and clearly indicate the reason for the withholding. The landlord has forty-five(45) days from termination of the rental agreement to send this statement.

By its plain language, the statute only applies in instances where the tenant notifies the landlord of his or her new address.

PENALTY FOR FAILURE TO COMPLY

1. Landlords who are found to have violated the Security Deposit Statute are subject to the following penalties: Forfeiture of entire security deposit.
2. Payment of the tenant's attorney fees in bringing an action to recover the deposit; and
3. Forfeiture of any back rent, unpaid utilities, or other damages due under the lease.

Taken to their logical extreme, the penalty provisions of the statute have draconian consequences for the noncompliant landlord. For example, suppose an evicted tenant negligently destroys his apartment by fire and forwards his address to his landlord upon eviction. If the landlord fails to forward the deposit statement within the 45 day period, and the tenant seeks to enforce the deposit statute, the landlord will be forced to return the deposit, pay the tenant's attorney fees and costs, and most importantly, will forfeit damages from the tenant for not only back rent, but also the fire which destroyed the premises.

OUR RECOMMENDATIONS:

- Landlords should forward an itemized statement regarding refund or retention of the security deposit, back rent and damages within thirty(30) days after termination of every residential lease, regardless of whether the tenant has supplied landlord with a forwarding address.
- The statement should be sent by both certified and regular mail, in the event that the tenant refuses certified mail.
- In the case where the tenant has not left a forwarding address, the landlord should send the statement to the last known address of the tenant so that this statement may be forwarded by the Post Office in the event the tenant has left a forwarding order with the post office.
- Security deposits by Indiana law should only be retained for the following charges:
 1. Back rent;
 2. Unpaid utilities; and/or
 3. Damage to premises.
- Provisions in landlord-tenant leases stating that deposits shall be forfeited as a penalty for default of any other condition of the lease are for dubious legality, and should not be attempted to be enforced.

The vast majority of problems encountered by landlords associated with residential leases can be avoided by careful planning and meticulous drafting. In dealing with residential leases, like contracts of any type, an "ounce of prevention" really is "worth a pound of cure". If you have any questions about your lease, don't hesitate to contact us.

NEW ASSOCIATES JOIN KDDK

Monica E. Edwards, a 1990 alumna of Reitz Memorial High School, received a Bachelor of Science in chemistry in 1994 and a master of science in Hazardous Waste and Material Management from Southern Methodist University in 1996. She received a J.D. from the University of Louisville in May 2000. Monica has worked in the chemical manufacturing field and has worked as an environmental consultant.

Kristi L. Prutow, a native of Sterling, Kansas, received her Bachelor of arts from John Brown University in 1997 and a J.D. from Indiana University School of Law in May 2000. Kristi practices primarily in the firms litigation department and has a special interest in appellate advocacy. She is a member of the American Bar Association and the Federal Society for Law and Policies Studies.

Will only states your desires and intentions when an emergency arises and you are unable to give directions on your medical care – it does not empower anyone.

By contrast, a Health Care Directive designates a specific person who has the power to make healthcare decisions in the event that you are unable to do so because, either on a temporary basis or permanent basis during a serious illness or injury, you can't act. In other words, you empower a person who will carry out your wishes, whose direction the hospital must follow as though you were giving those directions.

A Living Will applies only to decisions near the end of life. A healthcare directive applies more broadly, when you can't act on a medical decision such as, perhaps being unconscious after an accident.

If we can help, we would be pleased to assist with adoption of a healthcare directive.

of his national origin and in retaliation for filing a charge with the Equal Employment Opportunity Commission ("EEOC"). Ghosh had been hired by IDEM in 1985 as an environmental Engineer III in the Office of Water Management. Though he was eventually promoted to Engineer II, Ghosh filed suit after failing to receive promotions to several other positions he had sought during the course of his employment.

COURT'S DECISION

Ghosh filed his suit under Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's race, color, sex, or national origin. In its defense, IDEM argued that Ghosh failed to receive the requested promotions because he lacked the proper experience, had inadequate writing skills, did not submit the proper application, and did not score within the top 20 % of the candidates during the initial resume evaluation. In analyzing Ghosh's claim, the Court stressed that it would not "sit as a super-personnel department to review a company's honest business decisions" and would limit its analysis to whether the decisions to deny Ghosh the promotions in question were unlawfully motivated. Thus, even if the process by which Ghosh was evaluated for the promotions was poorly devised or executed, that fact alone would not be enough to create a presumption that the reasons IDEM offered as supporting this decision were pretextual, and that national origin discrimination was the true motivating factor.

Ghosh's claim ultimately failed because he made no effort to demonstrate that one of the reasons proffered by IDEM in support of the decisions not to promote him were pretextual. To prevail, the Court held that Ghosh would have to show that all of the reasons were pretextual; by failing to address one, he could not meet this burden.

IMPORTANCE

The Court's holding in Ghosh underscores the importance of evaluating employees using objective criteria so that any court reviewing that decision will be more easily convinced that, whether right or wrong, it was honestly made.

SUPREME COURT AGREES TO REVIEW DECISION REINSTATING REPEAT DRUG OFFENDER

The U.S. Supreme Court recently agreed to take up an employer's appeal of a lower court's decision which upheld an arbitrator's ruling reinstating a worker who twice tested positive for marijuana use.

FACTS

In *Eastern Assoc'd Coal Corp. V. United Mine Workers*, the employee was reinstated to his safety-sensitive position as a heavy equipment operator. The employee tested positive for drug use twice in a 16 month period and was discharged. An arbitrator, however, ordered Eastern to reinstate the employee. The company appealed the arbitrator's decision, but the 4th Circuit (covering Maryland, North Carolina, South Carolina, Virginia and West Virginia) ruled that the arbitrator could have rationally found that there was no just cause for firing the employee because neither the collective bargaining agreement, nor the company's drug abuse policy, mandated the firing of workers who tested positive for illegal drugs.

The Supreme Court's decision will hopefully settle a current split among the courts regarding whether, as Eastern argues, there is a public policy against enforcing an arbitration award ordering reinstatement to a safety sensitive position of an employee who has tested positive for illegal drug use.

IMPORTANCE

This case highlights the importance of clearly informing employees in writing the disciplinary actions that an employee will face if he or she tests positive for drugs in violation of an employer's anti-drug policy. If you have any questions about your company's drug policy, give us a call.