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LANDLORDS BEWARE AND TENANTS REJOICE:

THE CHICAGO RESIDENTIAL LANDLORD AND TENANT ORDINANCE

The Chicago Residential Landlord and Tenant Ordinance places large burdens and bestows few benefits upon all landlords in Chicago. The few benefits to landlords in this law are generally already found within well crafted leases. This ordinance regulates every lease for a dwelling unit within the City of Chicago. The only exclusion is for owner-occupied buildings containing six units or less. All other apartments, homes, townhouses and condominiums (even if you own and rent out only one unit) are included. Here are some of the highlights of this law (lowlights if you are a landlord).

Security Deposits

All security deposits remain the tenant's property and may not be used by the landlord even in the ordinary course of business. Every security deposit must be placed in a separate federally insured interest bearing account and may not be co-mingled with the landlord's assets. When the landlord receives the deposit, he must give the tenant a signed receipt stating the amount of the deposit, the recipient (if an agent, the name of the landlord as well) and the date received.

Interest must be paid on the security deposit if held for six months or more. Interest payments are due within 30 days of the end of each 12 month period, even if the lease or occupancy continues.

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If the landlord purchased the property with leases and tenants already in place, he automatically becomes liable for payment of interest on the deposits and he must refund the deposits irrespective of whether he received the security deposits or a credit at closing. The successor landlord must notify every tenant of the sale of the property and of the transfer of possession of the security deposits, and he must provide new contact information to each tenant.

Failure to comply with any of these security deposit provisions entitles the tenant to a court judgment of double the amount of the deposit plus interest of 5% per year and payment of the tenant's court costs and the tenant's attorney's fees. Those numbers can be very large.

Identification of Owner and Agents

The name, address and telephone number of the owner of the property or party authorized to act on his behalf must be given in writing to every tenant. The notices must be kept current and must specify who may receive notices intended for the landlord. If the landlord fails to comply with this notice provisions the tenant may cancel the lease or receive the greater of one month's rent or his actual damages.

Notice of Conditions Affecting Habitability

Before the tenant signs the lease, the landlord must disclose any notice of violations he received within the prior 12 months, even if the violations have been remedied. The landlord must also disclose all pending enforcement actions initiated against the landlord by the City. The landlord must also disclose all notices from utility providers that services to the rental unit will be discontinued. Failure to comply with these notice requirements entitles the tenant to one month's rent or actual damages.

Maintenance Responsibilities

The landlord must maintain each rental unit in compliance with all applicable City ordinances and must promptly make all repairs necessary to fulfill this obligation. The ordinance lists 27 ways in which a landlord can be deemed to have failed to maintain the premises. Premises includes not only the apartment, condominium or residence, but also common areas such as porches, hallways and elevators. If there has been material non-

compliance which makes the premises not reasonably fit and habitable, the tenant has multiple remedies. The tenant can give the landlord 14 days notice to correct the conditions and if they are not corrected, the tenant may terminate the lease or withhold an amount from the monthly rent that reasonably reflects the reduced value of the premises. The tenant decides what the reasonable reduction should be.

Failure to Provide Essential Services

Essential services means water, gas, electricity, heat and plumbing. After written notice to the landlord telling the landlord that there is something wrong with any of these services, the tenant may go out and get his own essential services and either deduct their cost from the rent, recover damages based on the reduction of the fair rental value of the dwelling unit or procure substitute housing and deduct its cost from rent due the landlord. The tenant may also withhold rent if the landlord fails to correct the condition within 24 hours of notification. If the failure persists for more than 72 hours following written notification to the landlord, the tenant may terminate the lease.

Notice of Refusal to Renew Rental Agreement

Yes, the landlord can still elect not to renew the lease of a rotten tenant (or even that of a good one), but the landlord must give notice of his election not to renew at least 30 days prior to expiration of the lease. If the tenant decides to stay, notwithstanding the fact that the landlord already relet the apartment, the tenant may stay for up to 60 days after he receives the required notice of non-renewal.

Prohibition on Retaliatory Conduct

Remember that rotten tenant who did not move at the end of his lease and remained for another two months thereafter because you forgot to notify him in writing of the non-renewal of his lease? Well, if you deem him rotten because he is constantly complaining to the City about the condition of the premises, it gets worse. It is illegal to take retaliatory action against a tenant not otherwise in breach of his lease for complaining to the City, to the press, to a community organization or to a tenant's union. If the tenant decides that he would rather move, then he can recover either his actual damages or double his monthly rent, plus his attorney's fees.

Summary of Ordinance Attached to Lease

A summary of the entire ordinance must be attached to each lease before it is signed by the tenant. Beware of old form leases, even those containing the summary. Every lease must now also include the following: "The porch or deck of this building should be designed for a live load of up to 100 pounds per square foot and is safe only for its intended use. Protect your safety. Do not overload the porch or deck. If you have any questions about porch or deck safety, call the City of Chicago non-emergency number . . .". Many old form leases do not have this language. If the landlord does not attach the proper summary, the tenant can terminate the lease.

Landlord's Right of Access

A landlord has a right of access to the property to make repairs, improvements, provide services, show to prospective buyers, etc., but the landlord must give at least two days notice to the tenant - unless there is an emergency. Failure to provide that notice or repeated unreasonable or harassing demands for entry may entitle the tenant to a court judgment against the landlord equal to one month's rent or double the actual damages, whichever is greater.

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SHOULD YOU HIRE AN EMPLOYEE WHO SIGNED A NON-COMPETE AGREEMENT WITH HIS PREVIOUS EMPLOYER?

What should you do when you want to hire someone who signed a non-compete agreement with his former employer? Can you hire him? Are you exposing your company to litigation? Can you do anything to minimize the risk?

Are non-compete agreements legally valid?

A non-compete agreement [sometimes called a restrictive covenant] is a written contractual promise by an employee, given to his employer, stating that after he leaves the employer's employment, he will not compete with the employer or work for a competitor for a stated amount of time in a stated geographic area.

In theory, any non-compete agreement that is reasonable as to time and distance is enforceable in Illinois and in many other states. In reality, enforcement of such agreements has been and remains a dicey proposition. Many courts dislike restrictive covenant agreements and often will look for ways to narrow or throw them out, because they drastically restrict a person's opportunity to work and earn a livelihood for several years.

Many non-compete agreements also include restrictions on the employee's disclosure of the former employer's trade secrets and confidential information to a new employer. Some non-compete agreements also state that the employee may not solicit any current customers of the employer after his employment ends. These

provisions may be viewed by courts as enforceable, even if the non-compete provisions are held unenforceable.

That is because the non-compete is a blanket prohibition on the employee taking new employment, but the trade secret, confidentiality and non-solicitation provisions are seen as merely restricting the terms of the employment, not the ability to be employed.

Analyze the documents and the facts.

Any company thinking of hiring someone who signed a restrictive covenant with his former employer should carefully review the documentation and should gather all the available facts, particularly with input from the potential employee. This is true regardless of whether the agreement is a pure non-compete or is a less onerous agreement such as a non-solicitation agreement. The company should have its attorney review the facts in light of the ever evolving law to determine the likelihood of enforceability of the agreement. If the company operates in multiple states, additional issues must be addressed as the states are not always consistent in how they treat these agreements.

The company should not share information provided by the company's attorney with the potential employee. Doing so could effectively negate the attorney-client privilege between the company and its attorney.

Determine whether the non-compete is enforceable.

You are going to have to determine as best you can whether the non-compete that the employee signed with his former employer is valid. Your company and attorney may determine that – as much as you may not like it – certain provisions of the non-compete agreement are indeed enforceable. If that is the conclusion, then you will need to balance that against the value that the potential employee can bring to your company. You may still believe it is in your company's best interest to hire the employee, knowing that the restrictive covenant is enforceable and could embroil you in litigation with the former employer.

Consider hiring the employee with restrictions.

If you decide to go ahead with the hiring of the employee, you may decide to hire him under a written agreement that will do whatever possible to insulate your company from liability. You should carefully detail his duties and obligations in the contract so that they do not violate the enforceable provisions of the non-compete. The writing must be carefully crafted so as not to admit that the non-compete is enforceable.

You might prohibit the potential employee from soliciting any current customers of the former employer, but allow him to respond to contact from current customers of the former employer. You might have a provision in the employment agreement that bars the employee from bringing to your company any confidential information or trade secrets obtained from his former employer.

You should also consider using an employment agreement with the potential employee that allows the company to terminate his employment for any reason and at any time or in the event that the company determines that any litigation resulting from the non-compete agreement has become too expensive or detrimental to the company.

Although hiring an employee with a non-compete agreement entails risks, by utilizing these and other precautions dictated by the circumstances, the risk can be minimized.

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THE EXPANDED HOMEOWNER EXEMPTION: TAX RELIEF FOR HOMEOWNERS, BUT A BURDEN FOR BUSINESS OWNERS

In a move that provides much needed tax relief to Cook County homeowners and further angst in the business community, Illinois has extended the 7% expanded homeowner exemption for an additional reassessment cycle. The exemption now extends to 2008 for Chicago homeowners, 2009 for homeowners in the north suburbs, and 2010 for homeowners in the south suburbs.

The expanded homeowner exemption (sometimes called the EHE) works as an extension of the homeowner exemption by limiting the annual increase in a property's taxable value to 7%. This is accomplished by increasing the amount of the homeowner exemption, with the minimum 2006 exemption being \$5,000, and the maximum ranging from \$40,000 in Chicago to \$20,000 in the suburbs.

Some homeowners might see their proposed assessed valuation being raised significantly more than 7%. In Cook County, a home's assessed valuation is 16% of its true estimated value, determined by a review of the selling price of comparable properties. For example, if the Assessor determines your home has a market value of \$500,000, its assessed valuation would be 16% of this amount, or \$80,000. The real estate tax is then based on the assessed value, not the market value.

Because of the way the EHE works, the assessed valuation cannot increase by more than 7% per year, with the remainder offset by an increase in the homeowner exemption. As a result, even if a home's assessed value will increase beyond 7%, the increase will be limited to 7% per year, and the amount that goes beyond 7% will be spread over the three-year assessment cycle. Thus EHE

does not affect the assessed value of a home, but rather limits the tax impact of an increased valuation.

If a homeowner believes his home was assessed incorrectly [that it was worth less than \$500,000 in our example], he should appeal the assessment.

To receive the EHE, the home must be owner-occupied and be the owner's principal place of residence. Additionally, the homeowner must be liable for paying the property taxes. The EHE covers single-family homes, cooperatives, condominiums and apartment buildings

with less than seven units. The EHE will be applied automatically to any home that received the homeowner exemption in the previous year.

The EHE is of great value to homeowners because it caps their taxes. That reduces governmental revenue, which has to be found somewhere else. Commercial and industrial taxpayers claim the burden is being thrown on to them – which it probably is.

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YOUR COMPANY'S PERSONNEL FILES: YOURS TO PROTECT

Every business and governmental agency eventually is likely to receive a subpoena for the personnel file of an employee. As a business owner or the person in charge of keeping the agency's records, must you comply? The answer is a resounding "maybe."

Illinois law limits the use of subpoenas in civil lawsuits to the discovery of things that are relevant to the subject matter involved in the case. If you receive a subpoena to produce your employee's records and do not know if they are relevant or do not believe they are relevant to the lawsuit you should ask the court to quash the subpoena. The court will then make a determination as to relevancy, leaving you protected by court order in the event disclosure is required.

Simply because you or your employee receives a subpoena does not make the records relevant. Sometimes a brief mention of your company or a former employee during the course of a lawsuit is sufficient to cause one side or the other to have a subpoena issued and sent your way. The parties may only be trying to cover themselves, to make sure they have everything – even things that truly are not relevant.

If the reason given for wanting to see your records is only that your files may contain evidence relevant to someone's conduct or that may suggest a pattern of misconduct, it is likely that the records will be deemed

non-relevant. Courts frequently label such requests as "fishing expeditions" and then hold that a party may not go on a fishing expedition for the subject records.

Personnel records may be sought from local governmental entities under the Illinois Freedom of Information Act, without a subpoena. However, that law recognizes that although citizens have the right to see many governmental records, personnel files of public employees are exempt from disclosure. That exemption pertains to resumes, applications, employment contracts, policies signed by the public employee, payroll information, emergency contact information, training records, performance evaluations and disciplinary records.

Federal privacy laws also prohibit the release of a person's medical or health records without a proper authorization, signed by the individual. Therefore, if your personnel files include employee medical records, physicians' reports or even disability claims, those records may be protected under federal law and may not be released. Penalties exist for those who violate the privacy rules.

So, next time a subpoena or letter crosses your desk seeking production of anything kept in employee personnel files, think twice before running to the copy machine.

✦ *Tracy E. Stevenson*



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I am not young enough to know everything.

~ Oscar Wilde

GREAT URBAN LEGENDS OF THE LAW

Fact or Fiction? A store is legally required to take back merchandise if it's unopened and you have the receipt.

A: Fiction. There is no law that requires a store ever to take back undamaged merchandise under any circumstances. It matters not whether the merchandise is returned within 30 days, seven days, one day, or whatever. It matters not whether the merchandise is returned opened or unopened, used or unused. It matters not whether you got three of the same thing for Christmas and only need one. A sale of merchandise by a store to a customer is a completed contract, and neither party has the right to unilaterally cancel the contract.

On the other hand, if the merchandise turns out to be damaged that's another story. The law is very clear that the buyer of goods has the absolute right to rescind the sale within a reasonable time after he receives the defective goods or discovers the defect, and get his money back.

So, why does nearly every store allow its customers to return merchandise, even if the merchandise is not damaged? Because every other store does so, and the forces of the marketplace therefore cause store management to adopt the same liberal return policy as their competitors, to try to prevent customers from shopping at a competitor's store. Most store management hates taking returns, but they see themselves as having no choice.

Why don't all stores get together and agree to stop all returns? Two reasons. First, getting every store owner to agree to do this is probably an impossibility. Second, the agreement might well be construed as a subtle form of price-fixing, which is a felony.

IN MEMORIAM

We are saddened to announce the recent passing of our good friend and professional colleague John Duax, attorney at law.

RECENT ANNOUNCEMENTS

All the news you can use...

Richard Stavins, your beloved editor-publisher-copyboy, is the new grandfather of Ezra Russell Jones of Raleigh, NC. Ezra enters the world at 9 lb 10 oz, and is currently working on his campaign to run for President of the United States in 2060.

NEW ATTORNEYS

We are pleased to welcome two new but very experienced attorneys to Robbins, Salomon & Patt:

Andrew Lapin joins us with 30 years of experience in real estate, secured lending, franchising, mergers and acquisitions, and corporate transactions.

Scott Spears comes to us with six years of experience in municipal law, business law and commercial litigation.

ACHIEVEMENTS OF NOTE

Tracy Stevenson and **Larry Woodard** have become shareholders (partners) in the Robbins, Salomon & Patt law firm. We offer our sincerest congratulations to them.

Andrew Lapin was elected as a national commissioner of the Anti-Defamation League of the B'nai B'rith.

Crystal Kontny and **Larry Woodard** recently delivered a presentation to lawyers at the Chicago Bar Association on traps to avoid in negotiating an office lease.

Eric Patt was named attorney for the villages of Glenview, Lincolnwood and Golf and for Northfield Township.

Nathaniel Pomrenze and **Tracey Salinski** delivered a presentation to pediatric residents at Loyola Medical School on negotiating employment contracts for newly hired doctors.

Andrés Gallegos authored an article on raising private capital which appeared in Renal Business Today, a national publication on practice management resources for dialysis facilities. He also authored an article on Convenience Care Clinics in Illinois for the Illinois State Bar Association's health care law publication.

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