

Clearinghouse Rule 13-002

DATCP Docket No. 12-R-07
Rules Clearinghouse No. _____

Hearing Draft Rule
November 20, 2012

**PROPOSED ORDER
OF THE WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION
ADOPTING RULES**

1 The Wisconsin department of agriculture, trade and consumer protection proposes the following
2 rule *to amend* ATCP 134.06 (2) (b) 1., (3) (a) and 1., 3., 4., 5., and 6., and (b) and (c), 134.08,
3 and 134.09 (4) (a), and *to repeal and recreate* ATCP 134.04 (2) and 134.09 (4) (b), *relating to*
4 Residential Rental Practices.

**Analysis Prepared by the Department
of Agriculture, Trade and Consumer Protection**

Statutes Interpreted

Statutes Interpreted: s. 100.20 (1), Stats.

Statutory Authority

Statutory Authority: ss. 93.07 (1), 100.20 (2)(a), and 704.95, Stats.

Explanation of Statutory Authority

DATCP has broad general authority, under s. 93.07 (1), Stats., to interpret laws under its jurisdiction. DATCP has authority under s. 100.20 (2) (a), Stats., to promulgate administrative rules forbidding trade practices which are determined by the department to be unfair and prescribing trade practices that are determined by the department to be fair.

Section 704.95, Stats. (created by 2011 Wisconsin Act 143) provides that practices in violation of Ch. 704, Stats., may also constitute unfair trade practices or unfair methods of competition under s. 100.20, Stats. This section also restricts DATCP from promulgating rules that change any right or duty arising under Ch. 704. However, there are a number of rights and duties in the existing rule, which predates 2011 Wisconsin Act 143 (Act 143), that are similar to the new statutory requirement.

Related Statutes and Rules

Chapter 704, Stats., regulates transactions between landlords and both residential and non-residential tenants. The department does not administer ch. 704.

Chapter ATCP 125, Wis. Adm. Code regulates rental transactions for sites upon which the tenant places a mobile home owned by the tenant.

Plain Language Analysis

Background

The department enacted ch. ATCP 134, Wis. Adm. Code, (“the existing rule”) in 1980 and the rule was revised in 1998. The current rule regulates rental transactions between landlords and residential tenants as follows:

- Requires disclosure of rental agreement and earnest money receipts to the tenant.
- Requires disclosures to tenant prior to lease relating to the identity of the landlord, conditions affecting habitability, and utility charges.
- Prescribes procedures for accepting and withholding earnest money fees and credit check fees.
- Prescribes procedures for handling security deposits.
- Prescribes procedures for promises to repair.
- Prohibits a landlord from including in rental agreements provisions that do the following:
 - Authorize unlawful eviction.
 - Accelerate rent payments in event of tenant default.
 - Require the tenant to pay attorney’s fees.
 - Authorize the landlord to confess judgment against the tenant.
 - Relieve the landlord from liability for property damage or personal injury caused by the landlord.
 - Impose liability on the tenant for property damage or personal injury not caused by the tenant.
 - Waive statutory or legal obligations of the landlord.
- Prohibits a landlord from:
 - Advertising or renting condemned premises.
 - Unauthorized entries.
 - Automatically renewing a lease without notice.
 - Unlawfully confiscating personal property.
 - Engaging in retaliatory or self-help eviction.
 - Charging late rental fees and other penalties not set out in the lease.
 - Misrepresenting the dwelling units offered or the amount of all rent and non-rent charges.
 - Failing to disclose all non-rent charges in connection with the representation of any rent amount.

Rule Content

The Wisconsin legislature enacted Act 143 on March 21, 2012. Act 143 made changes to ch. 704, Stats., that affect some of the provisions of the current rule relating to:

- Disclosures required before entering into a rental agreement.
- Returning security deposits.
- Withholding security deposits.
- Prohibiting certain rental agreement provisions.
- Confiscating personal property left behind by a tenant.
- Violations of Landlord Tenant law may constitute a violation of Unfair Trade Practices Law.

As a result of Act 143, some provisions of the existing rule overlap and conflict with Ch. 704. This rule would modify the current rule to conform to the new statutory requirements.

Disclosures required before entering into a rental agreement

The current rule requires certain disclosures a landlord must make to the tenant before entering into a rental agreement with, or accepting any earnest money or security deposit from, a prospective tenant. These disclosures relate to conditions affecting habitability.

Act 143 creates s. 704.07 (2) (bm), Stats., which requires disclosures relating to habitability that are similar, but not identical, to the disclosures prescribed by the current rule.

This rule repeals and recreates the required disclosures to make them identical to the disclosures required by statute.

Returning security deposits

Under the current rule, if the tenant surrenders the property before the last day of the rental agreement, the landlord must return the security deposit within 21 days after the landlord receives a written notice from the tenant that the tenant has surrendered the premises.

Act 143 creates s. 704.28 (4) (b), Stats., which requires the landlord, if the tenant surrenders the property before the last day of the rental agreement, to return the security deposit within 21 days after the last day of the rental agreement.

This rule amends the requirement to a return a security deposit to be identical to the provision Act.

Withholding security deposits

Under the current rule, a landlord may withhold a tenant's security deposit only for specific reasons listed in the rule such as damage to the premises; unpaid rent; unpaid utilities or assessments that the landlord is liable for unpaid amounts; or other reasons specifically listed in the rental agreement as "nonstandard rental provisions."

Act 143 creates s. 704.28 (1), Stats., which incorporates very similar (but not identical) provisions into the statute.

This rule makes minor changes to the wording of the provisions relating to withholding a tenant's security deposit to conform with Act 143, but does not substantially change the requirements from the current rule.

Prohibited rental agreement provisions

The current rule describes provisions that a landlord is prohibited from placing in a rental agreement, such as:

- Authorizing eviction by other than judicial procedure.
- Acceleration of rent payments if tenant breaches obligations.
- Requiring the tenant to pay landlord's attorney's fees in the event of a dispute.
- Relieving the landlord from liability for damage or injury caused by negligent acts or omissions of the landlord.
- Imposing liability on the tenant for personal injury arising from causes clearly beyond the tenant's control.

Act 143 creates portions of s. 704.44, Stats., which describe prohibited rental agreement provisions that are similar, but not identical, to provisions in the current rule. Further, Act 143 states that the entire rental agreement is void and unenforceable if it contains any of the prohibited provisions. The current rule does not have such a provision, but instead relies on a test established by the courts to determine whether the entire rental agreement is void based on the inclusion of a prohibited provision.

This rule makes minor changes in wording related to prohibited rental agreement provisions so that the rule is identical to the new statute. This rule also incorporates the provision in s. 704.44, Stats., that declares the entire rental agreement is void and unenforceable if it contains any of the prohibited rental agreement provisions.

Confiscating personal property left behind by the tenant

The current rule prohibits the landlord from confiscating the tenant's personal property except as authorized by law or in accordance with a written lien agreement. The current rule also prescribes the form and manner in which the landlord and tenant may execute the lien agreement.

Act 143 allows a landlord to dispose of personal property left behind by the tenant at the landlord's discretion as long as certain conditions are met. For example, there must not be a written agreement to the contrary, and the landlord must provide notice to the tenant of his or her

intent not to store the property before the tenant enters into or renews a rental agreement.

This rule amends the current rule so that provisions relating to abandoned personal property are identical to the statute.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations

Federal law does not generally regulate landlord and tenant relationships or residential rental practices. The Federal Fair Housing Act of 1968 makes it illegal for a landlord to discriminate against a potential tenant because of a person's race, sex, national origin, or religion, and it prohibits certain discriminatory conduct.

Comparison with Rules in Adjacent States

Illinois, Iowa, Michigan, and Minnesota all have statutes or administrative rules governing residential rental practices. These statutes and rules address common topics such as rental agreements, security deposits and other duties of landlords and tenants.

Summary of Factual Data and Analytical Methodologies

This rule modifies the current rule to conform to policies dictated by a change in Wisconsin statutes.

Analysis and Supporting Documents used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

DATCP anticipates that the economic impact of this rule will be minimal. This rule makes minor changes to conform to Ch. 704, Stats. This rule also makes changes to the current rule to replace requirements that are no longer enforceable because of changes in Ch. 704, Stats.

Effect on Small Business

The current rule and the proposed rule regulate transactions between landlords and tenants. Many landlords are small businesses. However, this proposed rule does not have any material effect on any small business. The proposed rule does not change the duties and responsibilities of landlords in relation to their tenants. Instead, the proposed rule states the duties and responsibilities of the landlord and eliminates inconsistencies between the Ch. 704, Stats., and Ch. ATCP 134, Wis. Admin. Code.

DATCP Contact

Questions and comments related to this rule may be directed to:

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E-Mail: kevin.leroy@wisconsin.gov

Where to Submit Comments and Deadline for Submission

Questions and comments related to this rule may be directed to:

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Rule comments will be accepted up to two weeks after the last public hearing is held on this rule. Hearing dates will be scheduled once this rule is approved by the Board of Agriculture, Trade and Consumer Protection.

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1 **SECTION 1.** ATCP 134.04 (2) is repealed and recreated to read:

2 ATCP 134.04 (2) A landlord shall disclose to a prospective tenant, before entering into a
3 rental agreement with, or accepting any earnest money or security deposit from, the prospective
4 tenant, any building code or housing code violation to which all of the following apply:

5 1. The landlord has actual knowledge of the violation.

6 2. The violation affects the dwelling unit that is the subject of the prospective rental
7 agreement or a common area of the premises.

8 3. The violation presents a significant threat to the prospective tenant's health or safety.

9 4. The violation has not been corrected.

10 **SECTION 2.** ATCP 134.06 (2) (b) 1. (3) (a) and 1., 3., 4., 5., and 6., and (b) and (c) are
11 amended to read:

1 ATCP 134.06 (2) (b) 1. If the tenant vacates the premises before the last day of tenancy
2 ~~provided specified~~ under the rental agreement, ~~and gives the landlord written notice that the~~
3 ~~tenant has vacated, surrender occurs when the landlord receives the written notice that the tenant~~
4 ~~has vacated. If the tenant mails the notice to the landlord, the landlord is deemed to receive the~~
5 ~~notice on the second day after mailing~~ and the landlord rerents the premises before the tenant's
6 rental agreement terminates, surrender occurs on the date on which the new tenant's tenancy
7 begins.

8 (3) (a) ~~A~~ When a landlord returns a security deposit to a tenant after the tenant vacates
9 the premises, the landlord may withhold from ~~a tenant's~~ the full amount of the security deposit
10 only amounts reasonably necessary to pay for any of the following:

11 1. ~~Tenant~~ Except as provided in par. (c), tenant damage, waste or neglect of the premises.

12 3. Payment ~~which that~~ that the tenant owes under the rental agreement for utility service
13 provided by the landlord but not included in the rent.

14 4. Payment ~~which that~~ that the tenant owes for direct utility service provided by a
15 government-owned utility, to the extent that the landlord becomes liable for the tenant's
16 nonpayment.

17 5. Unpaid ~~mobile home parking fees which a local unit of government has~~ monthly
18 municipal permit fees assessed against the tenant by a local unit of government under s. 66.0435
19 (3), Stats., to the extent that the landlord becomes liable for the tenant's nonpayment.

20 6. ~~Other reasons authorized~~ Any other payment for a reason provided in the a
21 nonstandard rental agreement according to provision document described in par. (b).

22 (b) ~~A~~ Except as provided in par. (c), a rental agreement may include one or more
23 nonstandard rental provisions which authorize ~~a~~ the landlord to withhold amounts from ~~a~~ the

1 tenant's security deposit for reasons not ~~identified under~~ specified in par. (a). ~~The landlord shall~~
2 ~~include the~~ Any such nonstandard rental provisions, if any, shall be provided to the tenant in a
3 separate written document entitled "**NONSTANDARD RENTAL PROVISIONS.**" ~~which the~~
4 ~~landlord provides to the tenant.~~ The landlord shall specifically identify and discuss each
5 nonstandard rental provision with the tenant before the tenant enters into ~~any~~ a rental agreement
6 with the landlord. If the tenant signs ~~or initials~~ a nonstandard rental provision, it is rebuttably
7 presumed that the landlord has specifically identified and discussed ~~that~~ the nonstandard rental
8 provision with the tenant, and that the tenant has agreed to it.

9 (c) This subsection does not authorize a landlord to withhold any amount from a security
10 deposit for normal wear and tear, or for other damages or losses for which the tenant cannot
11 reasonably be held responsible under applicable law.

12 **SECTION 4.** ATCP 134.08 is amended to read:

13 **ATCP 134.08 Prohibited rental agreement provisions.** ~~No~~ Notwithstanding s. 704.02,
14 Stats., a rental agreement may is void and unenforceable if it does any of the following:

15 (1) ~~Authorize~~ Authorizes the eviction or exclusion of a tenant from the premises, other
16 than by judicial eviction procedures as provided under ch. 799, Stats.

17 (2) ~~Provide~~ Provides for an acceleration of rent payments in the event of tenant default or
18 breach of obligations under the rental agreement, or otherwise purport to waive the landlord's
19 obligation to mitigate damages as provided under s. 704.29, Stats.

20 (3) ~~Require~~ Requires payment, by the tenant, of attorney's fees or costs incurred by the
21 landlord in any legal action or dispute arising under the rental agreement. This does not prevent
22 the recovery of costs or attorney's fees by a landlord or tenant pursuant to a court order under ch.
23 799 or 814, Stats.

1 (4) ~~Authorize~~ Authorizes the landlord or any agent of the landlord to confess judgment
2 against the tenant in any action arising under the rental agreement.

3 (5) ~~Relieve, or purport to relieve~~ States that the landlord ~~from liability is not liable~~ for
4 property damage or personal injury caused by negligent acts or omissions of the landlord. This
5 does not affect ordinary maintenance obligations of a tenant under s. 704.07, Stats., or assumed
6 by a tenant under a rental agreement ~~in accordance with sub. (7) and s. 704.07, Stats~~ or other
7 written agreement between the landlord and the tenant.

8 (6) ~~Impose, or purport to impose~~ Imposes liability on a tenant for any of the following:

9 (b) Property damage caused by natural disasters, or by persons other than the tenant or
10 the tenant's guests or invitees. This does not affect ordinary maintenance obligations assumed by
11 a tenant under ~~the~~ s. 704.07, Stats., or assumed by a tenant under a rental agreement, ~~in~~
12 ~~accordance with sub. (7) and s. 704.07, Stats~~ or other written agreement between the landlord
13 and the tenant.

14 (7) ~~Waive~~ Waives any statutory or other legal obligation on the part of the landlord to
15 deliver the premises in a fit or habitable condition, or to maintain the premises during the
16 tenant's tenancy.

17 **SECTION 5.** ATCP 134.09 (4) (a) is amended to read:

18 ATCP 134.09 (4) CONFISCATING PERSONAL PROPERTY. (a) No landlord may seize or
19 hold a tenant's personal property, or prevent the tenant from taking possession of the tenant's
20 personal property, except as authorized under s. 704.05 (5), Stats., or a written ~~lien~~ agreement
21 between the landlord and tenant.

22 **SECTION 6.** ATCP 134.09 (4) (b) is repealed and recreated to read:

1 (b) If the landlord does not intend to store personal property left behind by a tenant,
2 except as provided in s. 704.05 (5) (am), Stats., the landlord shall provide written notice to a
3 tenant when the tenant enters into, and when the tenant renews, a rental agreement that the
4 landlord will not store any items of personal property that the tenant leaves behind when the
5 tenant removes from the premises, except as provided in s. 704.05 (5) (am), Stats.

6

7 **SECTION 7. EFFECTIVE DATE:** This rule takes effect on the first day of the month
8 following publication in the Wisconsin administrative register, as provided in
9 s. 227.22(2)(intro.), Stats.

Dated this _____ day of _____, _____.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Ben Brancel
Secretary