

Tenancy Deposit Schemes



Tenancy Deposit Schemes

Further information

If you would like further information on any aspect of this client note, please contact a person mentioned below or the person with whom you usually deal.

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Tenancy Deposit Schemes

SUMMARY

- The relevant legislation is found in sections 212 – 215 of, and Schedule 10 to, the Housing Act 2004 (as amended by the Localism Act 2011).
- The legislation applies to assured shorthold tenancies only.
- It only applies to deposits received in connection with a tenancy on or after 6 April 2007.
- The Act requires landlords to protect their tenant's deposits and give them prescribed information within 30 days of receiving the deposit.
- If a landlord fails to protect the deposit and give the prescribed information by the date of the court hearing, he will be liable to pay a penalty between one and three times the amount of the deposit. He will also be prevented from recovering possession of his property until the position has been remedied.

BACKGROUND

The provisions in the Housing Act 2004 dealing with tenancy deposits were introduced to deal with cases where unscrupulous landlords withhold tenancy deposits at the end of a tenancy without good reason. The scheme seeks to ensure that, where the tenant has not committed a breach under the tenancy, the deposit is returned to him promptly and in full.

TENANCY DEPOSITS

A tenancy deposit is defined as any money intended to be held (by the landlord or otherwise) as security for:

- (a) the performance of any obligations of the tenant, or
- (b) the discharge of any liability of his,

arising under or in connection with the tenancy. Parties cannot contract out of the scheme

ASSURED SHORTHOLD TENANCIES

A landlord is only required to protect a tenant's deposit in a tenancy deposit scheme if the tenant has an assured shorthold tenancy.

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A residential letting will generally be an assured shorthold tenancy within the meaning of the Housing Act 1988 if:

- (a) it commenced on or after 28 February 1997;
- (b) the rent is between £250 per annum (£1,000 per annum in Greater London) and £100,000 per annum;
- (c) the landlord did not serve notices specifying that the tenancy would be an assured tenancy (i.e. with security of tenure) before it commenced;
- (d) it is not a business tenancy; and
- (e) the landlord is not a "resident landlord".

The parties do not need to have a written agreement if the tenancy is for a fixed term of less than three years. However, the tenant is entitled to request a written statement from the landlord as to the main terms of his tenancy.¹

LANDLORDS' DUTIES

Section 213(1) of the Housing Act 2004 provides: "Any tenancy deposit paid to a person in connection with a shorthold tenancy must, as from the time when it is received, be dealt with in accordance with an authorised scheme".

The landlord must protect the deposit with an authorised scheme within 30 days, beginning with the date it was received. There are currently three authorised schemes in England and Wales:

- a) Deposit Protection Service (DPS) – custodial scheme;
- b) MyDeposits – insurance scheme; and
- c) Tenancy Deposit Scheme (TDS) – insurance scheme.

The table in Appendix 1 sets out the differences between custodial and insurance schemes.

The landlord must also give "prescribed information" to the tenant, and to any person who paid the deposit on behalf of the tenant, within 30 days. The prescribed information requirements are set out in Appendix 2.

DEPOSITS TAKEN IN CONNECTION WITH TENANCIES PRIOR TO 6 APRIL 2007

As these provisions came into force on 6 April 2007, all deposits taken after this date in connection with assured shorthold tenancies must be protected. However, the legislation does not expressly provide for deposits taken before 6 April 2007. It is generally accepted that a landlord is not obliged to protect a deposit received in connection with a tenancy granted prior to the legislation coming into force, as it does not have retrospective effect.

¹ Section 20A Housing Act 1988

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Once the tenancy determines, by effluxion of time or otherwise, and the parties agree a new tenancy, the landlord will have to protect the deposit and give the prescribed information to the tenant (and any other relevant person) within 30 days of granting the new tenancy. If the tenant remains in occupation of the premises and continues to pay rent after the end of the tenancy, a statutory periodic assured shorthold tenancy will arise. The landlord should still protect the deposit and provide the prescribed information to the tenant (and any other relevant person) within 30 days of the creation of that periodic tenancy.

SANCTIONS FOR NON-COMPLIANCE

If a landlord fails to comply with his duties within the 30 day period, the tenant may apply to court. The court can require the person who appears to be holding the deposit to either repay it to the tenant or pay it into a designated account held by the scheme administrator under an authorised custodial scheme.

The court must also order the landlord to pay the tenant a sum representing between one and three times the amount of the deposit by way of a penalty (the exact sum will be determined at the court's discretion). A tenant is entitled to apply to court for a landlord to pay the penalty even once the tenancy has expired.

The landlord is prevented from serving a section 21 notice (a notice to regain possession of the premises on two months' notice, or at the end of the term if the tenancy is for a fixed term) until he has complied with his duties.

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APPENDIX 1

	CUSTODIAL SCHEME	INSURANCE SCHEMES
WHO RUNS THE SCHEME?	The Deposit Protection Service	Two schemes - MyDeposits and Tenancy Deposit Scheme
WHO HOLDS AND MANAGES THE DEPOSIT?	The landlord pays the deposit into the scheme managed by a Government appointed third party, known as the 'Scheme Administrator'.	The landlord holds the deposit throughout the tenancy and undertakes to pay it to the Scheme Administrator if so requested. That undertaking is backed up by insurance.
HOW IS IT PAID BACK TO THE TENANT AT THE END OF THE TENANCY IF THERE IS NO DISPUTE?	The Scheme Administrator makes the payment within 10 days of being notified either by the Landlord or the Tenant of the end of the tenancy.	The landlord returns to the tenant any part of the deposit that is undisputed.
WHAT HAPPENS IF THERE IS A DISPUTE AT THE END OF TENANCY?	The landlord and tenant are entitled to use the Alternative Dispute Resolution service or apply to court to determine the dispute. The Scheme Administrator retains the deposit until the dispute is resolved.	<p>The landlord pays the disputed amount to the Scheme Administrator. The Scheme Administrator holds the disputed amount until the dispute is resolved.</p> <p>The landlord and tenant are entitled to use the Alternative Dispute Resolution service or apply to court to determine the dispute.</p> <p>If a landlord refuses to send a disputed amount to the Scheme Administrator once a dispute is resolved, the Scheme Administrator pays the tenant and pursues the landlord for the disputed amount.</p>
IS THE SCHEME OPEN TO ALL LANDLORDS?	Yes	A refusal to pay a disputed amount to the Scheme Administrator can result in the landlord being prohibited from using the insurance scheme. Overseas landlords are also prohibited from using an insurance scheme unless they have a UK based agent.
IS THE SCHEME FREE TO USE?	Yes, any interest that accrues on the deposit is used to pay for the scheme's running costs, with any surplus being paid to the tenant or landlord, as appropriate.	There is usually a fee payable by the landlord to use the scheme to cover the insurance and administrative costs.

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APPENDIX 2

PRESCRIBED INFORMATION UNDER THE HOUSING (TENANCY DEPOSITS) (PRESCRIBED INFORMATION) ORDER 2007/797

1. The name, address, telephone number, e-mail address and any fax number of the scheme administrator of the authorised tenancy deposit scheme applying to the deposit.
2. Any information contained in a leaflet supplied by the scheme administrator to the landlord which explains the operation of the provisions contained in sections 212 to 215 of, and Schedule 10 to, the Housing Act 2004.
3. The procedures that apply under the scheme by which a deposit may be paid or repaid to the tenant at the end of the tenancy.
4. The procedures that apply under the scheme where either the landlord or the tenant is not contactable at the end of the tenancy.
5. The procedures that apply under the scheme where the landlord and the tenant dispute the amount to be paid or repaid to the tenant in respect of the deposit.
6. The facilities available under the scheme for enabling a dispute relating to the deposit to be resolved without recourse to litigation.
7. The following information in connection with the tenancy in respect of which the deposit has been paid:
 - a) the amount of the deposit paid;
 - b) the address of the property to which the tenancy relates;
 - c) the name, address, telephone number, and any e-mail address or fax number of the landlord;
 - d) the name, address, telephone number, and any e-mail address or fax number of the tenant, including such details that should be used by the landlord or scheme administrator for the purpose of contacting the tenant at the end of the tenancy;
 - e) the name, address, telephone number and any e-mail address or fax number of any relevant person (i.e. any person who, in accordance with arrangements made with the tenant, paid the deposit on behalf of the tenant);
 - f) the circumstances when all or part of the deposit may be retained by the landlord, by reference to the terms of the tenancy; and
 - g) confirmation (in the form of a certificate signed by the landlord) that—
 - (i) the information he provides is accurate to the best of his knowledge and belief; and
 - (ii) he has given the tenant the opportunity to sign any document containing the information by way of confirmation that the information is accurate to the best of his knowledge and belief.

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