
SECURITY DEPOSITS



A security deposit is money which you collect from the tenant prior to move-in and hold throughout the tenancy as insurance that the tenant will not leave owing you money. In general, the security deposit can be used by you after the tenant moves out for past-due rent, physical damage to the property, and/or for other itemized expenses that you suffer if the tenant breaches the rental agreement.

You do not have to charge a security deposit, but it is highly advisable. Keep in mind that simply to replace a piece of carpeting, for example, can cost \$200 to \$1,000.

LIMITS

For an unfurnished dwelling, Kansas law allows a landlord to charge as much as the equivalent of one month's rent as a security deposit. For a furnished dwelling, a landlord can charge as much as one and a half month's rent. It is important to remember that if you are renting to roommates and charging each person a security deposit, the total cannot go over the legal limits.

If pets are allowed, a pet deposit equal to as much as one-half month's rent (the total, not per pet) can additionally be charged.

Some landlords try to charge nonrefundable pet or cleaning deposits or fees. The legality of these is questionable primarily because of interpretations of the law regarding security deposits. Their usefulness is questionable as well. Tenants are often less careful about cleaning if they do not have the deposit return as an incentive. Also, if cleanup or repairs cost more than the fee, it could be argued that the fee is the limit of the tenants' liability. That would not be good! If you expect abnormal wear and tear because of certain tenants or pets, or you need more income to cover your standard pre-rental cleaning and improvements, you should probably simply charge more rent.

PAYMENT

Some tenants may say that they don't have enough money to pay the entire security deposit and the first month's rent at the same time. If you choose, you can allow tenants to make payments over a period of months, but this is inadvisable. If a tenant does not have enough money to pay the security deposit at move-in, how can you be sure that the person will be able to pay the rent in the months to come? Three-day eviction notices (see Evictions chapter) are available only for nonpayment of rent, not nonpayment of security deposits. If you agree to a payment plan, get it in writing.

PURCHASE OF PROPERTY

If you have purchased a property where there are already tenants in place, you want to make sure of the security deposit situation. Technically, the law says that when a rental property is sold, the former landlord is responsible to return whatever security deposit was owed to the tenant. As a practical matter, what normally happens is that when the purchaser acquires the business property, the purchaser also acquires its assets and debts. Therefore, you need to get from the former owner and confirm with the tenant the amount of the security deposit paid at the initial move-in. A short note or letter should be sent to the tenant stating that the security deposit of \$XXX has been transferred to you. If there was no security deposit with the original owner or you want to charge a higher security deposit than was originally held, you have the right to do this. In a month-to-month tenancy, the best way to handle this is to give the tenant a notice in writing at least 30 days in advance of a rent-paying date, stating that you are requiring \$XXX additional security deposit and it is to be paid on or before the next rent paying date. If you have acquired a property where the tenant is under a long-term lease, you will need to wait until the end of the lease

to adjust the security deposit as well as, of course, the rent or any other lease provision.

INTEREST

A private landlord in Kansas is not required to pay interest on security deposits. If you are willing to do so, you should agree at the time of payment on a fixed percentage rate, either simple or compound interest, that the interest will be paid at move-out time, and that, if the tenant owes the landlord more than the security deposit, the interest will be applied to the charges before any remainder is returned to the tenant.

Some tenants offer to do cleanup and repairs in lieu of paying a security deposit. This must be carefully agreed to: How many hours at what rate? Who pays for supplies and materials? When must the work be done? Will the tenant get a cash deposit if they move out and leave the place in good condition? In any event, the agreement should be in writing and attached to the rental agreement.

NO USE DURING TENANCY

The Kansas Residential Landlord and Tenant Act says that if a tenant attempts to use the security deposit for maintenance charges, other charges, or rent owed during the course of the tenancy, the tenant can forfeit the security deposit and still owe the charges. This includes the last month's rent.

Two Kansas Supreme Court decisions on this issue, however, indicate that this forfeiture provision may only be enforceable when language about that is included in bold face in a written lease.

If tenants suggest that you use a security deposit during the course of a tenancy, simply tell them that it is illegal and refer them to K.S.A. 58-2550 if they don't believe you.

REASONS FOR WITHHOLDING

A security deposit can be kept by the landlord for itemized deductions from three categories

– accrued rent, physical damages above and beyond normal wear and tear, and other damages.

1) "Accrued Rent" is rent that was due and owing before the date the tenant returned possession to the landlord. For instance, if your tenant gave notice on May 31 for a June 30 move-out but did not pay June's rent, that would be accrued rent and could be withheld from the security deposit. Whether the tenant has given notice to the landlord or the landlord has given notice to the tenant, the tenant does owe the last month's rent.

2) "Physical damages above and beyond normal wear and tear" are damages caused by the tenant, the tenant's family, guests, or pets. You have the right to bill the tenant for labor, cleaning, or repairs that you have hired done. You also have the right to bill the tenant at a reasonable rate, similar to what you would pay someone else, for your own labor in doing repairs or cleaning. Check with your local court to see what rates they allow for a landlord's personal labor.

"Normal wear and tear" can vary depending on the age and condition of the dwelling and who is occupying it. Your move-in inspection sheet (see Move-in Inspections chapter) becomes very important here because you don't want to charge this tenant for damages caused by a previous tenant.

Paint is an issue that comes up often. A general rule of thumb is that it should not be necessary to paint within six months, and that one would expect to paint even with the tenant in place after four years. Regardless of how long a tenant has been there, if the paint is of a quality or condition that makes it difficult to clean, it may be hard to hold a tenant responsible for it. If a landlord normally repaints before re-renting a unit, but the tenant has caused damage which requires special preparation prior to painting (such as special primer paint needed to cover smoke, stains, marks, grease, etc.), the deposit could be held to pay for the special preparation but perhaps not the entire paint job.

Carpeting is another issue that comes up often. If a carpet has been left dirty, a landlord needs to consider what condition it was in at move-in time, what efforts the tenant made to clean, and whether further cleaning will solve the problem. A tenant can be liable for your attempts to clean or re-clean. If the carpet is burned, stained, or otherwise damaged to where part or all of it needs to be replaced, the tenant can be held responsible. If it is possible to patch, then the tenant can be responsible for that cost. If a patch is not available or not feasible, the landlord needs to figure out the depreciated value of the carpeting as of that day. That value can be assessed to the tenant. An example – you purchased a carpet three years ago for \$500 and it now needs to be replaced. Using a straight line depreciating schedule of five years, that carpet today would be worth \$200 (depreciating \$100 per year). Therefore, you could charge the tenant \$200.

Taking the original purchase price and depreciating on a reasonable basis to come up with the current value of items damaged or destroyed is one that can be used to come up with dollar figures on any items in the dwelling. Depreciation formulas approved by the Internal Revenue Service (check your tax books or with your tax consultant) should give you figures that a landlord-tenant judge would approve of and that, if you can't collect from your tenant, you can use when claiming business expenses on a tax return.

3) "Other Damages" are those suffered by the landlord because the tenant has not complied with the rental agreement or tenant's duties by law. Simply saying that a tenant has "forfeited" a deposit or that a deposit is being kept as a "penalty" or as "liquidated damages" is generally considered **NOT ALLOWABLE** under current law. Kansas contract law allows compensation for actual losses but not penalties if someone breaks a contract. Landlord-tenant law requires itemized deductions; the above general clauses, by their nature, are not itemized. Your time to adver-

tise and show property, to do financial and legal paperwork, etc., is generally considered a routine business expense **NOT** chargeable to the tenant. However, there are a number of circumstances where you can clearly show an actual loss. You can collect future rent if a tenant has given inadequate notice or broken a lease. For instance, in the case of a month-to-month tenancy where a tenant gives no written notice or does not give a full 30 days in advance of a rent paying date, you have the right to collect rent up until the end of the next full rent period or the date that a new tenant moves in, whichever comes first. (See Notice to Terminate from Tenant chapter for more details.)

If certain advertising expenses are caused by a tenant's improper move-out and were expenses that you would not normally have incurred, those can be charged to the tenant's security deposit. For example, if month-to-month tenants give inadequate notice, the charge of running an ad probably would not be billable to the tenants. Within a couple of weeks, they could have given proper notice and you would have had the advertising as a regular business expense anyway. However, if a tenant breaks a one-year lease after only three months, that advertising expense is one that you did not expect; therefore, it would be chargeable. Complexes that advertise regularly should not charge.

If a tenant's actions (you will probably want to check K.S.A. 58-2555 in this instance) have caused you to lose neighboring tenants and you have incurred unrecoverable expenses, these could possibly be charged to the responsible tenant.

If a tenant has caused you to be unable to re-rent your place in a timely manner (refused entry for showing, kept the place so dirty no one wanted it, did so much damage you had to leave it vacant for a time while you had it repaired, did not move out on time), you may be able to keep some of the deposit to cover rent lost until you get a new tenant.

RETURN

The law requires that you return the tenant's deposit money and/or a written itemized list of deductions to the tenant within 14 days of your determination of the "damages," but in no case more than 30 days after the return of possession of your property to you and demand by the tenant. "Possession" is generally considered "returned" when the tenant has returned the keys. If you do not know where the tenant has gone – do not have an address – the law requires that you send the itemized list and/or the check to the tenant at the tenant's last known address, even if that is your own house. If you use certified mail (not required), you should either have a receipt proving that the tenant got the letter or have the letter back to prove that you made an attempt to send it.

"Itemized list" means list each item and how much it cost to repair or pay for that item, detailing cost of labor and materials where you can. (Of course, it is important to keep all of your receipts.) Without regard to the amount of the security deposit, you need to then total this list. Next on your paper, enter the amount of the security deposit in comparison to the amount of damages and note the difference. If there is a remainder, you need to send the tenant a refund check with a copy of your itemized list. If the security deposit is not adequate to cover the expenses, you need to indicate at the bottom of the page how much is still due and owing from the tenant. At this point, it is up to you whether you indicate to the tenants that you want them to pay and give them a deadline. In terms of your business, you can choose to handle it one of two ways. You can give the tenants a certain amount of time in which to pay the remainder and take them to Small Claims Court or a higher court to collect if they don't pay. Or, you can deduct it as a business expense for tax purposes. Of course, you can try the first and

do the second if the first doesn't work. Either way, you will need that complete itemized list with receipts both to satisfy Kansas landlord-tenant law as well as for your own tax records. No matter what has happened, make sure that you send the tenant something in writing within the thirty days. Kansas law provides that if a landlord has not at least attempted to send the tenant the money and/or the itemized list of deductions within thirty days, the tenant can sue for not only the amount due, but an additional one and one-half times that amount.

If you feel that you aren't ready to send your letter by the end of thirty days because you still aren't sure what all of the expenses will be, you need to send the tenant something in writing indicating what the expenses are to date and what information you are still waiting for. Presumably, in that situation, the tenant isn't getting any money back anyway; you are simply waiting to see what the total indebtedness to you is. Even if you settle the security deposit issues verbally with the tenant, agreeing to return all or none of the deposit, send the tenant the letter with the itemized list of deductions regardless so that you have protected yourself by complying with the law.

Once the tenant gets your letter, he or she may disagree with your itemized list. At that point, the tenant may call or write you a letter to attempt to negotiate further. The tenant has the option of going straight to Small Claims or a higher court and suing for what the tenant feels is due. It is entirely up to you once you have sent your itemized list of deductions whether you want to negotiate further. Be sure that you have carefully thought out your list, that you can prove your expenses, and that your charges are fair. Going to court does take time. If the tenant prevails, you possibly could have to pay the tenant's court costs as well. (See Small Claims Court chapter for small claims procedure.)

References: K.S.A. 58-2543, 58-2550, 58-2554, 58-2562, 58-2563; 1979 Kansas Supreme Court case **Clark v. Walker**; 1992 Kansas Court of Appeals case **Burgess v. Stroud**, re: forfeiture provisions; 1982 Kansas Court of Appeals case **Buettner v. Unruh**, re: when move-in inventory was not done; 2001 Kansas Court of Appeals case **Wurtz v. Cedar Ridge** re: landlord can't keep security deposit as liquidated damages; Model Security Deposit Return Letters can be ordered from Housing and Credit Counseling, Inc.