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| |  |  | | --- | --- | | |  | | --- | | https://gallery.mailchimp.com/aa8bc22c1e4c23cbd1f9ae045/images/bf1cf03b-01a1-42ce-a1dd-12686bd5de91.jpg | |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | | |  | | --- | | **TENANT FEE BAN** |  |  |  |  |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | | |  |  |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | | **This guide has been prepared by the team at Woodstock and is our interpretation of the Tenant Fees Act 2019 (“the Act”) read in conjunction with the Government Guide: The Tenant Fees Act 2019: Guidance for Landlords and Agents. There is also a guide for Tenants and an Enforcement guide that we highly recommend you read.**  **The Government Guides can be found at:**  [**https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/791273/TFA\_Guidance\_for\_LandlordsAgents.pdf**](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791273/TFA_Guidance_for_LandlordsAgents.pdf)  [**https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/791280/TFA\_Guidance\_for\_Tenants.pdf**](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791280/TFA_Guidance_for_Tenants.pdf)  <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791276/TFA_Statutory_Enforcement_Guidance.pdf>  **The legislation comes into effect on 1 June 2019. It is a very complex piece of law, therefore no doubt we will expect clarification on the interpretation once it is challenged through the courts. This is not a definitive guide and is a general overview of the law that should not be taken as legal advice. If you require specific advice on a particular case or your processes, then please contact us and we will be happy to assist you.**   |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | | ***When does the Tenant Fees Act 2019 come into force?***  **The ban is being introduced in 2 stages – 1 June 2019 and 1 June 2020. The time between is known as the transitionary period.**  **The ban applies to all tenancies commenced after 1 June 2019. Agent and landlords do not have to pay back fees charged before 1 June 2019. Where a tenancy agreement was entered into before 1 June 2019 you can still charge fees until 31 May 2020 BUT only where these are required under an existing agreement – for example a fee to renew the fixed term or check out fees where the tenant has agreed to pay this fee.**  **From 1 June 2020, the ban will apply to all relevant tenancies and licences to occupy housing in the private rented sector.**  **If a Landlord takes a payment after the 12 month date they will have to return the payment within 28 days or they will be in breach of the legislation.**  ***What is the aim of the legislation?***  **To make renting properties in England fair and affordable for tenants by reducing the costs at the outset of the tenancy and improving transparency throughout.**  ***Who does the ban apply to?***  **The ban applies to both agents and landlords   *Where does the ban apply?*  Both England and Wales are passing their own versions of the legislation. This note focuses on England.    *What type of tenancy does this apply to?***  **Assured shorthold tenancies and licences.**[**Company lets**](https://www.rla.org.uk/landlord/documents/tenancy_agreement/company_let_agreement.shtml)**are exempt.**  **The ban will apply to renewals after 1 June 2019 but not statutory or contractual periodic tenancies. So for all current fixed term ASTs that become periodic after 1 June 2019 the old rules continue to apply. All tenancies running as contractual periodic tenancy (no fixed term running on a month by month basis) then the old rules also continue to apply. However, after 12 months (so after 31 May 2020) the ban will apply to all existing tenancies and the charges imposed within the agreement will have no effect.**  ***What fees are banned?***  ***The starting point is that all fees are banned unless they are exempt -* banned fees include all fees that are not exempt that the tenant (or someone acting on their behalf i.e. a parent or guarantor) is required to pay in connection with the tenancy. As set out in the Government Guide, the ACT defines “in connection with a tenancy” as:**   * ***Requirements by a landlord or letting agent in consideration or on in consideration of arranging for the “grant, renewal, continuance, variation, assignment, novation or termination or renewal” of an assured shorthold tenancy or licence agreement.*** * ***On entry into a tenancy agreement, or an agreement relating to a tenancy with a letting agent, containing provisions requiring the tenant to do any of those things*** * ***pursuant to a provision of a tenancy agreement, or pursuant to an agreement relating to a tenancy with a letting agent, which requires or purports to require the person to do any of those things in the event of an act or default of the person or if the tenancy is varied, assigned, novated or terminated; and*** * ***as a result of an act or default related to the tenancy unless pursuant to, or for breach of, a tenancy agreement, or an agreement relating to a tenancy with a letting agent; and*** * ***in consideration of providing a reference for a former tenant.***   **Examples of banned fees include:**     |  |  | | --- | --- | | **Tenancy set up:** | **During the tenancy:** | | * **Credit checks** * **Referencing** * **Inventories** * **Guarantor forms** * **Front-loaded rent** * **Viewing fees** | * **Professional cleaning** * **De-fleeing the property as a “condition” of agreeing to allow pets at the property** * **Gardening services** * **Chimney Sweep** | | **RENEWAL** | **TERMINATION** | | * **Tenancy renewal fee** | * **Deed of Surrender other than for loss of rent during a void period.** * **Check out fee** |     **Summary of payments you can charge:**  **The Act confirms what payments are exempt and the Government Guide includes a summary list of payments that you can charge. So if the fee is not on this list you cannot charge it and it is a prohibited payment!**  **a) the rent**  **b) a refundable tenancy deposit capped at no more than five weeks’ rent where the annual rent is less than £50,000, or six weeks’ rent where the total annual rent is £50,000 or above**  **c) a refundable holding deposit (to reserve a property) capped at no more than one week’s rent**  **d) payments to change the tenancy when requested by the tenant, capped at £50, or reasonable costs incurred if higher**  **e) payments associated with early termination of the tenancy, when requested by the tenant**  **f) payments in respect of utilities, communication services, TV licence and council tax; and**  **g) A default fee for late payment of rent and replacement of a lost key/security device, where required under a tenancy agreement**  **BUT there are also additional restrictions!   HOLDING DEPOSITS**  **Holding Deposits will be limited to a maximum of 1 weeks rent, plus:**  **1.    The landlord has 15 days from the date the holding deposit is taken to make a decision as to whether they agree to let the property to the prospective tenant. This is known as the “deadline for agreement” and applies unless the parties agree to vary that deadline in writing.**  **2.    If the tenancy does not proceed (and the tenant is not at fault) then the holding deposit must be repaid within 7 days from the deadline for agreement or from the landlord’s decision not to proceed if that is sooner.**  **The Government guide specifically refers to circumstances when the holding deposit must be returned in full :**  ***“You must refund the holding deposit where a tenant later enters into a tenancy agreement, the landlord decides not to rent the property, an agreement is not reached before the ‘deadline for agreement’ (and the tenant is not at fault), or if you impose a requirement that breaches the ban and/or act in such a way that it would be unreasonable to expect a tenant to enter into a tenancy agreement with you (i.e. including unfair terms in a tenancy agreement or harassment etc.).”***  **3.   The landlord or agent can retain reasonable costs from the holding deposit in the following circumstances: -**   * **the tenant decides not to proceed;** * **the tenant fails the right to rent checks;** * **provides false or misleading information; or** * **where the landlord tries their best to get the information required and the tenant fails to provide it within the 15 days.**   **4.    If the tenancy does go ahead, the holding deposit must be returned within 7 days of agreement, unless it is offset against payment of the main deposit or used towards the first months’ rent.**  **5. If the tenancy does not go ahead and you wish to retain the holding deposit you must also set out in writing the reason for this within 7 days of deciding not to enter the agreement or the “deadline for agreement”. We suggest you provide evidence in support as this can be challenged by the prospective tenant.**  **6. A holding deposit can only be taken for one property at any one time. The Government Guide specifically sates:**  ***“You may only accept one holding deposit for one property at any one time. If you accept more than one, this will be a prohibited payment. You should stop advertising a property once a holding deposit has been agreed to be paid.”***  **The Government Guide (pg 33) includes some very useful and detailed FAQs on holding deposits which are certainly worth reading.**  **RENT**  **The rent can no longer be set at a higher level at the start of the tenancy and reduced at a later date. This is clearly to combat any artificial increase in rent as a way of getting around the ban on fees. There is however nothing to stop a higher rent being charged for the duration of the tenancy – which is of course one of the predicted outcomes of the Act.**  **The Government Guide specifically states:**  ***“The amount charged will usually be equally split across the tenancy. In the first year of the tenancy, you must not charge more at the start of the tenancy compared to a later period.***    ***For example, you cannot require a tenant to pay £800 in month one and £500 in month two onwards – the additional excess of £300 in month one will be a prohibited payment. But, if appropriate, you may decrease the rent (without penalty) during the first year if agreed by the tenant once the tenancy has started or under a rent review clause that enables both rent increases and decreases.”***  **DEPOSITS**  **Deposits will be limited to 5 weeks rent for tenancies where the annual rent is below £50,000. This has increased (slightly) from the proposed one months’ rent. Deposits for tenancies where the annual rent is £50,000 or more are limited to the equivalent of 6 weeks rent.**  **The Government Guide shed little further light on this aspect of the ban – most probably because it is the most straightforward of the exemptions. The guide simply states:**  ***“You may ask a tenant to pay a tenancy deposit as security for the performance of any obligations, or the discharge of any liability arising under or in connection with the tenancy for example in case of any damage or unpaid rent or bills at the end of the tenancy. You are not legally required to take a deposit. In any case, you must not ask for a deposit which is more than five weeks’ rent where the annual rent is less than £50,000. If the annual rent is £50,000 or greater the tenancy deposit is capped six weeks’ rent. Any amount above this will be a prohibited payment.***    ***Any deposit you request must usually be protected in one of the three Government backed tenancy deposit schemes within 30 days of taking the payment. You must provide the tenant with information as to where and how their deposit is protected. The deposit is the tenant’s money and you will need to provide evidence to substantiate any deductions from the deposit at the end of the tenancy if challenged.”***  **This is nothing new of course. One important change to note is that you cannot therefore add on a pet deposit which takes the deposit sum over and above the 5/6 week threshold.**  **The Government Guide (pg 32) also provides some useful FAQs on deposit options addressing specifically the use of rent guarantee schemes, bond schemes and deposit replacement products which are all still allowed. One thing to note though is that as the deposit replacement product requires the tenant to pay a fee to a third party you cannot require them to use the product – it must only be an optional fee and they must be given the option of paying a traditional deposit.**  **CHARGES FOR DEFAULTING**  **You are allowed to charge for two types of default payments - loss of keys and late payment of rent. Both are subject to restrictions and must be written into the tenancy agreement:**   1. **Loss of keys: landlords may charge a reasonable cost that can be evidenced in writing. Anything landlords cannot evidence in writing with receipts will probably be considered a prohibited payment. This also includes other “security device” which gives access to the housing.** 2. **Late payment of rent: landlords and agents may only charge interest at 3% above the Bank of England base rate on the late payment of rent from the date the payment is missed. This charge can also only be levied for rent which is more than 14 days overdue. You cannot charge for sending reminder letters nor can you include fixed charges.**   **The Government Guide states that:**  ***“The fee will be a prohibited payment where this exceeds interest at more than 3% above the Bank of England’s annual percentage rate for each day that the payment is outstanding (for a late rent payment) or the reasonable costs incurred by the landlord or agent (for a replacement key/security device). The Act does not affect any entitlement to recover damages for breach of contract”.***  **CHANGES TO THE TENANCY**  **Where a tenant requests a change to the tenancy agreement (for example a change of sharer, permission to run a business, sublet or permission to keep pets on the property) you are entitled to charge up to £50 for the work involved in amending the tenancy agreement or the amount of your reasonable costs if these are higher than £50.**  **The Government Guide specifically states:**  ***“It is good practice for a landlord or agent to agree to reasonable requests to vary the tenancy agreement. The general expectation is that the charge will not exceed £50. You should provide evidence to demonstrate the reasonable costs of carrying out the work if you wish to charge above £50. Any charge that exceeds the reasonable costs you have incurred will be a prohibited payment.***  **The Government Guide goes on to make it clear that extension to terms or renewals do not fall under this category of exempt payments.**  ***“Please note: the provisions on a change to the tenancy does not apply to a renewal or to the length of the tenancy. From 1 June 2019, agents and landlords will not be able to charge for a renewal of a tenancy under the Act. However, if the tenancy was entered into before 1 June 2019 and it was agreed in their contract to pay certain renewal fees, then a landlord or agent can charge these fees for a new fixed-term agreement or statutory periodic agreement up until 31 May 2020.”***  **EARLY TERMINATION**  **You are allowed to charge an early termination fee if the tenant requests to leave before the end of their tenancy. However, sums charged must not exceed the financial loss that the landlord has suffered or those reasonable costs that have been incurred by the agent in arranging for the tenant to leave early.**  **The Government Guide states that:**  ***“This usually means that a landlord must not charge any more than the rent they would have received before the tenancy reaches its end. It is good practice to agree to any reasonable request to terminate the tenancy agreement early. If there are no missed rent payments, we encourage you to not charge any early termination fees unless you can demonstrate through evidence to the tenant that specific costs have been incurred (e.g. marketing and referencing costs). Any payment that exceeds the landlord’s financial loss or an agent’s reasonable costs will be a prohibited payment.***  **So our advice is to be cautious and obtain evidence of your reasonable costs.**  **THIRD PARTY PAYMENTS**  **The general rule is that you cannot require a tenant to pay for the services of a third party – for example the costs of obtaining a reference, credit check, professional end of tenancy cleaning or completion of a professional check out report. The tenant can however opt to employ the service of a third party if they wish.**  **There are however a number of third party payments that are often required under the terms of the tenancy agreement and which are not prohibited fees. Examples include a contractual obligation for the tenants to pay:**  **·      Television licence ·      Council tax ·      Landlord's costs from a specific service provider for utilities ·      Landlord's cost for a specific communication service i.e. phones, broadband, Sky TV.  If the landlord seeks to charge more than the billed costs for these services then the additional sum will be considered a prohibited payment. This could be troublesome for landlords who charge a set amount for services, regardless of the cost of the bill.**  **The Government Guide states: -**  ***“Tenants are still responsible for paying bills in accordance with the tenancy agreement, which could include council tax, utility payments (gas, electricity, water) and communication services (broadband, TV, phone). There is associated consumer protection legislation which prohibits landlords from over-charging for these services. The Office of Gas and Electricity Markets, ‘OFGEM’, fixes maximum resale prices under section 44 of the Electricity Act 1989, section 37 of the Gas Act 1986 and the Water Resale Order 2006 governs the maximum price for water.”***  **FINANCIAL PENALTIES**  **If a breach occurs and payment is taken for any banned fee then the tenants will have recourse through the First Tier Tribunal.   Local Trading Standards are expected to assist tenants with their claims. More worryingly Trading Standards will be required to enforce the legislation and can issue a fine of up to £5,000 for a first offence. Subsequent breaches are criminal offences or alternatively, the landlord can be fined up to £30,000 and be subject to a banning order.**  **The Government Guide (pg 10) provides useful FAQs on the enforcement of the Act, financial penalties and convictions.   RESTRICTIONS ON SECTION 21 NOTICES**  **No**[**Section 21**](https://www.rla.org.uk/landlord/documents/section-21-for-england.shtml)**notice can be served until the landlord or agent have repaid any unlawfully charged fees or returned an unlawfully retained holding deposit.**  **Landlords and agents can either refund the prohibited payment or (with the permission of the tenant) use that money as payment towards rent or the deposit. This should always be properly documented so that the agreement can be evidenced for the court should the need arise.**  **Before serving a s21 notice a review of fees charged should be carried out to avoid invalidating any notice served.**  **WARNING  We would like to reinforce that the legislation does require further clarification from the courts and The Tenant Fee Act is a significant piece of legislation. Given the consequences of the Act we urge agents to review their agreements and processes. This purpose of this guide is to outline the legislation and further clarification will be required once in force.** | | **Disclaimer: This information does not constitute legal advice and should not be treated as such. It is provided without any representations or warranties, express of implied.** | | | |  | | |  | |  | |