

Use Employee Log to Help Win Nonprimary Residence Case

Suppose you strongly suspect that one of your tenants isn't a primary resident. After doing a little digging (either by yourself or with the help of a private investigator), you discover that most, if not all, of the time, the tenant isn't living at the apartment. But you want some extra proof of this fact to help win your nonprimary residence case.

One way to get this proof inexpensively is by using an employee log that keeps track of when the tenant is (and isn't) in the apartment, suggests Manhattan attorney Adam Leitman Bailey. The employee knocks on the tenant's door or rings the doorbell three times each day and uses the log to record whether or not the tenant answers the door.

You can use the log as proof in court to back up your claim that the tenant doesn't live in the apartment, he says. Depending on the judge, it should be admissible in court as a business record. And even if a court refuses to admit it as a business record, your attorney can use it to help with your employee's testimony at trial—the employee can use the log to “refresh his recollection” when testifying about his visits to the tenant's apartment and what the response was. You may even avoid having to go to court at all. That's because many tenants back down when you tell them that you have a log that shows that they're hardly ever at the apartment. Bailey says that he has successfully used a log like this both in court and in settling cases with tenants.

We've given you a log, based on Bailey's, which you can copy and use (see p. 3). Here are the steps Bailey says you should take to use the log effectively as a tool in a nonprimary residence case, and what you should do if an occupant answers the door.

Take Four Steps

Step #1: Set up log. Once you suspect that a particular tenant isn't living in the apartment, set up a log that the

employee will fill out whenever he checks to see if the tenant is in the apartment.

You can either use the log or set up your own. Call the log “Log of Employee Visits.” Put the address of the apartment on top of the first page. Then, put the following information in five columns.

➤ *Date.* The employee will write the date of each visit;

➤ *Time.* The employee will write the time of the visit. You can list am/pm underneath so the employee only has to write the time, and can circle whether it's am or pm;

➤ *Visit number.* Keep track of the visits by writing down which visit it is. For example, the first time the employee visits the apartment, the employee will write “1,” the second time, he'll write “2,” and so on. That way, you can see at a glance how often the employee has been to the apartment and how often the tenant has actually been there;

➤ *Response to visit.* The employee can circle Answer/No Answer, whichever is applicable. If the employee circles Answer, he should take some additional steps. See “If Someone Answers Door,” below; and

➤ *Initial the log.* Have the employee who filled out the other information place his initials in this column.

Step #2: Knock on tenant's door. Your employee should knock on the tenant's door (or ring the doorbell) three times each day, says Bailey—once in the morning (before business hours), once in the afternoon, and once in the evening (after business hours).

Step #3: Fill out log entry. Each time the employee goes to the tenant's apartment and knocks on the door or rings the doorbell, the employee should fill out one entry in the log.

Unless someone answers the door (see below), the employee should continue this routine for at least seven months, says Bailey.

PRACTICAL POINTER: To increase the chance that a court will admit the log into evidence, make sure your employee consistently makes entries within a short time after he knocks on the tenant's door, says Bailey. Making these entries should be a part of your employee's regular duties.

If Someone Answers Door

It's possible that someone will answer the door when your employee knocks. What should your employee do in this situation? Here's what Bailey suggests:

Get more information. Tell your employee to explain that he's checking on who's living in the apartment, and then to ask the occupant to give her name and explain her relationship with the tenant (for example, is she a relative, subtenant, friend) says Bailey. Try to get as much information about the occupant as possible (for example, how long has she been living in the apartment, how much rent is she paying to the tenant). Also, ask the occupant if she knows where the tenant is living. You may be surprised

how much information your employee can get from the apartment occupant. If the occupant has a gripe with the tenant, she may even be willing to put the information she gives you in writing.

It's also possible that your information about the tenant's not living in the apartment was wrong, and it's actually the tenant who answers the door. In this case, you'll save yourself time and money by not pursuing a losing nonprimary residence claim.

Stop visiting the apartment. Once someone answers the door and you've gotten whatever information you can, tell your employee to stop visiting the apartment, at least for the time being, warns Bailey. Otherwise, you may be crossing the line into harassment. You may use the information you got from the occupant to pursue other methods of finding out about the tenant's situation.

PRACTICAL POINTER: Using the log is just one way to get proof that a tenant isn't a primary resident. To win your case, you (and your attorney) should also be trying to get other documentary evidence that the tenant isn't living in the apartment (for example, the tenant's tax returns, driver's license) and finding out whether the tenant owns property anywhere else. ■

