



PROFESSIONAL OFFICE BUILDING MANAGEMENT

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Take Six Steps to Reduce Risks of Self-Help Eviction

Many owners believe that the only way to get rid of a holdover tenant or a tenant that violates its lease is to sue to evict it, says New York attorney Adam Leitman Bailey. But, depending on what state law and tenants' leases say, many owners may have another option, he says. They may be able to take back a tenant's space using self-help eviction—that is, terminating the tenant's lease and locking it out of its space.

While all states ban self-help evictions of *residential* tenants, some states permit self-help evictions of *commercial* tenants if that right is included in the tenant's lease, says Bailey. Having a self-help eviction right can benefit you in several ways, he notes. You won't have to go through a long and costly lawsuit to evict the tenant, thereby saving you lots of time and money. And you'll be able to rerent the tenant's space faster, he adds.

But you first have to make sure you have a self-help eviction right and, if you do, make sure you properly exercise it. Otherwise, a court could hold you liable for damages for wrongfully evicting the tenant. We'll give you six steps to take before and during a self-help eviction to protect yourself. And we'll give you a Model Notice that you can adapt and send to a tenant to inform it that you've exercised your self-help eviction right (see box, page 2).

Step #1: Check State Law on Self-Help Evictions

First, have your attorney check your state law on self-help evictions, advises Bailey. As mentioned above, all states ban self-help evictions of *residential* tenants, but some states, such as Ohio and Texas, permit self-help evictions of *commercial* tenants, he explains. Note that some states, such as Tennessee, let owners use self-help eviction only if the tenant has abandoned its space, he adds.

Step #2: Check Lease for Self-Help Eviction Right

Next, check the tenant's lease to see whether it gives you a self-help eviction right, suggests Bailey. Most states that permit self-help evictions of commercial tenants require owners to include the right to do so in the tenant's lease, he says. If your state law and your lease give you a self-help eviction right and you exercise that right, a court will likely rule that you were justified in doing so.

Example: After a restaurant tenant didn't pay its rent, the owner took possession of the tenant's space without notifying the tenant. So the tenant sued the owner, arguing that it had been wrongfully evicted. A Georgia appeals court ruled that the owner had properly exercised its self-help eviction right. The court explained that, under state law, an owner can exercise a self-help eviction right and take possession of a commercial tenant's space "without notice or resort to legal proceedings" provided the right is included in the tenant's lease. Here, the tenant's lease gave the owner a self-help eviction right, which the owner properly exercised when the tenant violated the lease by not paying its rent, the court said [Rucker v. Wynn].

Note that you can't sue to evict a tenant *and* exercise your self-help eviction right, warns Bailey. So you'll have to choose which course of action is best for your situation, he advises.

POBM Says: Make sure the lease language spelling out your self-help eviction right is clear and unambiguous, advises Bailey. Because self-help eviction is such a drastic remedy, courts usually won't approve its use if there's any ambiguity in the lease's language, he explains. If you have *any* uncertainty about whether you have a self-help eviction right, sue to evict the tenant instead.

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Notify Tenant that You've Taken Back Space

Here's a Model Notice, written with help from New York attorney Adam Leitman Bailey, that you can adapt and send to a tenant to inform it that you've exercised your self-help eviction right. Show this notice to your attorney before sending it to a tenant.

EVICITION NOTICE

CERTIFIED MAIL RETURN RECEIPT REQUESTED

John Tenant
XYZ Corp., ABC Office Building
Anytown, USA 66666

Re: Notice of Eviction from [*insert description of the tenant's space*] ("Premises") Pursuant to Section [*insert # of section covering self-help eviction right*] of Lease, Dated [*insert date*]

- 1. Lease default.** Tenant is hereby notified that it is in default of Section [*insert # of section covering the tenant's lease violation*] of the Lease because Tenant [*insert description of violation, e.g., didn't pay rent for May and June 2006*].
- 2. Exercise of self-help eviction right.** Because of said default, Landlord has exercised its self-help eviction right under Section [*insert # of section covering self-help eviction right*] of the Lease and has taken possession of Premises. In addition, Landlord reserves the right to pursue all legal remedies available to it under the Lease, at law, and in equity. Landlord shall also hold Tenant strictly liable for all consequential damages as well as all legal expenses, attorney's fees, litigation disbursements, and court costs incurred by Landlord in the enforcement of its rights and remedies against Tenant.
- 3. Status of property.** In accordance with Section [*insert # of section covering surrender of premises*] of the Lease, Tenant's Property is [*insert description of the status of tenant's property as required by its lease, e.g., being stored at LMN storage facility*].

Tenant's immediate attention to this critical situation is appreciated and expected. If you have any questions or comments with regard to the above, please contact Landlord at [*insert tel. #*].

Landlord _____

Date _____

TAKE SIX STEPS (continued from p.1)

Step #3: Make Sure Tenant Is in Default or Lease Has Expired

Even if state law and the tenant's lease give you a self-help eviction right, don't exercise that right unless it's crystal clear that the tenant is in default of its lease or that its lease has ended, warns Bailey. For example, if the tenant doesn't repair a roof leak and it's not clear whether you or the tenant is responsible for such repairs, don't exercise your self-help eviction right, he advises. Instead, sue to evict the tenant and litigate the

issue in court, he says. But if a tenant doesn't pay its rent for two months, it's probably safe to exercise your self-help eviction right, he says. And make sure that any cure period given in the lease has run out before you either exercise your self-help eviction right or sue to evict the tenant, he adds.

POBM Says: Exercise your self-help eviction right only if the tenant has committed a "material"—that is, major—lease violation, advises Bailey. So don't exercise your self-help eviction right if the tenant violates

its lease by, say, ignoring your building's recycling rules, but do exercise it if the tenant, say, doesn't maintain the proper insurance coverage, he suggests.

Step #4: Take Possession of Tenant's Space Peacefully

If, after taking the above steps, you decide to exercise your self-help eviction right, make sure you do so peacefully, advises Bailey. That is, avoid any interaction, conflict, or confrontations with the tenant when you take back its space and change the locks, he says. If possible, change the locks at night or on the weekend, when the tenant or its employees aren't present, he suggests. If they're present, don't use any physical violence, threatening conduct, or intimidation, he adds. If the self-help eviction isn't peaceful, a court may hold you liable for damages, warns Bailey.

It's a good idea to videotape the self-help eviction to document its peacefulness, and to take photographs to show that you didn't damage the space or any of the tenant's property, and that you didn't steal anything, says Bailey.

Step #5: Arrange for Removal or Storage of Tenant's Property

Once you've taken back the tenant's space and changed its locks, you'll need to arrange for either the removal or storage of the tenant's property, says Bailey. Check whether the tenant's lease says what you must do with

property a tenant leaves behind after it's evicted, it abandons the space, or its lease ends—and then comply with those requirements, he says.

Step #6: Notify Tenant of Self-Help Eviction

Notify the tenant that you've exercised your self-help eviction right, advises Bailey. And do so even if the tenant already knows informally because, say, its employees were there when you took back the space, he adds. To notify the tenant, send it a notice, like our Model Notice, that says the following:

- The tenant has violated its lease, which section it has violated, and a brief description of the violation;
- Because of the tenant's lease violation, you've exercised your self-help eviction right and taken back the tenant's space. Also, say that you reserve the right to pursue all other legal rights and remedies available to you; and
- The status of the tenant's property—that is, whether it's in the space or in storage. You should adapt the notice to reflect the lease's requirements regarding disposal of the tenant's property after it surrenders its space. ■

POBM Source

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