



A LOOK AT LATE FEES

Understand the new late fee law with these helpful FAQs.

THE WORLD OF charging late fees in the apartment industry has changed! Section 92.019 of the Texas Property Code, the statute on late fees, was substantially modified in the 2019 Legislative Session. How does it affect owners and residents? What actions do owners need to take under the new law? What lease changes are required under the new law?

(Let's look at these and other questions.

What changes have been made under the law?

The new law incorporates the following changes:

1. Implements a safe harbor to comply with the law.
2. Moves the date on which the initial late fee can be assessed.
3. Requires owners to account for how much late fees a resident owes.
4. Recharacterizes what an owner can "collect" rather than what an owner can "charge."

What is the safe harbor late fee that can be charged?

A late fee is considered to be reasonable if the late fee is not more than:

1. 12% of the amount of rent for the rental period under the lease for a dwelling located in a structure that contains not more than four dwelling units; or
2. 10% of the amount of rent for the rental period under the lease for a dwelling located in a structure that contains more than four dwelling units.

As long as an owner charges a late fee in accordance with this safe harbor, the amount of the late fee will be considered to be reasonable and in compliance with the new law.

Both the old and new law provide that the late fee may include an initial fee and a daily fee for each day the rent continues to remain unpaid, however, the new law provides that

the combined fees are considered a single late fee for the purposes of the law. Consequently, if you are intending to collect the safe harbor amount, the initial fee and all daily fees for a single month will be combined to be considered a single late fee for the purposes of calculating the safe harbor.

Can an owner charge more than the safe harbor amount?

Yes, as long as the late fee is "reasonable."

A late fee will be considered reasonable if the late fee is not more than uncertain damages to the owner related to late payment of rent, including direct or indirect expenses, direct or indirect cost, or overhead associated with the collection of late payment.

If an owner is charging an amount in excess of the safe harbor amount, the owner should be prepared to provide evidence to support that the amount of the fee is not more than damages related to the late payment of rent. The statute provides some guidance with respect to what types of damages will be considered including direct or indirect expenses, direct or indirect costs or overhead associated with the collection of late payment.

When can a late charge be assessed?

The owner may charge a late fee unless any portion of the resident's rent has remained unpaid two full days after the rent was originally due. The old law (before the change) provided that the late charge could not be collected unless the rent has remained unpaid one full day after the rent was originally due. If rent is due on or before the first day of the month (as indicated in the TAA lease), the late fee can be charged under the

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old law on the third day of the month. Under the new law, the late fee cannot be collected until the fourth day of the month.

Is an owner in violation of the new law if an unreasonable late fee is included in the lease?

Not necessarily. The law has been changed such as the owner cannot "collect from" a resident a late fee unless the legal requirements are met. The old law provides that an owner may not "charge" a late fee unless the legal requirements are met. Although this distinction may seem small, it would appear that an argument can be made that the amount of the fee in the lease is not as important as the amount the owner actually collects from a resident. However, it should also be noted that the law has provided, and continues to provide, that the late fee cannot be charged nor collected unless the notice of the late fee is included in a lease. In other words, whether an owner "collects" the fee or "charges" the fee, notice of the fee should be included in the lease.

What is the penalty for violating the law?

The penalty provision of the statute has been mostly unchanged. An owner who violates the statute is liable to the resident for the amount equal to the sum of \$100, three times the amount of the late fee "collected" (instead of "charged") in violation of the

The **penalty provision of the statute** has been mostly unchanged. An owner who violates the statute is liable to the resident for the amount equal to the sum of \$100, three times the amount of the late fee “collected” (instead of “charged”) in violation of the statute, and the resident’s reasonable attorney’s fees. Consequently, the only difference between the old law and the new law is that the penalty provision includes an assessment of three times the amount of the late fee collected in violation of the statute, rather than three times the amount of the late fee charged in violation of the statute.

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Does an owner have to provide the resident with a statement of how much late fees are to be paid?

Yes. In response to a request from the resident, an owner is required to provide a statement of whether the resident owes a late fee and, if so, the amount of the late fee. The owner is required to provide the statement to the resident by any established means used for written communication by the owner and the resident.

When does the new law take effect?

The new law applies only to a late fee under a lease entered into or renewed on or after Sept. 1, 2019. If you are going to modify your late fee to the safe harbor amount, you would want to do so in any lease entered into or renewed on or after Sept. 1, 2019.

Can I change my old lease to charge the safe harbor amount?

The lease can be modified by a subsequent written agreement signed by all parties. However, absent a signed lease modification, an owner can waive amounts a resident owes under the lease. The only issue may be that the old law (the one that would be applicable to the lease signed before Sept. 1, 2019) provided that an owner may not charge a late fee unless notice of the fee is included in a written lease. Consequently, there may be an issue with charging a late fee that is different than the fee stated in the lease. However, the counter argument is that you are simply discounting the amount due under the lease.

What changes have been made to the TAA lease to account for the new law?

Paragraph six of the lease was modified to provide that the owner won’t impose late charges until the fourth day of the month. The lease also allows the owner to designate that the late fee will either be a percentage of

one month’s rent or a dollar amount, and allows the owner to impose an initial late charge and daily late fees (by dollar amount or by percentage of the fee).

The new law effects the owners and residents’ rights and responsibilities when a resident is delinquent in paying rent. Before taking any action or making decisions, the new law should be reviewed and followed.

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THE 2019 LEGISLATIVE SESSION IS OVER, PART 2
Here is the second part of a synopsis of the new laws affecting the apartment industry from the first part of this synopsis in the July issue.

LAST MONTH, WE looked at the new laws that affect the apartment industry. In this issue, we look at the new laws that affect the apartment industry.

What Changes? The new law changes the amount of the late fee that an owner can charge. The new law allows an owner to charge a late fee that is a percentage of the rent or a dollar amount, and allows the owner to impose an initial late charge and daily late fees (by dollar amount or by percentage of the fee).

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